

# *The New Racism in Employment Discrimination: Tales from the Global Economy\**

Margaret Thornton\*\* and Trish Luker\*\*\*

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## *Abstract*

Neoliberal employment strategies, immigration policies, economic globalisation and the events of 9/11 have created new environments for racism in Australia. In this article, the ramifications of the shifting political environment on race discrimination against ethnicised Others in employment since 1990 are examined, with particular regard to the post-9/11 period. Drawing on complaints made to anti-discrimination agencies and decisions of courts and tribunals, it is argued that there has been a contraction in the ambit of operation of the legislation through the application of exemptions and a heightened burden of proof for complainants which has had a chilling effect on the jurisdiction. Drawing on David Goldberg's thesis of the racial state, it is posited that in the contemporary political environment, the state is active in producing and sustaining racism.

## **Introduction**

### *The Racial State*

David Goldberg argues that the modern state is nothing less than a racial state.<sup>1</sup> He bases this proposition not only on the history of colonialism but the impact of the proliferating racial heterogeneity arising from global integration in the wake of World War II. Australia is a case in point, for the hegemonic powers of whiteness and Anglocentricity have remained defining features of the construction of the nation state. The so-called 'White Australia' Policy, a cornerstone of the newly federated nation, was fostered in response to the perceived threat posed to white labour by Chinese and Pacific Island workers and served as the foundation for planned economic development over subsequent years.<sup>2</sup> The official demise of this policy and the subsequent development of an expanded immigration program

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\*\* Professor of Law and ARC Professorial Fellow, Australian National University, Canberra.

\*\*\* Research Associate, ANU College of Law, Australian National University, Canberra.

<sup>1</sup> David Theo Goldberg, *The Racial State* (2002). We thank Dr Alisoun Neville for drawing Goldberg's work to our attention.

<sup>2</sup> The White Australia Policy was implemented through immigration control under the *Immigration Restriction Act 1901* (Cth) and the *Migration Act 1958* (Cth).

directed towards an enhanced labour source marked an important policy shift from assimilation to multiculturalism,<sup>3</sup> yet it coincided with new global economic formations and the emergence of race-based nationalism which revealed ambivalence and anxiety about the white nation.<sup>4</sup> Notwithstanding the racism inherent within ongoing neo-colonial relations with indigenous people, racial animus in Australia has otherwise not been directed against a static Other but has reflected the contingency of economic and ideological formations of race relations.

While the policy of multiculturalism was launched with great fanfare by the Whitlam Government at a time of significant immigration and economic expansion in the early 1970s to signal a new era of acceptance, it did not spell the end of official racism. Multiculturalism was discomfited not only by indigeneity, it was also ambivalent about ‘ethnicity’, which tended to be confined to those who were from non-English speaking backgrounds (NESBs). Indeed, according to the Goldberg thesis, multiculturalism is a form of *racelessness* that sustains the nation state by virtue of its liberal carapace. Far from being a premodern relic, racism is in fact central to modernisation whereby the state seeks to slough off responsibility for past wrongs:

Racelessness is the neoliberal attempt to go beyond — without (fully) coming to terms with — racial histories and their accompanying racist inequities and iniquities; to mediate the racially classed and gendered distinctions to which those histories have given rise without reference to the racial terms of those distinctions; to transform, via the negating dialectic of denial and ignoring, racially marked social orders into racially erased ones.<sup>5</sup>

The enactment of legislation proscribing race discrimination was an important plank of multicultural policy in Australia. It evinced an ostensible commitment to equality and tolerance in accordance with the values of liberal legalism. This article sets out to explore the applicability of Goldberg’s thesis with particular regard to race discrimination in employment against ‘ethnicised’ Others over the last two decades.<sup>6</sup>

*The Liberal Promise*, which represented a detailed critique of anti-discrimination measures in Australia, was published in 1990.<sup>7</sup> It is not our intention to rehearse the arguments made in that work as many of its findings regarding the limitations of the legislation remain valid. Nevertheless, the extensive socio-political changes of the last two decades that have taken place against a kaleidoscope of neoliberal and globalised practices demand a critical revisiting of the legislation. Crucial to the understanding of the racial state are the findings of *The Liberal Promise* that anti-discrimination legislation is capable of

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<sup>3</sup> James Jupp, *From White Australia to Woomera: The story of Australian immigration* (2<sup>nd</sup> ed, 2007) 31.

<sup>4</sup> Ghassan Hage, *White Nation: Fantasies of white supremacy in a multicultural society* (1998).

<sup>5</sup> Goldberg, above n 1, 221.

<sup>6</sup> We have addressed the specificity of discrimination against indigenous people in employment in a companion piece. See Margaret Thornton and Trish Luker, ‘The Wages of Sin: Compensation for Indigenous workers’ (2009) 32 *University of New South Wales Law Journal* 647.

<sup>7</sup> Margaret Thornton, *The Liberal Promise: Anti-discrimination legislation in Australia* (1990).

addressing only those acts of direct discrimination close to the surface, not systemic discrimination, that is, the racism (or sexism or homophobia or disable-ism) deeply embedded in the social psyche. If complainants allege discriminatory harms of a systemic kind, their complaints are likely to fail because of the limitations of legal form and the seemingly rational explanations that serve to legitimise the discriminatory conduct. Goldberg identifies rational discrimination as the ‘handmaiden of racelessness’, whereby the values of efficiency and economy ‘assume the status of empirically established truth the force of which is unquestionable and so incontestable’.<sup>8</sup>

The phenomenon of racelessness is played out dramatically in the world of work where respondent employers have recourse to an arsenal of stock responses that have rational explanatory value, such as the construction of ‘the best person for the job’, ‘merit’, ‘qualifications’ and ‘experience’, which are adduced as though they consist of a descriptive component alone and do not have to be interpreted in a particular context.<sup>9</sup> The effect is that the burden of proof confronted by those alleging race discrimination in employment remains intractable, thereby underscoring the racelessness thesis.

Different manifestations of racism and racialised inequality, which both support and disturb the theory of racelessness, have been engendered by the radical changes that have occurred within the polity over the last two decades. While the ideology of market liberalism, emphasising deregulation, entrepreneurialism and the maximisation of profits, has been jolted by the global economic crisis of 2008–09, neoliberalism increasingly came to dominate public policy in all areas of life for much of the preceding two decades.<sup>10</sup> In particular, it has dramatically impacted on workplace relations and produced new formations of precarious work with significant social consequences.<sup>11</sup> There was a reinstatement of employer prerogative, as manifested by the Howard Government’s WorkChoices legislation,<sup>12</sup> which served to raise the probative bar ever higher for those alleging discrimination in employment. Neoliberalism is also a global phenomenon, which is the dominant political philosophy of North America and Europe, as well as Australasia and many other parts of the world. Its logic animates the phenomenon of economic globalisation, as will be shown. It is notable that Goldberg situates the theory of racelessness firmly within a contemporary context of neoliberalism, arguing that it serves a current political agenda as a strategy for eliminating all obstructions to the privileging of global

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<sup>8</sup> Goldberg, above n 1, 228.

<sup>9</sup> Margaret Thornton, ‘Affirmative Action, Merit and the Liberal State’ (1985) 2 *Australian Journal of Law and Society* 28.

<sup>10</sup> Mark Western et al, ‘Neoliberalism, Inequality and Politics: The changing face of Australia’ (2007) 42 *Australian Journal of Social Issues* 401.

<sup>11</sup> See, eg, Judy Fudge and Rosemary Owens (eds), *Precarious Work, Women, and the New Economy: The challenge to legal norms* (2006); Katherine VW Stone, *From Widgets to Digits: Employment regulation for the changing workplace* (2004).

<sup>12</sup> A body of legislation incorporated in the *Workplace Relations Act 1996* (Cth) and *Workplace Relations Regulations 2006* (Cth) was repealed and replaced by the *Fair Work Act 2009* (Cth) (‘FWA’).

capital, as well as sustaining the hegemony of whiteness, that is both gendered and classed.<sup>13</sup>

On the other hand, the theory of racelessness is disturbed by the effects of the most recent decade of neo-conservative political leadership, which saw the intensification of racial inequality, exclusion and violence.<sup>14</sup> Once neoliberalism had been fervently embraced, the discourse of multiculturalism began to be heard only faintly, if at all. Overtly racist policies also emerged on the official policy agenda following the attack on the World Trade Centre in New York in September 2001, colloquially referred to as '9/11', and the moral panics generated by terrorism and the global movements of refugees. These policies have animated and revived incidents of racism in the community at the same time as the racelessness theory has become more pronounced.

### *Locating the Research*

Nine legislative instruments, which operate concurrently, proscribe discrimination in Australia on the ground of (inter alia) race in specified areas of public and quasi-public life, including employment.<sup>15</sup> The model prevailing in all Australian federal, State and Territory jurisdictions is a civil, compensatory model, although a short-lived criminal law model was initially adopted in South Australia.<sup>16</sup> As a complaint-based system, the legislative schema depends on an individual identifying the discriminatory harm and assuming responsibility for lodging a complaint with an agency and pursuing the complaint to a tribunal or court if not conciliated, where the impugned conduct must be proven to the requisite standard. Although there may be provision for representative complaints<sup>17</sup> and inquiries into organisational practices by agencies and commissioners,<sup>18</sup> it is notable that these initiatives, which represent a nod in the direction of the systemic nature of racism, are rarely used. The favoured procedures not only exacerbate the burden confronted by individual complainants but neutralise the racism inherent in the conduct.

There has been a paucity of empirical research and minimal scholarly attention paid to the field of race discrimination in employment in Australia. Nevertheless, existing critiques have highlighted key issues, including: the inherent problems with legal form;<sup>19</sup>

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<sup>13</sup> Goldberg, above n 1, 221.

<sup>14</sup> Andrew Markus, *Race: John Howard and the remaking of Australia* (2001).

<sup>15</sup> *Racial Discrimination Act 1975* (Cth); *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 1995* (Vic); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1984* (WA); *Anti-Discrimination Act 1998* (Tas); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1992* (NT).

<sup>16</sup> *Prohibition of Discrimination Act 1966* (SA). The Act was repealed by the *Racial Discrimination Act 1976* (SA).

<sup>17</sup> Eg, *Anti-Discrimination Act 1977* (NSW) s 101; *Anti-Discrimination Act 1991* (Qld) ss 146–152, 194–200.

<sup>18</sup> Eg, *Equal Opportunity Act 1995* (Vic) s 156; *Equal Opportunity Act 1984* (WA) s 80; *Anti-Discrimination Act 1992* (NT) s 13(1).

<sup>19</sup> Margaret Thornton, 'Revisiting Race' in Race Discrimination Commissioner (ed), *The Racial Discrimination Act: A Review* (1995) 81.

the challenges in demonstrating indirect discrimination,<sup>20</sup> the burden of proof,<sup>21</sup> the use of a normative white comparator,<sup>22</sup> and the poverty of the track record of the *Racial Discrimination Act 1975* (Cth) ('*RDA*') in addressing discrimination.<sup>23</sup> It was 20 years before a substantial review of the *RDA* was conducted,<sup>24</sup> and a comparative international analysis of its effectiveness is only now currently underway.<sup>25</sup> In this article, we will pursue the critical interrogation further, examining complaints made to anti-discrimination agencies and decisions of courts and tribunals in cases of race discrimination against ethnicised Others in employment in Australia over the last two decades, but with particular regard to the post-9/11 period. The research forms part of a research project, 'EEO in a Culture of Uncertainty',<sup>26</sup> which investigates the retreat from equal employment opportunity in Australia as a result of the shift from social liberalism to neoliberalism. Fieldwork for the project involved a longitudinal study of employment-related discrimination, including examination of confidential conciliation complaint files in the area of employment held by anti-discrimination agencies in three jurisdictions.<sup>27</sup>

Research in the field of anti-discrimination law is fraught with difficulties. During the course of this project, it has been our experience that most anti-discrimination agencies fiercely guard the confidentiality requirement, making it difficult to conduct research which would reveal important information about the process. Indeed, not only are complaint files protected by confidentiality, they are also subject to periodic 'sentencing' and possible destruction under the economic rationalist policies which determine that not all public documents can be preserved.<sup>28</sup> In spite of the obstacles encountered as a result of these policies, we have been able to access complaint files for recent years held by three anti-discrimination agencies. For the purposes of this article, the relevant years are 2001–02 and 2006–07.

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<sup>20</sup> Rosemary Hunter, *Indirect Discrimination in the Workplace* (1992) 66–72.

<sup>21</sup> Jonathon Hunyor, 'Skin-Deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25 *Sydney Law Review* 535; Loretta de Plevitz, 'The *Briginshaw* "Standard of Proof" in Anti-Discrimination Law: "Pointing with a Wavering Finger"' (2003) 27 *Melbourne University Law Review* 308.

<sup>22</sup> Thornton, above n 7, 47–54; Aileen Moreton-Robinson, 'Witnessing the Workings of White Possession in the Workplace: Leesa's Testimony' (2007) 26 *Australian Feminist Law Journal* 81; Jennifer Nielsen, 'Whiteness and Anti-Discrimination Law — It's in the design' (2008) 4(2) *ACRAWSA e-journal* <<http://www.acrawsa.org.au/ejournalVol4no22008.htm>> at 17 November 2009.

<sup>23</sup> Beth Gaze, 'Has the *Racial Discrimination Act* Contributed to Eliminating Racial Discrimination? Analysing the Litigation Track Record 2000–04' (2005) 11 *Australian Journal of Human Rights* 171.

<sup>24</sup> Race Discrimination Commissioner (ed), *Racial Discrimination Act: A Review* (1995).

<sup>25</sup> Human Rights and Equal Opportunity Commission, *An International Comparison of the Racial Discrimination Act 1975, Background Paper No 1* (2008).

<sup>26</sup> See above n \*.

<sup>27</sup> In order to adhere to the confidentiality requirement, the jurisdictions will not be identified.

<sup>28</sup> The Commonwealth and all States and Territories have archives or public records legislation which specifies standards and codes of practice for the sentencing and disposal of records for the public service and state instrumentalities, including equal opportunity agencies. For example, National Archives of Australia, *Records Disposal Authority: Human Rights and Equal Opportunity Commission*, Job No 2003/00211156 (2003); Public Record Office Victoria, *Retention & Disposal Authority for Records of Equal Opportunity Commission Victoria* (2005); Territory Records (*Records Disposal Schedule — Human Rights and Discrimination Records*) Approval 2004 (No 1) Notifiable instrument NI2004 — 335 2004 (ACT).

A notable feature of the jurisdiction of racial discrimination is the generally lower percentage of complaints lodged in comparison with other grounds, such as disability. For example, in 2008–09, 980 complaints were received under the *Disability Discrimination Act 1992* (Cth) ('DDA'), 40 per cent of which were in the area of employment, compared to 396 complaints received under the *RDA* (encompassing all racial backgrounds), 54 per cent of which were employment-related.<sup>29</sup> On the basis of a study of race discrimination complaints under the *RDA*, Beth Gaze found that the number of complaints lodged fell substantially over the period 2000–04.<sup>30</sup> A longer-term analysis reveals that there was a general downturn in the number of complaints under the *RDA* post-1996, which was sustained over the subsequent decade.<sup>31</sup> Despite the fact that employment is the most significant area in which complaints of discrimination are made, during the period 1988–2008, only 30–50 per cent of complaints made under the *RDA* were employment-related, in contrast to sex discrimination, where it was consistently above 80 per cent.<sup>32</sup> The dearth of complaints of race discrimination is at variance with the social reality of Australia's increasingly racially and culturally diverse population and the divisive impact of neoliberal policies, such as those pertaining to workplace relations.

Notwithstanding the legislative imperative to effect conciliation, complaints of race discrimination also have a lower rate of settlement in comparison to other grounds, such as sex and disability. Over the years 2001–07,<sup>33</sup> no more than 26 per cent of complaints made under the *RDA* were finalised through conciliation, the remainder being terminated by the Human Rights and Equal Opportunity Commission (HREOC)<sup>34</sup> or withdrawn by the complainant.<sup>35</sup> Even where conciliation is attempted, it may not be successful and complaints of race discrimination also have a lower resolution rate overall, a situation that HREOC attributes to 'the difficulties complainants often have in demonstrating a link between their race and the alleged less favourable treatment and the associated limited case precedent in this area'.<sup>36</sup> However, it is not a requirement that complainants meet a burden of proof in conciliation, and such statements illustrate the ever encroaching legalism onto the informal pyramidal base of the dispute resolution hierarchy. A complaint may be finalised because there is no reasonable prospect of conciliation, or withdrawn by the complainant as a result of factors such as frustration, fatigue and/or disillusionment with the

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<sup>29</sup> Australian Human Rights Commission, *Annual Report 2008–09* (2009), 70, 76.

<sup>30</sup> Gaze, above n 23, 183.

<sup>31</sup> This is notwithstanding an anomalous peak which occurred in 1998, most likely attributable to a large number of complaints made in relation to stolen wages. See Thornton and Luker, above n 6.

<sup>32</sup> These figures have been calculated on the basis of statistics in HREOC annual reports, which provide the number of complaints and the areas for each of the Acts administered: data on file with authors.

<sup>33</sup> This time frame is identified because it is consistent with the years covered by the fieldwork. However, we note that in 2008–09, the figure rose to 55 per cent, providing further evidence of the volatility of the jurisdiction.

<sup>34</sup> Now the Australian Human Rights Commission (AHRC).

<sup>35</sup> Complaints may be terminated by AHRC on a number of grounds, including there being no reasonable prospect of conciliation. AHRC publishes statistics of outcomes of finalised complaints under the Acts it administers in its annual reports.

<sup>36</sup> Human Rights and Equal Opportunity Commission, *Annual Report 2001–2002* (2002), 62.

process.<sup>37</sup> Complaints which are terminated, withdrawn or unsuccessfully conciliated may proceed to a formal hearing at a tribunal or court, but only a very small proportion do so. In the federal arena, approximately 99 per cent of complaints do not proceed beyond conciliation.<sup>38</sup> The risk of having to pay the respondent's legal costs as well as their own encourages abandonment of a quest for a remedy.

The precept of confidentiality attaching to the conciliation process serves to privatise not only the discriminatory acts, but also the respondent's behaviour during conciliation, offering a guarantee of protection from public scrutiny and adverse publicity.<sup>39</sup> Such considerations have greater significance for larger corporate respondents which commonly deploy the discourse of EEO as part of their public profile. This concealment erases the function of race discrimination as an organising technology of power within workplaces, as well as the subjective experience of racism and disadvantage.

The jurisdiction is also highly vulnerable to the winds of political change. Concurrent legislative coverage is inconsistent across federal, State and Territory jurisdictions and is subject to frequent amendment, making national, comparative and historical analyses very difficult. Agencies empowered to oversee administration of legislation vary in size, structure and resourcing, and appointments to boards, committees and leadership positions reflect the political inclinations of governments of the moment. The specialist field of anti-discrimination law is now taught in only a limited number of law schools and is attracting a diminishing number of practitioners with a high degree of mobility between public agencies, private practice, decision-making bodies, and to a lesser extent academia, reflecting a contracting field of expertise.

## The Diminishing Ambit of Operation

In this section, we highlight the fragile and politically contingent nature of the legislative commitment to the non-discrimination principle. This commitment is diminished by numerous qualifications and exceptions in the ambit of operation of the legislation, which

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<sup>37</sup> Victorian Equal Opportunity and Human Rights Commission, *Factors Influencing the Resolution of Complaints lodged under the Equal Opportunity Act 1995: A Preliminary Study Paper* (2007), 18–19; Tracey Raymond and Sofie Georgalis, 'Dispute Resolution in the Changing Shadow of the Law: A Study of Parties' Views on the Conciliation Process in Federal Anti-Discrimination Law' (2003) 6(2) *ADR Bulletin* 31; Anna Chapman, 'Discrimination Complaint Handling in NSW: The Paradox of Informal Dispute Resolution' (2000) 22 *Sydney Law Review* 321, 347–8; New South Wales Law Reform Commission, *Discrimination Complaints-Handling: A Study*, Research Report 8 (1997); Annemarie Devereux, 'Human Rights by Agreement? A Case Study of the Human Rights and Equal Opportunity Commission's Use of Conciliation' (1996) 7 *Australian Dispute Resolution Journal* 280, 288–9.

<sup>38</sup> This figure is calculated on the basis of the total number of complaints lodged with HREOC, as published in the annual reports, and the number of first instance applications to the Federal Magistrates Court for 2006–07 and 2007–08: data on file with authors.

<sup>39</sup> For a thoroughgoing analysis of the process, see 'Equivocations of Conciliation' in Thornton, above n 7, 143–70.

includes not only express exemptions (or exceptions),<sup>40</sup> but also a discretionary exemptions power, on which we propose to focus. This introduces an element of porosity in the constitution of race discrimination that has enabled the legislation to be deployed in the normalisation of the ‘new racism’ (mainly involving Muslims and those of Arabic descent) in the post-9/11 period.

Apart from the *RDA*,<sup>41</sup> all legislation provides for discretionary exemptions for a fixed term (usually from three to five years) on application to the relevant board or tribunal. Until recently, it was customary to grant temporary exemptions only when the purpose accorded with the beneficial intent of the legislation.<sup>42</sup> In other words, temporary exemptions, unlike statutory exemptions, were expected to operate in the interests of those whom the legislation purported to protect. Apropos 9/11, there has been a startling change that both reflects and instantiates the new racism, as well as the privileging of the market within a context of globalisation. We will consider a recent series of exemptions granted in all mainland State jurisdictions and the ACT, which highlight the way the proscription of race discrimination may be trumped by the rationality of actions aimed at averting the threat of terrorism (at the behest of the United States) as well as promoting profit-making.

Applications for exemption have been lodged by several private defence and aerospace companies and their affiliates, including Australian Defence Industries (ADI), BAE Systems Australia (BAE), Boeing and Raytheon. They consistently argued that it was necessary for them to discriminate on the ground of race in order to comply with United States *International Traffic in Arms Regulations* 22 CFR §§120-130 (ITAR) so that they could obtain access to specialised aerospace technology. The sticking point was that ITAR denied access to foreign nationals from certain proscribed countries,<sup>43</sup> which, until 2006, included Australian citizens with dual nationality.<sup>44</sup> Needless to say, the companies downplayed any racism in their applications, arguing that they had no alternative but to comply. What is striking is that this argument has been consistently accepted by tribunals around the country, often with very little evidence in support. How could inroads be made

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<sup>40</sup> Probably the most glaring instance is that contained in the *Equal Opportunity Act 1995* (Vic) s 21, which out of deference to the business community excepts all businesses with no more than five employees.

<sup>41</sup> In the absence of a temporary exemptions power under the *RDA*, the Commonwealth Government suspended the Act altogether to enable large scale intervention into Aboriginal communities; see *Northern Territory National Emergency Response Act 2007* (Cth). The ‘Intervention’ was widely criticised and the Government has announced that the *RDA* will be reinstated in 2010. See Australian Human Rights Commission, ‘Reinstating the *RDA* in the Northern Territory welcomed’ (Press Release, 25 November 2009) <[http://www.humanrights.gov.au/about/media/media\\_releases/2009/119\\_09.html](http://www.humanrights.gov.au/about/media/media_releases/2009/119_09.html)> at 14 February 2010.

<sup>42</sup> Eg, *Stevens v Fernwood Fitness Centres Pty Ltd* (1996) EOC ¶92-782 (Vic EOB); *Xiros v Forbes Life Assurance Ltd* (2001) 162 FLR 433.

<sup>43</sup> The list of countries is updated periodically. In November 2009, the countries were Afghanistan, Belarus, Cuba, Eritrea, Haiti, Iran, North Korea, Syria and Venezuela. It also includes US arms embargoed countries (eg, Burma, China, Liberia and Sudan) and UN Security Council arms embargoed countries (eg, Côte d’Ivoire, Democratic Republic of Congo, Iraq, Iran, Lebanon, Liberia, North Korea, Sierra Leone, Somalia and Sudan). Some countries are assessed on a case-by-case basis with respect to non-lethal articles and services, namely Libya, Vietnam and Sri Lanka: ITAR, 22 CFR §126.1

<sup>44</sup> *BAE Systems Australia Ltd (Anti-Discrimination)* [2008] VCAT 1799, [42].



into a legislative instrument purporting to proscribe race discrimination with such scant regard for alternatives?

To start with, the statutory power to grant an exemption tends to be expressed very broadly,<sup>45</sup> although criteria have been added recently in some jurisdictions.<sup>46</sup> Between 2003 and 2008, the preponderance of ITAR-related applications sought in New South Wales,<sup>47</sup> Victoria,<sup>48</sup> Queensland,<sup>49</sup> South Australia,<sup>50</sup> Western Australia<sup>51</sup> and the ACT<sup>52</sup> have accorded considerable weight to the ‘public interest’<sup>53</sup> — another malleable legal standard — which has been construed to privilege economic interests over the prohibition against racism. Indeed, commercial advantage was formerly viewed as being outside the ambit of a decision-maker’s discretion in considering an application for an exemption,<sup>54</sup> but in the cluster of applications under consideration where very significant profits were at stake, it was treated as central. For example, at the time of the application by ADI to the Western Australian Administrative Tribunal, 49 agreements were generating AUD 400 000 000 in sales revenue.<sup>55</sup> In addition to profits, other factors relied upon by the applicant corporations included Australia’s defence capability, possible loss of jobs and higher education advantages.<sup>56</sup> The question of susceptibility to prosecution in the United States was also a key factor.<sup>57</sup>

The concerns raised in the ITAR exemption applications take place against a backdrop of economic globalisation, international politics and security issues post-9/11, together with the reality that the United States is the dominant world power. In an application for a second three year exemption by Boeing in Victoria, the United States is described by Morris J as the ‘elephant in the room’: ‘Like it or not, the United States is *the*

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<sup>45</sup> See, eg, *Equal Opportunity Act 1995* (Vic) s 83.

<sup>46</sup> See, eg, *Discrimination Act 1991* (ACT) s 109(3). Regulations made under the *Anti-Discrimination Act 1977* (NSW) in 2004 (which were repealed and replaced in 2009) specified criteria that included reasonableness, necessity, non-discriminatory ways of achieving the objects of the exemption, measures taken to reduce the adverse effect of the action, and ‘the public, business, social or other community impact’ of the proposed exemption. The same criteria now appear in the *Anti-Discrimination Regulation 2009* (NSW) reg 5.

<sup>47</sup> Three-year exemptions were granted by the NSW Attorney-General to Boeing and ADI. See *New South Wales Government Gazette*, No 25 (11 February 2005); *New South Wales Government Gazette*, No 81 (1 July 2005).

<sup>48</sup> *Raytheon Australia Pty Ltd (CAN 063709295) Exemption Application (Anti-Discrimination)* [2007] VCAT 2230.

<sup>49</sup> *Exemption Application re: Raytheon Australia Pty Ltd* [2008] QADT 1.

<sup>50</sup> *Application for Exemption: BAE Systems Australia Ltd* [2008] SAEOT 1; *Application for Exemption: Raytheon Australia Pty Ltd* [2008] SAEOT 3.

<sup>51</sup> *Commissioner for Equal Opportunity v ADI Ltd* [2007] WASCA 261.

<sup>52</sup> *Raytheon Australia Pty Ltd v ACT Human Rights Commission* [2008] ACTAAT 19.

<sup>53</sup> But see *Boeing Australia Holdings Pty Ltd (Anti Discrimination Exemption)* [2007] VCAT 532 in which Morris J determined the application in terms of the avoidance of an unreasonable outcome rather than the public interest.

<sup>54</sup> *Stevens v Fernwood Fitness Centres Pty Ltd* (1996) EOC ¶92-782, 78,805.

<sup>55</sup> *ADI Ltd and Commissioner for Equal Opportunity* [2005] WASAT 259.

<sup>56</sup> *Boeing Australia Holdings Pty Ltd (Anti Discrimination Exemption)* [2007] VCAT 532, [42].

<sup>57</sup> *Exemption Application re: Boeing Australia Holdings Pty Ltd (No 3)* [2008] QADT 34, [65]. See also *Ontario Human Rights Commission and Sinclair and General Motors Defence* 2006 HRTO 30; 2006 HRTO 35; 2006 HRTO 36.

world power and controls key aerospace technology'.<sup>58</sup> It is notable that Canada was able to negotiate an agreement with the United States Government when the Canadian military argued that compliance with ITAR would be inconsistent with the Canadian *Charter of Rights and Freedoms*.<sup>59</sup> In contrast, the Australian Government decided to utilise United States technology without resolving the question of race discrimination.<sup>60</sup> It was therefore left to tribunals and courts to make determinations that upheld United States law,<sup>61</sup> while diminishing Australian law, in order to make Australia competitive on the world stage. The devolution of responsibility by the legislature to the judicial and quasi-judicial branch creates an arms-length approach that obscures the state's role in the manipulation of policy behind the scenes. Justification of the exemption in terms of the public interest, or the need to avoid an unreasonable outcome, obscures further the political and economic issues at the heart of the exemption application.

As well as stressing the material benefits that could be jeopardised if the applications were declined, some decision-makers have also sought to play down the particular manifestation of racism that an exemption entails. Morris J, for example, suggested that nationality/citizenship might be less offensive as a basis of discrimination than other forms of racism 'as a person can often exercise some control over their citizenship'.<sup>62</sup> However, a person exercises no control over where they are born and Australian residents born in a proscribed country are not protected. The fact that individuals were required to wear badges identifying them as American, Australian or Canadian reveals how race was a crucial marker of identity in the ITAR-approved workplace,<sup>63</sup> distinguishing between favoured and disfavoured nation states.

Once the initial exemptions had been granted to competitors in one State, it was virtually impossible for a tribunal in another State to deny an exemption on similar terms. As McKenzie DP noted in a 2008 application in Victoria, if BAE were not granted the exemption, it would close its Victorian facilities and move to South Australia where an exemption had been granted, causing the loss of 180 skilled jobs.<sup>64</sup> While McKenzie DP granted the exemption, she framed the terms narrowly and adopted a somewhat more critical approach than had formerly been the case:

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<sup>58</sup> *Boeing Australia Holdings Pty Ltd (Anti Discrimination Exemption)* [2007] VCAT 532, [42].

<sup>59</sup> See *Exemption Application re: Boeing Australia Holdings Pty Ltd (No 3)* [2008] QADT 34, [55]–[56].

<sup>60</sup> Simon Rice, 'Discriminating for World Peace' in Jeremy Farrall and Kim Rubenstein (eds), *Sanctions, Accountability and Governance in a Globalised World* (2009) 1, 8–9. See also *Treaty between the Government of the United States of America and the Government of Australia concerning Defense Trade Cooperation*, 5 September 2007, [2007] ATNIF 31 (not yet in force).

<sup>61</sup> It is notable that in the United States, national security constitutes an exception to discrimination in employment on the ground of national origin in Title VII of the *Civil Rights Act of 1964* 42 USC §2000e-2(g). See also Sandra F Sperino, 'Complying with Export Laws without Importing Discrimination Liability: An Attempt to Integrate Employment Discrimination Laws and the Deemed Export Rules' (2008) 52 *Saint Louis University Law Journal* 375.

<sup>62</sup> *Boeing Australia Holdings Pty Ltd (Anti Discrimination Exemption)* [2007] VCAT 532, [25].

<sup>63</sup> *Boeing Australia Holdings Pty Ltd (Anti Discrimination Exemption)* [2007] VCAT 532, [13].

<sup>64</sup> *BAE Systems Australia Ltd (Anti-Discrimination)* [2008] VCAT 1799, [51]–[52].

I would have thought that the use of nationality-based measures to prevent unauthorised access to information or material is a blunt and imperfect instrument. Assessment of individuals on a non-stereotyped basis, or training and education about the importance of the obligation of secrecy, would seem to me to be a better approach.<sup>65</sup>

An individual rather than a class-based assessment is, of course, the very point of a non-discrimination policy.

The ACT was the first jurisdiction to refuse an exemption (to Raytheon) in the ITAR-related applications.<sup>66</sup> Commissioner Watchirs — who had recourse not only to statutory criteria mandating compliance with the *Discrimination Act 1991* (ACT), but also the *Human Rights Commission Act 2005* (ACT) — was prepared to take a stand against the decisions of the State tribunals and Supreme Courts at that stage. She was of the opinion that they had failed to give due consideration to the ‘profoundly damaging effects of race discrimination (individual as well as systemic)’.<sup>67</sup> Nevertheless, this stance did not persuade Peedom P of the ACT Administrative Appeals Tribunal who, in reviewing the decision, accepted that the exemption was justified in terms of the impact on employment and Australia’s defence capability. Peedom P was anxious to ensure ‘uniformity and comity’ with the State decisions.<sup>68</sup> Accordingly, the Commissioner’s decision was overturned.<sup>69</sup> Commissioner Fitzgerald of the Northern Territory Anti-Discrimination Commission also proposed to reject an application by Raytheon on the ground that the public interest would be better served by the avoidance of racial discrimination, but the application was withdrawn.<sup>70</sup>

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) has not applied to any of the ITAR cases to date, but the role of the Charter in exemption applications was considered rigorously and in depth by Bell P in an application for exemption by a company seeking to restrict gated community accommodation to people over 50 years old.<sup>71</sup> Bell P was highly critical of the expansive view of the statutory discretion to grant an exemption adopted by Morris J in *Boeing*.<sup>72</sup> He was even more critical of the decision of Peedom P in *Raytheon* because the reasoning implied that the presence of a Charter made no difference to

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<sup>65</sup> *BAE Systems Australia Ltd (Anti-Discrimination)* [2008] VCAT 1799, [79].

<sup>66</sup> Helen Watchirs, *Application for Exemption under s 109 (1) of the Discrimination Act 1991* (ACT) (2007) ACT Human Rights Commission <<http://www.hrc.act.gov.au/content.php/category.view/id/105>> at 20 February 2010.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Raytheon Australia Pty Ltd and ACT Human Rights Commission* [2008] ACTAAT 19, [48].

<sup>69</sup> An appeal by the ACT Human Rights Commission to the Supreme Court was unsuccessful. See *ACT Human Rights Commission v Raytheon Australia Pty Ltd* [2009] ACTSC 55.

<sup>70</sup> The then NT Commissioner, Tony Fitzgerald, posted on the NT Anti-Discrimination Commission website what would have been his decision. See Tony Fitzgerald, *Exemption Application by Raytheon Australia Pty Ltd and related companies* (2007) Northern Territory Anti-Discrimination Commission <<http://www.nt.gov.au/justice/adcdocs/decisions/2007/exemptionraytheonanors.pdf>> at 17 November 2009.

<sup>71</sup> *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869 (‘*Lifestyle Communities*’).

<sup>72</sup> *Lifestyle Communities* [2009] VCAT 1869, [95].

the exercise of the discretion.<sup>73</sup> The shift in thinking in post-Charter Victoria suggests that the grant of an exemption to achieve ‘convenient, economic and practical outcomes’<sup>74</sup> may not suffice in future applications.

The Queensland Anti-Discrimination Tribunal adopted an altogether different approach in a second application by Boeing in late 2008.<sup>75</sup> The effect is potentially more devastating than the temporary exemptions granted in ITAR-related applications to date for, if the approach were to win favour elsewhere, it would acquire the status of a permanent exemption, although the reasoning is somewhat confusing. Savage P determined that the necessity to comply with the provisions of the laws of the United States constituted a genuine occupational requirement (GOR), an express statutory exemption under *Anti-Discrimination Act 1991* (Qld), s 25, which rendered unnecessary the need to apply for a temporary exemption.

The GOR is specific to a proscribed ground. A GOR based on sex has been traditionally regarded as justifiable on the basis of privacy in prisons, for example, but is viewed very narrowly in respect of race, usually being restricted to authenticity in dramatic performances. Indeed, it is difficult to argue that a person must be of a particular race in order to perform a particular job.<sup>76</sup> Unsurprisingly, there is a dearth of GOR jurisprudence. In accepting that the need to comply with ITAR constitutes a GOR on the ground of race, Savage P stretched the meaning of the exception considerably. What is more, he elided it with the inherent requirement of a job.

Savage P relied on several discrimination cases that addressed the question of an inherent requirement of a job, which is rather a different issue, albeit not legislatively addressed other than in the context of disability and age.<sup>77</sup> The inherent requirements of any job are the core skills, abilities and duties essential to its performance. Under the *DDA*, discrimination is not unlawful if a person is unable to perform the job because of their disability or to employ them would ‘impose unjustifiable hardship’ on the employer in providing appropriate services or facilities.<sup>78</sup> The understanding of the inherent requirement has been expanded by the High Court to include factors, such as safety and administrative convenience,<sup>79</sup> which carried weight with Savage P.

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<sup>73</sup> *Lifestyle Communities* [2009] VCAT 1869, [103].

<sup>74</sup> *Boeing Australia Holdings Pty Ltd (Anti Discrimination Exemption)* [2007] VCAT 532, [35].

<sup>75</sup> *Exemption Application re: Boeing Australia Holdings Pty Ltd (No 3)* [2008] QADT 34.

<sup>76</sup> A bona fide occupational qualification exception on the ground of national origin under Title VII of the US *Civil Rights Act* is allowed if ‘reasonably necessary to the normal operation of that particular business or enterprise’. See above n 61.

<sup>77</sup> *Disability Discrimination Act 1992* (Cth) (‘*DDA*’) s 15(3); *Age Discrimination Act 2004* (Cth) s 18(4). See also Chris Ronalds, *Discrimination Law and Practice* (3<sup>rd</sup> ed, 2008), 72–6.

<sup>78</sup> *DDA* ss 21A, 21B.

<sup>79</sup> *Qantas Airways Ltd v Christie* (1998) 193 CLR 280; *X v Commonwealth* (1999) 200 CLR 177. For critique, see Margaret Thornton, ‘Disabling Discrimination Legislation: The High Court and Judicial Activism’ (2009) 15 *Australian Journal of Human Rights* 1.

Savage P also sought High Court authority from a case dealing with indirect discrimination on the ground of sex. *New South Wales v Amery*<sup>80</sup> turned on the identification of the threshold issue in indirect discrimination, namely, the existence of a requirement or condition with which the complainant is expected to comply, not the issue of reasonableness as Savage P suggested, an issue that was discussed only by Gleeson CJ (Callinan and Heydon JJ agreeing).<sup>81</sup> Nevertheless, Savage P found that reasonableness, like the GOR, can also be equated with an inherent requirement of employment: ‘Whether or not the terms were reasonable is akin in that case to asking whether or not the term is an inherent requirement.’<sup>82</sup> It seems to us that Savage P misdirected himself in endeavouring to extrapolate from a series of discrete decisions arising from the inherent requirement of a job, reasonableness and the GOR based on age, disability and sex to support his conclusion in respect of race. While the elision of these factors is unlikely to withstand judicial scrutiny in the future, Savage P was clearly of the opinion that compliance with ITAR rendered the granting of the exemption unnecessary in the Boeing application.

Somewhat contradictorily, however, Savage P also put forward detailed reasons for *rejecting* the exemption on the merits should the decision be appealed.<sup>83</sup> In this respect, his approach, like that of Commissioner Watchirs in the ACT, focused on the evil of racism against the supposed benefits of the exemption. In particular, Savage P found that the nexus between nationality or national origin and a possible security threat to the United States had not been made out.<sup>84</sup> He was critical of the scant evidence adduced by the applicant in respect of the community benefit as well as the impact on employees and potential employees if the exemption were to be granted.<sup>85</sup> He also claimed that compliance with human rights standards ought to be accorded comparable weight.<sup>86</sup> This reasoning would have been laudable but for the fact that it was entirely hypothetical. Any concerns about weaknesses in the applicant’s argument were swept away in finding that compliance with ITAR constituted a GOR.

It would seem that merely hinting at the conjunction of 9/11, national security and Islam is sufficient to minimise the burden of proof. Indeed, it is notable that the standard of proof appears to have slipped for corporations generally in justifying their actions, whereas it will be shown to have risen for individuals alleging race discrimination. The ITAR-related applications, particularly the Boeing application in Queensland, provide powerful evidence in support of the Goldberg thesis of racelessness, where the values of efficiency and economy are invoked to relegate to the sidelines overt discrimination in employment on the ground of national origin. This cluster of decisions does not go beyond the demands of

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<sup>80</sup> (2006) 230 CLR 174.

<sup>81</sup> *New South Wales v Amery* (2006) 230 CLR 174, 183–5 (Gleeson CJ).

<sup>82</sup> *Exemption Application re: Boeing Australia Holdings Pty Ltd (No 3)* [2008] QADT 34, [29].

<sup>83</sup> *Exemption Application re: Boeing Australia Holdings Pty Ltd (No 3)* [2008] QADT 34, [38].

<sup>84</sup> *Ibid.*, [83].

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

ITAR (obedience to the law of the United States) to explore the stereotypical assumptions concerning a propensity for terrorism and treason that are used to stigmatise those from ‘proscribed countries’, particularly those of Arabic descent. The veneer of rationality pertaining to state security and deference to the United States, the world’s superpower, effectively cloaks the new racism, while making significant inroads into the ambit of operation of anti-discrimination legislation.

## **Conciliating the New Racism in the Post-9/11 Environment**

During the last two decades, the impact of neoliberalism and economic globalisation has had a profound effect on employment relations. Previously, industrialisation and the existence of local skilled labour marked the economic advantage of Western nations such as Australia. Now, however, the dominance of transnational corporations with mobile workforces, combined with the collapse of local industries, has resulted in the internationalisation of labour supplies. In addition, labour relations are fragmented through the increasing use of labour-hire contracting and labour outsourcing. On top of these significant transformations, the emergence of the post-9/11 global ‘war on terror’ has produced radically new forms of racism fed by political rhetoric which demonises the ‘Arab Other’.

We found clear evidence of this new racism being played out in the context of employment relations when examining conciliation files held by anti-discrimination agencies. One file revealed the experience of a worker whose complaint arose as a result of the conditions imposed by ITAR, discussed in the previous section. The complainant had been employed for eight years but was removed from his position as a highly qualified operations technician when the employer became aware of his place of birth.<sup>87</sup> The complainant was born in an ITAR-listed country, had been adopted by an Australian couple and spent most of his life in Australia — and would probably have been entitled to United States citizenship on the basis of his biological father’s nationality. Testament to the transient nature of constructions of race and national identity in legal discourse, the status of the country on the ITAR list changed and was from this point on to be assessed on a case-by-case basis. The discretionary power of the United States to list, or delist, countries, and the willingness of Australian tribunals to grant exemptions to powerful corporations in order to comply with ITAR regulations highlights the overwhelming inequities faced by complainants in the global economy. It also demonstrates the power of racelessness to erase the subjective experience of discrimination. While this complainant had demonstrated considerable tenacity in pursuing his complaint, his experience of discrimination resulted in psychological strain and hospitalisation, and he was unable to return to the workplace. Despite being an Australian citizen, he had to pay the price for deference to United States national security interests on Australian soil.<sup>88</sup>

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<sup>87</sup> EEO project CF6, 2006–07.

<sup>88</sup> Cf Rice, above n 60.

### *The Demand for International Labour Markets*

The internationalisation of labour markets has had a dramatic impact on migration patterns.<sup>89</sup> Australia's post-war immigration policies prioritised permanent migrants to facilitate population growth and support industries such as manufacturing. However, the neoliberal turn has resulted in a focus on skilled migration under business visitor programs to work in market-driven industries, often facilitated by transnational corporations.<sup>90</sup> In response to employer demand for a more efficient process for international recruitment in areas of labour shortage, the requirement for labour market testing was removed for most visas classes.<sup>91</sup> This resulted in a reduction in domestic skills levels in areas such as trades because employers avoided the need to invest in local training.<sup>92</sup>

The potential for exploitation and discrimination of temporary migrant labour has been high and is reflected in complaints of racial discrimination. Under conditions for the most common employer-sponsored visa program, subclass 457,<sup>93</sup> Australian or overseas business employers have been able to recruit overseas workers for a period of between three months and four years. Sponsoring employers have been required to pay designated minimum wages based on the annual average salary in Australia<sup>94</sup> and be responsible for travel, medical and hospital expenses, conditions which have placed workers in a vulnerable position if they become ill or are injured. In one complaint file, for example, a Chinese man on a four-year 457 visa, employed as an electrician in a packaging company, suffered an injury at work and claimed that he was not provided with appropriate medical care or accommodation of his injury. He said that after he raised discrimination issues, he was threatened with dismissal which placed him at risk of visa cancellation.<sup>95</sup>

Skilled migrant workers on temporary visas employed in industries such as hospitality where labour shortages have resulted in unregulated wages and conditions are

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<sup>89</sup> Graeme Hugo, 'Globalization and Changes in Australian International Migration' (2006) 23 *Journal of Population Research* 107.

<sup>90</sup> Graeme Hugo, 'Temporary Migration and the Labour Market in Australia' (2006) 37 *Australian Geographer* 211. Hugo identifies the policy shift as occurring in 1996 with the introduction of the employer-sponsored temporary business visa categories (457) and (467): see 215.

<sup>91</sup> Hitoshi Nasu, 'Reform of Subclass 457 Visa Scheme: Proposal of Three Models' (2008) 33 *Alternative Law Journal* 147. Labour market testing, necessary for other employer-sponsored visa classifications (see, eg, Educational Visa 418), requires employers to advertise and attempt to fill a position in Australia with an Australian citizen or permanent resident in the six months prior to the visa application.

<sup>92</sup> Phillip Toner and Richard Woolley, 'Temporary Migration and Skills Formation in the Trades: A Provisional Assessment' (2008) 16(3) *People and Place* 47.

<sup>93</sup> In 2008–09, 50 660 Subclass 457 visas were granted to primary applicants (101 280 including dependants). See Department of Immigration and Citizenship, *Annual Report 2008–09* (2009) Table 24: Temporary Skilled Migration (subclass 457) <<http://www.immi.gov.au/about/reports/annual/2008-09/html/outcome1/output1-1-5.htm#table24>> at 17 November 2009.

<sup>94</sup> We note, however, that the *Migration Legislation Amendment (Worker Protection) Act 2008* (Cth) has introduced tighter employer obligations, including the obligation to ensure subclass 457 visa holders equivalent terms and conditions as Australian citizens or permanent residents by paying market salary rates. In addition, a temporary skilled migration income threshold has been introduced.

<sup>95</sup> EEO Project CF42, 2006–07.

particularly vulnerable to exploitation. In another jurisdiction, a series of race discrimination complaints were made by male and female workers who had been recruited in the Philippines and employed on 457 visas as chefs in a number of restaurants. They included allegations of underpayment of wages, excessive working hours and failure to provide medical treatment, as well as bullying and harassment.<sup>96</sup> The workers, assisted by a trade union, claimed they had been targeted for exploitation because of their race, illegally charged a 'sign-on' fee, underpaid, denied overtime payments, penalty rates and allowances, and that unauthorised deductions for accommodation were taken from their pay. The complainants said that they were told that they had been 'sold' to their employers for AUD 6–8000.<sup>97</sup> The complaints were made by three workers against three restaurants and the manager of another restaurant who recruited the staff, but attempts at conciliation were unsuccessful. The Office of Workplace Services prosecuted two of the restaurants for underpayment of wages and breaches of the *Workplace Relations Act 1996* (Cth).

Successive waves of immigration to Australia reveal that the more recent the arrival and the more exotic the immigrant vis-à-vis the white Anglophonic benchmark, the greater is the likelihood of discrimination.<sup>98</sup> The point is revealed by the recent wave of African refugees, who have also been subjected to significant discrimination as visible Others.<sup>99</sup> These waves of immigrants result in a constant supply of labour for unskilled low-paid positions, thereby demonstrating the way racial discrimination is imbricated with state policy.

### *The Impact of Labour-Hire Contracting*

The dissipation of the traditional employment relationship, as a result of casualisation, labour-hire contracting, outsourcing, home-based and other precarious forms of work, is a defining characteristic of contemporary labour formations. Labour hire agencies that employ their own workers on temporary assignment with client host employers have proliferated in Australia with the deregulation of labour markets and privatisation of public employment agencies.<sup>100</sup> While regulatory frameworks such as discrimination law and occupational

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<sup>96</sup> EEO Project, CF15, CF16 & CF18, 2006–07.

<sup>97</sup> This type of labour exploitation has been discussed as a form of slavery by Bernadette McSherry and Miriam Cullen, 'Without Sex: Slavery, Trafficking in Persons and the Exploitation of Labour in Australia' (2009) 34 *Alternative Law Journal* 4.

<sup>98</sup> Val Colic-Peisker and Farida Tilbury, 'Employment Niches for Recent Refugees: Segmented Labour Market in Twenty-first Century Australia' (2006) 19 *Journal of Refugee Studies* 203.

<sup>99</sup> See Victorian Multicultural Commission & Victorian Equal Opportunity & Human Rights Commission, *Harnessing Diversity: Addressing Racial and Religious Discrimination in Employment* (2008) <<http://www.humanrightscommission.vic.gov.au/pdf/Harnessing%20Diversity%20report.pdf>> at 17 November 2009. The AHRC is currently conducting a project to investigate the experience of African communities: *African Australians: A Report on Human Rights and Social Inclusion Issues, Discussion Paper* (2009) <<http://www.hreoc.gov.au/africanus/index.html>> at 17 November 2009.

<sup>100</sup> Elsa Underhill, 'The Role of Employment Agencies in Structuring and Regulating Labour Markets' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006) 282.



health and safety are the responsibility of the host, the latter is not the employer of the contracted worker, which results in a 'regulatory void'.<sup>101</sup>

This is the situation which occurred when an African-American man who was working on a short-term contract as a software packager for a large bank claimed that he had been treated less favourably by his supervisor because of his race, making his working environment intolerable.<sup>102</sup> The complainant also alleged victimisation because, subsequent to his internal complaints, his contract was terminated and he was denied access to the workplace. The employment relationship was mediated by three entities: a multinational telecommunications company, an IT contracting and recruitment company, and an employment agency. Declaring that it had outsourced desktop service functions, the respondent bank denied that the complainant was at any stage an employee of the company. Occlusion of employers' identity and the status of workers conveniently functions to obscure ownership of transnational and subsidiary corporations and to avoid national regulatory frameworks, including discrimination law. As Judy Fudge points out, when large corporations subcontract, the risks are borne by the smaller firms and ultimately by the more vulnerable workers.<sup>103</sup> Guest workers on employer-sponsored or short-term contracts are particularly vulnerable to racial discrimination and exploitation because they are at risk not only of losing their job but also of deportation if they complain.

### *Demonisation of the 'Arab Other'*

In the post-9/11 environment, racial discrimination has also been experienced by Australian citizens whose racial identity has become demonised in the context of the global 'war on terror'. The racial identification category 'of Middle-Eastern appearance' is a manifestation of racelessness that comes into effect via homogenisation of cultural, ethnic and national specificity, providing a stark example of the historical and political contingency of racialisation.<sup>104</sup> While racism directed against the 'Arab Other' has been pervasive in Australia since the arrival of Syrian and Lebanese immigrants in the 1880s,<sup>105</sup> an escalation of racially-based violence and vilification against individuals, often women and girls wearing the hijab, as well as Arab and Muslim organisations was documented during the Gulf War<sup>106</sup> and repeated in the political environment post-9/11.<sup>107</sup> The demonisation of the

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<sup>101</sup> Ibid, 302.

<sup>102</sup> EEO Project CF23, 2006–07.

<sup>103</sup> Judy Fudge, 'The Legal Boundaries of the Employer, Precarious Workers, and Labour Protection' in Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (2006) 302.

<sup>104</sup> Joseph Pugliese, 'The Locus of the Non: The Racial Fault-line of "of Middle-Eastern Appearance"' (2003) 2(3) *borderlands e-journal* <[http://www.borderlands.net.au/vol2no3\\_2003/pugliese\\_non.htm](http://www.borderlands.net.au/vol2no3_2003/pugliese_non.htm)> at 17 November 2009.

<sup>105</sup> Anne Monsour, 'Whitewashed: The Lebanese in Queensland, 1880–1947' in Ghassan Hage (ed), *Arab-Australians Today: Citizenship and Belonging* (2002) 16.

<sup>106</sup> Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (1991) 145–46.

<sup>107</sup> Human Rights and Equal Opportunity Commission, *Ismaʿ— Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australians* (2004) 47–69.

Arab Other effected through the semantic conflation of ‘Arab’, ‘Muslim’ and ‘terrorist’ is pervasive in media portrayals and political discourse.<sup>108</sup>

Legislation variously making unlawful racial and religious vilification or racial hatred in the form of verbal or written statements, images or sounds in public places was introduced from 1989, but does not apply in the area of employment.<sup>109</sup> Discrimination on the grounds of religious belief or activity is not proscribed under federal legislation, nor in New South Wales or South Australia, although courts in various jurisdictions have found Jews and Sikhs to be included under the term ‘ethnic origin’<sup>110</sup> and the term ‘ethno-religious origin’ has been included in the definition of ‘race’ in New South Wales and Tasmania.<sup>111</sup>

Not limited to racial violence and vilification in public places and racist media representations, Arabic and Muslim Australians have reported an increased level of racism, abuse and violence in workplaces in the wake of both the Gulf War in 1991 and 9/11.<sup>112</sup> Globalisation is resulting in increasing numbers of displaced people, many of whom are Muslims from Afghanistan, Iran and Iraq, whose claims for asylum in Australia have been exploited for political gain, fuelling levels of racist nationalism hinged to rhetoric about border security.<sup>113</sup> Arabs and Muslims are subjected to levels of racism, criminalisation and stereotyping in workplaces where anyone of ‘Middle-Eastern appearance’ is implicated in anti-West terrorist activities. Media portrayals of Arabs and Muslims have played a significant role in the demonisation subsequently experienced at work where a person’s appearance, dress or name may be the trigger for racist abuse which can make working conditions intolerable.

We identified a number of complaint files involving anti-Arab and anti-Muslim race discrimination in workplaces. In the immediate aftermath of 9/11, a complaint was made by a young man working as a workshop manager who had been repeatedly subjected to discrimination and vilification because of his Muslim religious beliefs and Arabic background. Two managers interrogated and ridiculed him because his name was ‘Jihad’; they accused him of having obtained a pilot’s licence, told him that a Muslim colleague was implicated in the terrorist attacks in the United States and exposed him to obscene images. The complainant reported that the harassment had begun as soon as he had started work, prior to 9/11, but was intensified immediately afterwards, a situation that may be attributed

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<sup>108</sup> Scott Poynting et al, *Bin Laden in the Suburbs: Criminalising the Arab Other* (2004); Anti-Discrimination Board of New South Wales, *Race for the Headlines: Racism and Media Discourse* (2003).

<sup>109</sup> *Anti-Discrimination Act 1977* (NSW) s 20C; *Racial and Religious Tolerance Act 2001* (Vic) ss 7, 24; *Anti-Discrimination Act 1991* (Qld) ss 124A, 131A; *Racial Vilification Act 1996* (SA); *Equal Opportunity Act 1984* (WA) ss 49A–49D; *Anti-Discrimination Act 1998* (Tas) ss 19, 22(2); *Discrimination Act 1991* (ACT) ss 65–67.

<sup>110</sup> *King-Ansell v Police* [1979] 2 NZLR 531 and *Mandla v Dowell Lee* [1983] 2 AC 548, cited with approval by Hely J in *Jones v Scully* (2002) 120 FCR 243, 272. However, there is no jurisprudence which clarifies whether this is the case for Muslims.

<sup>111</sup> *Anti Discrimination Act 1977* (NSW) s 4; *Anti-Discrimination Act 1998* (Tas) s 3.

<sup>112</sup> HREOC, above n 106, 60.

<sup>113</sup> David Marr and Marian Wilkinson, *Dark Victory* (2003).

to the effect of media portrayals and racist political discourse functioning to legitimate racist behaviour. The complaint was settled through conciliation with financial compensation, although the complainant resigned.<sup>114</sup>

Another complaint was made in the same jurisdiction by a man who reported a similar experience. He had made a complaint to management about racist abuse and less favourable treatment by his supervisor because of his Muslim religious beliefs dating back to 1998, which resulted in his shifts being changed and a loss in income of AUD110 per week. After being on stress leave for four months, he returned to work but was placed back on the shift with the supervisor, who he alleged attempted to harm him physically, resulting in his resignation.<sup>115</sup>

In another complaint from 2005, an Afghani Muslim woman who was employed in a management position in a large telecommunications company said that once staff became aware of her national origin and religious beliefs she was treated less favourably and was humiliated by her manager who made comments about 'Bin Laden' in front of other workers; she was also denied leave during Ramadan, despite the fact that another worker had been granted leave for Jewish religious holidays. The complainant was refused an opportunity to transfer, and eventually resigned due to the culture of racism and discrimination in the workplace.<sup>116</sup>

Racial discrimination in workplaces that results in resignation or dismissal functions as the ultimate form of racelessness, for it reinscribes hegemonic whiteness and relegates the ethnicised Other to precarious work or unemployment, thus reinforcing disadvantage which in turn perpetuates racism. Women are particularly vulnerable to this form of erasure because of their historically unequal position in the labour market, exacerbated by neoliberal industrial relations policies, resulting in them increasingly dominating insecure casual, part-time and other precarious forms of work.<sup>117</sup>

In the contemporary environment where economic rationalities are said to underscore all modes of interaction, conciliation may appear to be a lame mechanism for resolving complaints of race discrimination. As the examples from conciliation files reveal, the intensification of racial inequality that has emerged in the post-9/11 environment and the impact of neoliberal economic policies resulting in the globalisation of labour and deregulation of industrial relations have undermined the potential for conciliation to address complaints of racial discrimination.

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<sup>114</sup> EEO Project CF65, 2001–02.

<sup>115</sup> EEO Project CF54, 2001–02.

<sup>116</sup> EEO Project CF35, 2006–07.

<sup>117</sup> Yolanda van Gellecum, Janeen Baxter and Mark Western, 'Neoliberalism, Gender Inequality and the Australian Labour Market' (2008) 44 *Journal of Sociology* 45.

## Race and the Jurisprudence of Identity in the New Global Economy

Where a complaint is declined or conciliation fails, a complainant may pursue a claim to a formal hearing at the Federal Magistrates Court or a State tribunal. However the shift away from specialist to generalist tribunals and courts serves as a serious disincentive to complainants who are unable to afford the expense of legal representation and the risk of costs being awarded against them. The trend to increasing formalism is also resulting in decisions generating an evidential burden which, while ostensibly reflecting the civil standard, where inferences may be drawn from circumstantial evidence to make a finding of discrimination on the balance of probabilities, is actually closer to the criminal standard, requiring complainants to provide unquestionable evidence of discriminatory conduct, which admits of no other explanation. Racelessness is often reinscribed by tribunals and courts when decision-makers fail to recognise the function of racialised hierarchies of power, thus proving themselves able handmaidens of Goldberg's rhetoric of racelessness.

Neither race discrimination, nor the cognate concept of national origin, is defined in the legislation or the *International Convention on the Elimination of All Forms of Racial Discrimination*.<sup>118</sup> It is left to courts and tribunals to ascribe meaning, thereby underscoring further the malleability and the contingency of race discrimination. The inequality of bargaining power between the parties in employment complaints is thrown into high relief in a formal hearing where corporate respondents are able to capitalise on their superior status and resources and mould the jurisprudence in their own image.

This is illustrated by the case of *Stamatov*, which involved a Bulgarian migrant whose position with the Department of Defence (for which he had been invited to apply) was terminated because his background was deemed to be uncheckable, although he had provided a large number of certified documents. While HREOC found that the complainant had been discriminated against on the basis of national origin, the decision was overturned by the Federal Court.<sup>119</sup> Von Doussa J accepted the argument of the applicant that HREOC had misconstrued the meaning of national origin. He concluded that the failure to waive the nationality requirement was not on the basis of the complainant's 'national origin', that is, where the complainant was born, but because of his 'country of origin', that is, where he had 'lived and worked'.<sup>120</sup> Thus, a fine distinction was made between discrimination on the ground of the complainant's 'national origin' (unlawful discrimination) and his 'country of origin' (bona fide conduct). The fact that Mr Stamatov had been born in Bulgaria of Bulgarian parents was held to be 'an irrelevant coincidence',<sup>121</sup> a finding that would undoubtedly bemuse the ordinary person. In this case, we see how counsel for powerful

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<sup>118</sup> Opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969).

<sup>119</sup> *Stamatov v Department of Defence* [1998] HREOCA 6; *Commonwealth v McEvoy* (1999) 94 FCR 341.

<sup>120</sup> *Commonwealth v McEvoy* (1999) 94 FCR 341, 354.

<sup>121</sup> *Commonwealth v McEvoy* (1999) 94 FCR 341, 352.

employer respondents are able to exploit seeming ambiguities in the text so as to erase all signs of racism from the impugned conduct.

Using examples of reported decisions of race discrimination in employment in Australia, Jonathon Hunyor highlights the reticence of courts to find racial discrimination when there is no direct evidence, a situation that he attributes to a failure of decision-makers to acknowledge the existence of systemic racism and the function of conscious and unconscious racial bias in decision-making.<sup>122</sup> Loretta de Plevitz shows how the evidentiary problems are exacerbated through acceptance by anti-discrimination tribunals of the *Briginshaw* test of ‘reasonable satisfaction,<sup>123</sup> in lieu of the normal civil standard, that is, on the balance of probabilities.<sup>124</sup> The reason for the more rigorous test is because of what is perceived to be the moral odium associated with naming someone ‘a discriminator’.<sup>125</sup> Nevertheless, automatic acceptance of the *Briginshaw* test has been challenged in the context of race discrimination.<sup>126</sup>

Furthermore, to show that the political pendulum only ever goes so far in the one direction before the state loses its legitimacy,<sup>127</sup> it is notable that the *Fair Work Act 2009* (Cth) (*FWA*) also contains a prohibition of discrimination at work, together with several significant ancillary provisions. First, the *FWA* enables Fair Work Inspectors to enter workplaces,<sup>128</sup> which could mitigate the burden of proof on individual complainants and, secondly, the Act contains a provision reversing the burden of proof.<sup>129</sup>

While there is a plethora of case law illustrating the difficulty of proving race discrimination in employment,<sup>130</sup> we have chosen to focus on instances that exemplify the impact of the global economy through the internationalisation of labour markets, a neoliberal phenomenon that emerged in the 1990s. We argue here that the requirement that complainants provide evidence sufficient to satisfy the decision-maker that race was the cause of the discriminatory conduct, has received a restrictive legal interpretation which has served to erase the pervasiveness of racism.

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<sup>122</sup> Hunyor, above n 21.

<sup>123</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362–3 (Dixon J).

<sup>124</sup> de Plevitz, above n 21.

<sup>125</sup> Beth Gaze, ‘Context and Interpretation in Anti-Discrimination Law’ (2002) 26 *Melbourne University Law Review* 325, 335.

<sup>126</sup> *Weatherall obo Leelan Powell v Smart Dollar Liverpool Pty Ltd* [2009] NSWADT 234; *Chand v Rail Corporation of NSW (No 2)* [2009] NSWADTAP 27; *Qantas Airways v Gama* [2008] 167 FCR 537.

<sup>127</sup> EP Thompson, *Whigs and Hunters: The origin of the Black Act* (1975) 184.

<sup>128</sup> *FWA* s 708.

<sup>129</sup> *FWA* s 361.

<sup>130</sup> See, eg, *Sharma v Legal Aid Queensland* (2001) 112 IR 124; *Monash University v Kapoor* [1999] VSC 463; *aff’d Kapoor v Monash University* (2001) 4 VR 483.

### *The Demand for Skilled Migrant Labour*

In Australia, the regulation of immigration has always been closely tied to labour market structuring in meeting requirements for skilled and unskilled labour and the protection and development of local workforces.<sup>131</sup> Post-WWII European immigrants allowed into Australia were largely recruited into positions in manufacturing and construction that did not threaten hegemonic Anglocentricity. However, the contemporary employer demand for skilled temporary migrants to work in the new knowledge-based economy has produced a shift in immigration policy. As a consequence of the focus on skilled migration in areas of economic need, a national process for recognition, accreditation and assessment of overseas qualifications was established. However, the introduction of competency-based skills recognition coincided with labour market deregulation, with assessments performed by professional bodies and employers, resulting in discriminatory practices which prevent skilled NESB migrants from obtaining secure employment.<sup>132</sup>

While globalisation has facilitated the growth of labour markets, such as health care,<sup>133</sup> discrimination in recognition of qualifications, recruitment and promotion continues to exclude qualified professionals from the workforce. When, for example, doctors, dentists and other health professionals from developing countries apply for positions in Australian medical services and hospitals, they may encounter racism in selection procedures and career development, but this can be conveniently obscured by rationales which ‘explain away’ race as the basis for decisions. While inferences may be drawn on the basis of evidence presented, decision-makers are circumspect in their assessment of it unless confronted with incontrovertible evidence of discriminatory conduct.

This is exemplified in a series of cases involving health professionals who made complaints of racial discrimination in employment in the 1990s. In *Nagasinghe v Women’s and Children’s Hospital, Adelaide*,<sup>134</sup> a complaint made by a Sri Lankan woman who unsuccessfully applied for a position as Senior Visiting Dentist was summarily dismissed by HREOC, even though Commissioner Worthington recognised the ‘possibility of concealed racism in a large institution such as a hospital where persons may consciously or unconsciously apply racist guidelines in selecting personnel’.<sup>135</sup> The complainant, representing herself, was subsequently refused judicial review of the decision in the Federal Court,<sup>136</sup> because she had not demonstrated ‘even a remote possibility or hint of any

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<sup>131</sup> Mary Crock and Leah Friedman, ‘Immigration Control and the Shaping of Australia’s Labour Market: Conflicting Ideologies or Historical Imperatives?’ in Arup et al (eds), above n 100, 322–3.

<sup>132</sup> Dimitria Groutsis, ‘The State, Immigration Policy and Labour Market Practices: The Case of Overseas-Trained Doctors’ (2003) 45(1) *Journal of Industrial Relations* 67, 72–73.

<sup>133</sup> Paul Clark, James Stewart and Darlene Clark, ‘The Globalization of the Labour Market for Health-Care Professionals’ (2006) 145 *International Labour Review* 37.

<sup>134</sup> *Nagasinghe v Women’s and Children’s Hospital, Adelaide* (1994) EOC ¶92-613.

<sup>135</sup> *Nagasinghe v Women’s and Children’s Hospital, Adelaide* (1994) EOC ¶92-613, 77,286.

<sup>136</sup> *Nagasinghe v Worthington* (1994) 53 FCR 175. In this decision, von Doussa J relied upon the determinations of Wilson P in *Assal v Department of Health, Housing and Community Services* (1992) EOC ¶92-409 and *GVR*

connection'<sup>137</sup> between her race, colour or national or ethnic origin and the decision not to appoint her, despite the fact that she had not been permitted to subpoena documentary evidence or cross-examine members of the selection committee. Rather than race, von Doussa J concluded that the complainant had raised issues regarding the 'fairness' of the selection process,<sup>138</sup> failing to recognise the powerful rhetoric of 'fairness' and its attendant unmarked racialisation in discourses of Australian nationalism.

In another case, a doctor who had received his medical qualifications and clinical training in India and who had passed the Australian Medical Council exam for foreign doctors unsuccessfully applied for a training position in neurosurgery at the Royal Adelaide Hospital.<sup>139</sup> He took action against the Royal Australian College of Surgeons, alleging that he had been dealt with in a superficial and perfunctory way and that his application had not been treated fairly. The complainant gave evidence that when he arrived for the interview, he was required to wait 45 minutes while the panel was assembled, there were no other candidates, he was not asked questions about his experience or research and it became apparent that the interview exercise was futile. However, Commissioner Johnston found that the complaint was lacking in substance because the complainant had not provided evidence that anything was said 'in explicit terms which adversely reflected upon his origins or background or from which implications could be drawn that race was a factor'.<sup>140</sup> The complaint was dismissed under application from the respondent, although the complainant, representing himself, had not been given an opportunity to present evidence.<sup>141</sup> The power of courts and tribunals to dismiss complaints on application from respondents compounds the disadvantaged position of complainants, who, already confronted with the onus of demonstrating discrimination, are thwarted in their claim in a first instance hearing when denied an opportunity to present their case fully.

Occasionally, a complainant is able to marshal the requisite level of evidence and succeeds in persuading decision-makers of the worthiness of his or her claim, only for this to be overturned on appeal by a powerful respondent. In *Siddiqui v Australian Medical Council*,<sup>142</sup> an Indian doctor who had successfully obtained a position from London with the New South Wales Area Health Service was notified that he would be granted permanent residency, but the day before departure, his visa was cancelled and he was given temporary residency status because the employer nomination form could not be located. Upon arrival

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v *Department of Health, Housing and Community Services* (unreported, Wilson P, 23 August 1993) to dismiss the claim under RDA s 25X.

<sup>137</sup> *Nagasinghe v Worthington* (1994) 53 FCR 175, 179.

<sup>138</sup> *Nagasinghe v Worthington* (1994) 53 FCR 175, 179.

<sup>139</sup> *Gaekwad v The Royal Australasian College of Surgeons* (1998) EOC ¶92-944 ('*Gaekwad*').

<sup>140</sup> *Gaekwad* (1998) EOC ¶92-944, 78,288.

<sup>141</sup> Commissioner Johnston relied upon the decision of Drummond J in *Ebber v Human Rights and Equal Opportunity Commission* (1995) 129 ALR 455, which followed the decision of von Doussa J in *Nagasinghe v Worthington* (1994) 53 FCR 175.

<sup>142</sup> *Siddiqui v Australian Medical Council* (1995) EOC ¶92-730. See also *Siddiqui v Australian Medical Council* (2000) EOC ¶93-059.

in Australia, he pursued his immigration status with the Commonwealth Ombudsman and became an Australian citizen. He worked under temporary registration in nine hospitals across three States without job security for seven years, during which time he sat the Australian Medical Council (AMC) exam six times, but despite meeting the qualifications on the last three occasions, was excluded as a result of a quota on overseas trained doctors (OTDs).<sup>143</sup> The Commissioners found that the quota functioned to discriminate indirectly against the applicant, because it meant that in order to proceed to the clinical exam, he was required to meet a higher standard than graduates of Australian and New Zealand medical schools. This decision was overturned on appeal by the Federal Court, which determined that the Commission had incorrectly reversed the onus of proof and that Mr Siddiqui had not succeeded in demonstrating that the necessity for the quota was unreasonable because he had not shown that it had a disproportionately adverse impact on OTDs of Indian origin.<sup>144</sup> The Court's decision turned on an interpretation of the meaning of 'reasonableness', finding it in this context to be 'dictated by reason and rationality — not necessarily one with which all people or even most people agree'.<sup>145</sup> Reliance on the elusive standard of reasonableness against the backdrop of a contemporary debate concerning the nexus between doctor numbers and the rising cost of health care highlights the rationality of racelessness in this case. Further underscoring the suggestion that race discrimination was irrelevant to his claim, Dr Siddiqui was ordered to pay the costs of the AMC.

Health care is only one industry in which global labour markets have emerged in the last two decades. Internationalisation of recruitment has increasingly become the norm for transnational and national corporations. In *Oyekanmi v National Forge Operations Pty Ltd*,<sup>146</sup> a Nigerian-born engineer with qualifications from Nigeria and the United Kingdom alleged that he had been employed on a probationary basis to give 'scientific rigour' to the company's procedures but was subjected to treatment which diminished his capacity to perform the role and was then dismissed for failing to make the 'transition to industry'. In this case, the Board found evidence of less favourable treatment on the basis of race because the respondent admitted that there was concern among management that the complainant would not be accepted by the company's all white staff. In an unusual success for a complainant of race discrimination in employment, the Board accepted evidence of incidents relating to the complainant's colour and found that the expectation that he maintain credibility with the other staff was based on his race and awarded him AUD 26 704 in damages.

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<sup>143</sup> The quota was introduced in 1992 and was established at 200 per year. At the time, there were 4500 applications from OTDs pending with the AMC: *Siddiqui v Australian Medical Council* (1995) EOC ¶92-730, 78,454.

<sup>144</sup> *Australian Medical Council v Wilson* (1996) 68 FCR 46.

<sup>145</sup> *Australian Medical Council v Wilson* (1996) 68 FCR 46, 61 (Heerey J).

<sup>146</sup> *Oyekanmi v National Forge Operations Pty Ltd* (1996) EOC ¶92-797. See also *Meka v Shell Company Australia Ltd* [2005] FMCA 250.



### *The Impact of the War on Terror*

Despite the proliferation of anti-Arab and anti-Muslim racism post-9/11, this form of racism appears to have featured in only one case of racial discrimination in employment formally heard by a court or tribunal in Australia.<sup>147</sup> In *Abdulrahman v Toll*,<sup>148</sup> an Australian man of Lebanese background who was employed for two and a half years as a forklift operator gave evidence that throughout his employment his name had been intentionally mispronounced by his manager, including over the loudspeaker, and that he had been regularly subjected to humiliating racist taunts; even the union delegate had referred to him as ‘Osama bin Laden’ and a ‘bomb chucker’. Despite fear of victimisation, he made a complaint to the State Manager, but the behaviour did not cease. The New South Wales Administrative Decisions Tribunal accepted that name calling had occurred and that the respondent had failed to take steps to prevent this behaviour. It found direct discrimination and awarded the complainant AUD 25 000 for distress, humiliation and embarrassment, but did not make an order for economic loss, even though the complainant had been dismissed. The Tribunal also ordered that the respondent pay the complainant’s costs, but the respondent appealed to the Appeal Panel, which dismissed the appeal regarding damages but upheld the appeal regarding costs, remitting the matter to the Tribunal.<sup>149</sup>

Despite the original assumption of the jurisdiction that each party would pay their own costs at hearing, unsuccessful complainants are now frequently ordered to pay the costs of corporate respondents.<sup>150</sup> This decision of the state functions to penalise complainants further and can only serve as a disincentive for others to persevere with their complaints. While it is not uncommon for complainants to represent themselves in accordance with the original aim of providing an expeditious and inexpensive avenue of dispute resolution, the inequitable bargaining power that characterises employer/employee relations is accentuated when respondents routinely employ senior counsel who argue subtle points of procedure to the detriment of the merits.

### **Conclusion**

The liberal hope for legislative measures designed to ameliorate race discrimination in employment was that the lodgement of each individual complaint would exercise a ripple effect so as to reduce discrimination and augment tolerance and diversity in society. This

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<sup>147</sup> We note however the case of religious vilification: *Islamic Council of Victoria v Catch the Fire Ministries Inc (Final)* (2005) EOC ¶93-377, successfully appealed by the respondent: *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VR 207. We have considered this case in Margaret Thornton and Trish Luker, ‘The Spectral Ground: Religious Belief Discrimination’ (2009) 9 *Macquarie Law Journal* 71.

<sup>148</sup> *Abdulrahman v Toll Pty Ltd (t/as Toll Express)* (2006) EOC ¶93-445.

<sup>149</sup> *Toll Pty Ltd (t/as Toll Express) v Abdulrahman* (2008) EOC ¶93-482.

<sup>150</sup> See, eg, *Dean v Cumberland Newspaper Group* (2004) 54 AILR ¶100-166; *Firew v Busways Trust* [2003] FMCA 193; *Klimentos v Health Insurance Commission* [2005] FMCA 859; *Cheng v Nicolas* [2007] FMCA 755.

hope was somewhat naïve in assuming that societal discrimination was finite and would gradually dissipate over time, for it ignored its dynamic and contingent character, as it is perennially being reproduced. Furthermore, an individualised approach not only exercises little impact on the systemic nature of discrimination, it may actually legitimise it because of the inability of a complainant to counter a rational justification adduced by the respondent. We have suggested that the neoliberal employment strategies, immigration policies and the economic globalisation that emerged in the 1990s, together with the events of 9/11, highlight the shifting sands of discrimination and its sensitivity to the political mood of the moment. The effect of these developments, all of which are intimately intertwined with entrenched racism towards Others, has been to augment greatly the scope for the rationalisation of race discrimination so that its incidence appears as *race-less*-ness in accordance with Goldberg's thesis.

'Merit', 'experience' and 'qualifications' are legitimate factors that are conventionally privileged by employers, but they continue to bedevil complaints of race discrimination in employment as the reason for the complainant's lack of success by obscuring the racism at the heart of the complaint. However, the political swing rightwards has seen a marked shift away from workers' rights to the 'good of the economy', which has meant the adulation of the market, including the maximisation of profits and, by extension, the strengthening of employer prerogative. Not only has the market turn irrevocably altered the notion of stable and secure employment, it has served to contract the ambit of operation of the legislation. It has become far more difficult for workers to allege discrimination on the ground of race, let alone prove it when the conditions of employment are precarious. It goes without saying that this unstable environment weighs heavily with potential complainants who are likely to opt out of resolving their grievances formally. Furthermore, we suggest that the phenomenon of WorkChoices contributed to the normalisation of discrimination, which inevitably heightened the burden for complainant employees and insidiously lowered it for respondent employers.

The ITAR-related exemption applications illustrate most clearly the privileging of employers, particularly multinationals. In this cluster of applications, it was the tribunals, the very bodies charged with upholding the non-discrimination principle, which were prepared to jettison their statutory guardianship role in favour of extraneous factors — deference to the laws of a foreign state and the generation of substantial profits. As public officials, their complicity supports Goldberg's thesis that the modern state is in fact a racial state. The political ramifications of globalisation, including free trade agreements, especially those to which the United States is a party, appear to have exercised a tsunami-like effect on Australia that has weakened the commitment to the non-discrimination principle.

Anti-discrimination legislation was enacted during the high point of social liberalism when beneficence and tolerance underpinned immigration policies designed to woo skilled workers to a dynamic New World economy. However, neoliberalism is frequently

accompanied by a moral conservatism that has evinced a meaner and less tolerant stance towards ethnicised Others. The focus of this animus is not just an exotic Oriental Other, of which Edward Said has written so insightfully,<sup>151</sup> but the imbrication of terms such as 'Islam' 'Muslim' and 'Arab' with 'terrorist', 'suicide bomber' and 'security threat'. In the aftermath of 9/11, this animus has inserted itself within the quotidian reality of the workplace, where discrimination may now be overt. We do not know what proportion of innocent would-be complainants have been deterred from exercising their rights under anti-discrimination legislation because of the parlous nature of their employment, their status as overseas nationals, or their fear of being visible Muslims in a hostile environment. We do know that the conflation of an ethnicised embodied Otherness with a discrete set of community concerns about violence and security has crystallised into systemic racial discrimination against them in the workplace that cannot be countered by the ad hoc lodgement of individual complaints.

Post-9/11 is the environment in which the new racism thrives and the role of the state in its production cannot be gainsaid. This may be seen from the form of the legislative instruments that purport to deal with complaints of discrimination, for they are peppered with substantive and procedural limitations, including supposedly temporary exemptions that may serve to promote racism. Tribunals are now awarding costs against unsuccessful complainants in contradistinction to the past practice of having each party pay their own. This change has been orchestrated by the decision of the state to shift from specialist to generalist tribunals. Complaints are dismissed not because they are vexatious but because complainants are unable to meet the heightened burden of proof within a hostile climate where racism has been normalised. Their 'failure' has a chilling effect upon other complainants whose complaints are not conciliated. In addition, this means that the shaping of the jurisprudence relating to race discrimination in employment has become the prerogative of well resourced employer respondents, making it impossible for racialised Others to counter. Despite the good intentions of those individuals and agencies who work for justice in the area, the case against the state in producing and sustaining racism is overwhelming.

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<sup>151</sup> Edward W Said, *Orientalism: Western Conceptions of the Orient* (1978).