

AFFIRMATIVE ACTION: A NEVER-ENDING  
STORY?

by

Nicole M. Lederer

Thesis submitted for the degree of  
Doctor of Philosophy

Law School  
Faculty of Professions  
The University of Adelaide, Australia

March 2013

## **TABLE OF CONTENTS**

<i>Abstract</i>		ii
<i>Acknowledgements</i>		iii
<i>Declaration</i>		iv
<i>Detailed Table of Contents</i>		v
<i>Chapter One:</i>	<i>Introduction</i>	1
<i>Chapter Two:</i>	<i>Meaning of Affirmative Action</i>	17
<i>Chapter Three:</i>	<i>The Rationale for Affirmative Action</i>	43
<i>Chapter Four:</i>	<i>The Limits of Affirmative Action in the United States</i>	70
<i>Chapter Five:</i>	<i>The Limits of Affirmative Action in Canada</i>	124
<i>Chapter Six:</i>	<i>The Limits of Affirmative Action in Australia</i>	166
<i>Chapter Seven:</i>	<i>Affirmative Action: For A Limited Time Only?</i>	213
<i>Bibliography</i>		251

## ABSTRACT

---

Affirmative action addresses the phenomenon of historical and present disadvantage for groups including racial minorities and women within societies around the world. The thesis interrogates the concept of affirmative action in employment in three jurisdictions: the United States, Canada and Australia. It focuses on how these countries construct, measure and determine limits for specific affirmative action programs at the workplace.

The thesis begins with a critical investigation of the meaning of affirmative action, followed by an analysis of its theoretical justification by various scholars. International guidelines of the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD) and *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) are considered for the national implementation of affirmative action in the comparator countries.

The thesis outlines affirmative action in the three key jurisdictions noting differences in their approach to implementation. These analyses lead to the conclusion that there are two types of affirmative action, of which the first addresses equality of opportunity and the second equality of outcome. Both types of affirmative action require different methods of implementation. Whilst the first type is more effective through the application of pro-active permanent strategies, the second type should be based on specific targets and temporal limits, which need to be reassessed after their deadlines have been reached. At this point, either the latter type of affirmative action should be ended or readjusted to meet the challenges of multi-cultural societies today.

It is concluded that affirmative action is theoretically justifiable and has an important role in the achievement of equal opportunities and equality of outcome. However, its justification is reliant on it being appropriately limited in time or limited to the achievement of specific outcomes. The thesis ends by offering an analysis of the different ways of limiting affirmative action, and suggests what limits are most appropriate and effective.

## ACKNOWLEDGEMENTS

---

It has been a great experience and honour to dedicate the last 3.5 years to writing a PhD dissertation in Australia. This wonderful country has shown me only kindness and provided me with many friendships that have given me the emotional support for being away from my family and friends in Germany for so long.

I have been fortunate to receive support from the Law School of the University of Adelaide, who not only awarded me the title of Master of Comparative Law in partnership with the University of Mannheim in Germany in 2008, but also gave me the chance to return and write a PhD dissertation for which I am very thankful. The Law School of the University of Adelaide had a huge positive influence in my life that I will never forget.

Thank you to my supervisors, Alex Reilly and John Williams. Thank you for all your invaluable support, inspiration and motivation. You have both been wonderful supervisors and I could not have done it without you! Thank you for all the time you spent reading, critiquing and editing my thesis. Thank you.

I also thank the academic and professional staff of the Adelaide Law School for their camaraderie and assistance. Thank you to my fellow PhD candidates of the Thesis Writing Group, who helped me to lay the foundations of the thesis in its early beginnings.

I would like to acknowledge with gratitude the financial support I received from the University of Adelaide Scholarship and the International Postgraduate Research Scholarship, which made the writing of this PhD dissertation possible.

Finally, I would like to thank my friends and family for all their love and encouragement. Thank you for all your supportive calls, letters, emails and even visits from overseas that warmed my heart. A special thanks to my friend Mark, who inspired me to the amazing endeavour to write a PhD dissertation and whose constant loving support and understanding helped me to broaden my horizons in many aspects of life.

## DECLARATION

---

This work contains no material which has been accepted for the award of any other degree or diploma in any university or other tertiary institution to Nicole M. Lederer and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text.

I give consent to this copy of my thesis, when deposited in the University Library, being made available for loan and photocopying, subject to the provisions of the Copyright Act 1968.

I also give permission for the digital version of my thesis to be made available on the web, via the University's digital research repository, the Library catalogue, and also through web search engines, unless permission has been granted by the University to restrict access for a period of time.

.....  
Signed

.....  
Date

## DETAILED TABLE OF CONTENTS

---

<b>CHAPTER 1: INTRODUCTION</b>	1
I. THESIS	2
II. AFFIRMATIVE ACTION	4
III. THE NEED FOR LIMITS FOR AFFIRMATIVE ACTION	8
IV. METHODOLOGY	11
V. STRUCTURE OF THIS THESIS	13
<b>CHAPTER 2: MEANING OF AFFIRMATIVE ACTION</b>	17
I. INTRODUCTION	19
II. FORMS OF AFFIRMATIVE ACTION	21
III. DEFINITION OF AFFIRMATIVE ACTION	23
A. <i>Affirmative Action and Discrimination</i>	23
1. <i>Concepts of Discrimination</i>	24
2. <i>Forms of Discrimination</i>	26
3. <i>Arguments For and Against Affirmative Action                 as a Response to Discrimination</i>	28
B. <i>Affirmative Action and Equality</i>	33
1. <i>Affirmative Action as the Pursuit of                 Substantive Equality</i>	34

C.	<i>Affirmative Action and the Requirement of Limits in International Law</i>	37
1.	<i>International Treaties and Temporary Limits of Affirmative Action</i>	37
2.	<i>Temporal Limits for Affirmative Action</i>	39
IV.	CONCLUSION	42
	<b>CHAPTER 3: THE RATIONALE FOR AFFIRMATIVE ACTION</b>	43
I.	INTRODUCTION	45
II.	POLITICAL THEORIES OF LIBERALISM AND AFFIRMATIVE ACTION	46
A.	<i>Classical Liberalism and Affirmative Action</i>	47
B.	<i>Political Liberalism and Affirmative Action</i>	50
C.	<i>Egalitarian Liberalism and Affirmative Action</i>	57
D.	<i>Communitarian Liberalism and Affirmative Action</i>	62
III.	CONCLUSION	68
	<b>CHAPTER 4: THE LIMITS OF AFFIRMATIVE ACTION IN THE UNITED STATES</b>	70
I.	INTRODUCTION	72
II.	AMBIGUOUS CONSTITUTIONAL APPROACH	79
A.	<i>Freedmen's Bureau Act of 1866</i>	81
B.	<i>The Strict Scrutiny Test of the Supreme Court</i>	84
C.	<i>Supreme Court Cases and Limits for Affirmative Action</i>	90
1.	<i>Johnson v Transportation Agency</i>	90
2.	<i>Adarand Constructors, Inc. v Pena</i>	92
D.	<i>Conclusion</i>	95
III.	ANTI-DISCRIMINATION LAW AND AFFIRMATIVE ACTION	97

A.	<i>Title VII of the Civil Rights Act of 1964</i>	97
IV.	SPECIFIC AFFIRMATIVE ACTION LEGISLATION	102
A.	<i>Executive Order 10925</i>	103
B.	<i>Executive Order 11246</i>	105
C.	<i>Equal Employment Opportunity Act of 1972</i>	107
V.	IMPLEMENTATION OF AFFIRMATIVE ACTION	109
A.	<i>Equal Employment Opportunity Commission (EEOC)</i>	110
B.	<i>Office of Federal Contract Compliance Programs (OFCCP)</i>	113
1.	<i>Non-Construction Contractors (Supply and Service)</i>	114
2.	<i>Construction Contractors</i>	117
C.	<i>Differences in Applying Limits for Affirmative Action</i>	120
VI.	CONCLUSION ABOUT LIMITS FOR AFFIRMATIVE ACTION IN THE UNITED STATES	122
 <b>CHAPTER 5: THE LIMITS OF AFFIRMATIVE ACTION IN CANADA</b>		124
I.	INTRODUCTION	126
II.	SUPPORTIVE CONSTITUTIONAL APPROACH	135
A.	<i>Supreme Court Cases and Limits for Affirmative Action</i>	138
1.	<i>Canadian National Railway v Canada</i>	138
III.	ANTI-DISCRIMINATION LAW AND AFFIRMATIVE ACTION	141
A.	<i>Canadian Human Rights Act 1977</i>	141
IV.	SPECIFIC AFFIRMATIVE ACTION LEGISLATION	145
A.	<i>Employment Equity Act 1995</i>	146
V.	IMPLEMENTATION OF AFFIRMATIVE ACTION	152
A.	<i>Legislated Employment Equity Program (LEEP)</i>	152
B.	<i>Federal Contractors Program (FCP)</i>	159
VI.	CONCLUSION	164



<b>CHAPTER 6: THE LIMITS OF AFFIRMATIVE ACTION IN AUSTRALIA</b>	166
I. INTRODUCTION	168
II. NEUTRAL CONSTITUTIONAL APPROACH	172
A. <i>High Court Cases and Limits for Affirmative Action</i>	178
1. <i>Gerhardy v Brown</i>	178
III. ANTI-DISCRIMINATION LAW AND AFFIRMATIVE ACTION	182
A. <i>Racial Discrimination Act 1975 (Cth)</i>	183
1. <i>The Northern Territory Emergency Response</i>	188
B. <i>Sex Discrimination Act 1984 (Cth)</i>	193
IV. SPECIFIC AFFIRMATIVE ACTION LEGISLATION	200
A. <i>Workplace Gender Equality Act 2012 (Cth)</i>	200
V. IMPLEMENTATION OF AFFIRMATIVE ACTION	206
A. <i>Australian Human Rights Commission</i>	207
VI. CONCLUSION	211
<b>CHAPTER 7: AFFIRMATIVE ACTION: FOR A LIMITED TIME ONLY?</b>	213
I. INTRODUCTION	215
II. TYPES OF AFFIRMATIVE ACTION	216
III. WHY AFFIRMATIVE ACTION AIMING AT EQUALITY OF OUTCOME IS IN NEED OF LIMITS	218
IV. HOW AFFIRMATIVE ACTION AIMING AT EQUALITY OF OUTCOME IS LIMITED IN THE UNITED STATES, CANADA AND AUSTRALIA	220
A. <i>Positive Limits</i>	220
1. <i>Quotas</i>	221

2.	<i>Numerical Goals</i>	224
a)	<i>Numerical Goals with Temporal Limits</i>	225
b)	<i>Numerical Goals without Temporal Limits</i>	230
B.	<i>Negative Limits</i>	230
1.	<i>Annual Placement Goals</i>	231
2.	<i>Supreme Court Approaches to Limit the Application of Affirmative Action</i>	232
3.	<i>General Constitutional Limitation Clauses</i>	234
V.	CRITICAL ANALYSIS OF DIFFERENT APPROACHES FOR THE DESIGN OF AFFIRMATIVE ACTION UNDER THE LIBERAL THEORIES OF STATE	237
A.	<i>Limits of Affirmative Action under the Liberal Theories of State</i>	237
1.	<i>Limits of Affirmative Action under Political Liberalism</i>	238
2.	<i>Limits of Affirmative Action under Egalitarian Liberalism</i>	239
3.	<i>Limits of Affirmative Action under Communitarian Liberalism</i>	240
4.	<i>Conclusion about Limits under the Liberal Theories of State</i>	240
B.	<i>The Most Effective and Justifiable Form of Affirmative Action</i>	241
VI.	COULD AFFIRMATIVE ACTION BE A PERMANENT POLICY DESPITE ITS NEED FOR LIMITS?	243
VII.	CONCLUDING COMMENTS	245
VIII.	CONCLUSION	248
	<b>BIBLIOGRAPHY</b>	251
	<b>Books and Chapters in Books</b>	251
	<b>Journal Articles</b>	261
	<b>Other Sources (Media and Internet)</b>	270
	<b>Parliamentary Debates, Speeches, Government Reports, UN Reports, and Interest Group Releases</b>	272

<b>Case Law</b>	276
<b>Legislation</b>	278
<b>International Treaties</b>	280