

CERTIFICATION OF TEACHERS, PRE-SERVICE TEACHER EDUCATION, TESTS AND LEGAL ISSUES IN AUSTRALIA AND THE UNITED STATES OF AMERICA (US): PART B IMPLICATIONS FOR QUEENSLAND AND AUSTRALIA

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This article is a companion discussion to the previous article in this issue that provides an overview of the introduction of Teacher Licensure Testing for Professional Certification in the United States of America (US) and England.¹ The companion article also provides the context for the introduction of such testing as a new registration requirement in Queensland, Australia, from the end of 2011, and an overview of legal issues, and outcomes, that have arisen, principally in the US, where such test requirements have been in place for some time. This article draws on the legal issues identified in US case law and the employment, antidiscrimination and administrative law context of Australia to identify and discuss potential challenges that may arise, or requirements that will need to be satisfied in Queensland and Australian law, when the teacher licensure tests are introduced. The discussion includes considerations of professional test development standards for high-stakes purposes, such as job credentialing, given the absence of such discussions to date in Australian statute or case law. These discussions are offered in the possibility that such additional requirements could become federally-legislated, given the Australian Commonwealth Government's active involvement in setting education policy.²

I ASSESSMENT, THE COURTS AND TEACHER CREDENTIALS IN AUSTRALIA

In our companion article, we identified the rationale for the introduction of teacher registration tests in Queensland. The tests to be introduced in Queensland at this stage are for those aspiring to teach in early childhood and primary school settings from the commencement of 2012.³ Secondary school teachers and teachers already registered are excluded. At this stage, therefore, we do not need to consider legal consequences for retroactive application of the registration tests to contracted teachers, as discussed in our considerations on US legal issues and teacher licensure tests.

However, the type of licensure test to be introduced in Queensland, to follow graduation with an accredited teacher education program qualification, is without precedent in Australia. The proposed test format and process do not reflect the nature of certification assessments used for other professions, pre or post admission, in Australia, although the format and process are

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common in the US. In Australia, admission to professions such as law, medicine, engineering, and in the past, education, has been based on the completion of the appropriate higher education programs which meet accreditation requirements of professional bodies, and meeting eligibility requirements set by the profession such as the fit and proper person test for admission as a solicitor.⁴ Achievement of a higher status such as a registered engineer, chartered accountant or specialist medical doctor is based on further training and completion of documentation and/or written or performance assessments. For example to become a medical specialist in public health requires:

- Completion of 36 units of Advanced Training (confirmed by approved Supervisor's Reports);
- Satisfactory completion of three (3) Workplace Reports;
- Completion of an oral presentation (a formative assessment requirement);
- Submission of a Training Summary; and
- Satisfactory completion of an oral examination.⁵

Admission as a solicitor in Australia requires post-qualification experience, either through time served in a legal office, sometimes with related studies and assessments, or through completion of a formal education program with considerable praxis-based assessments in lieu of office experience. In education, teachers may acquire provisional registration status on first entry to teaching, with confirmation or full registration obtained by meeting experience and supervision requirements.⁶ No current professional admission in Australia is reliant, post-successful formal education, on multiple choice format tests intended to be representative of the knowledge and skills that should have been developed prior to or through the professional training program, without further supervision, instruction or observation-based assessments. The closest example occurs in recognition of overseas qualified doctors (OTD), examined by Australian courts and commissions in a medical admission case, *Siddiqui*,⁷ discussed later.

The use of standardised vocational and aptitude testing as part of employment selection processes is common in Australia, both to reduce an applicant pool to a manageable number and for senior management roles. As such tests tend to assess underlying 'attributes' or psychological traits that are deemed desirable for an advertised position, not professional knowledge, they are not relevant to this discussion. Further, such tests are not designed for use as the final selection point for employment, and professional guidelines on the use of tests strongly advise against such use.⁸

As Australia has limited experience with standardised tests as a professional entry point, and does not have the tradition of acceptance of standardised tests in decision-making,⁹ Australian case law and tribunal decisions to date provide limited guidance on legal issues that might arise with the implementation of the teacher registration tests proposed in Queensland. The following discussion explores issues that may be raised, in the main by a teacher education graduate who successfully completes the accredited training program but who fails to be registered on the basis of failure to meet the 'threshold' standard on the new standardised tests.¹⁰ This article presents is an initial foray into potential legal issues — each legal area will need exhaustive analysis of possible precedents, tests, statutory or caselaw rebuttals, and remedies.

In our companion article¹¹ we discuss the evolution of teacher licensure testing in the US and legal issues that have arisen in that jurisdiction. The caselaw discussed shows that the matters have been wide ranging, with findings both for plaintiff teachers and for state authorities. In summary, in the US, aspiring or practising teachers who have failed to pass teacher licensure tests have no legal protection or right to licensure if the tests are *not* found to lack due process or to be

discriminatory, and have been shown to be sufficiently job-related, if challenged. However, the US courts have differed to the extent to which they will require evidence that the tests are job-related, the degree to which the validity of the tests has been required to be established, including their appropriate use for the decisions made, and, in particular, demonstration that a specified 'cut-score' that denies certification can be shown to be related to potential teaching success or failure. US courts have also varied in consideration of the evidentiary burden for demonstration of disparate impact¹² in areas such as race and disability.

Teacher licensure testing using a standardised form of test is a new initiative in Queensland and Australia, indeed in any professional area in Australia. As our companion article identified, a review (Masters' Review¹³), focused on improving Queensland student learning outcomes, recommended to the Queensland government that 'all aspiring primary teachers be required to demonstrate through test performances, as a condition of registration, that they meet threshold levels of knowledge about the teaching of literacy, numeracy and science and have sound levels of content knowledge in these areas',¹⁴ a recommendation accepted by the Queensland government for implementation from mid-2011.

The question posed in this article is how Queensland and Australian courts might treat the issue of teacher licensure testing if a challenge against a decision denying teacher licensure, on the basis of the test outcomes, was raised. As in other countries, Australian courts have shown reluctance to engage in matters that might be considered educational policy and professional educational judgment, such as educational assessment, unless clear legal contexts such as discrimination or unfair work practices can be identified.¹⁵ Similarly, courts will respect the authority of a state or federal government to enact laws in the interests of public policy and safety, and responsible government, as long as the laws are within power.¹⁶ The Queensland Government proposed that the new licensure tests for teachers are to promote higher education outcomes for Queensland students on the basis that

improved outcomes in literacy, numeracy and science are likely to be facilitated by a number of factors, including access to a well-prepared teaching workforce.

The Masters review recommended that all aspiring primary teachers should be required to demonstrate, through test performances, that they meet threshold knowledge levels about the teaching of literacy, numeracy and science and sound content knowledge in these areas prior to registration as a teacher.¹⁷

Educational research does not provide a causal link between the Masters' review focus and this specific recommendation for external standardised testing.¹⁸ However, any government policy statement and accompanying legislation that talk about improved learning outcomes for school students are likely to be considered by a court as promoting the public good, much like 'motherhood' and 'apple pie', and therefore a state's prerogative to enact in the public interest. In law, state parliaments in Australia have the plenary power to legislate about matters in the states' interests, subject to the powers awarded to the Australian Commonwealth government under ss 51 and 52 of the *Australian Constitution*. However, there are areas of Australian federal and state law with which the proposed tests will need to comply, including antidiscrimination laws, fair work and employment laws, and, not least, natural justice in administrative procedures. The following discussion explores the legal issues that may arise for individual teacher aspirants who are unsuccessful or likely to be unsuccessful on the new tests for various reasons, and the standards that need to be met in the implementation of the new licensure tests.

II AUSTRALIAN PRECEDENTS OF COURT AND TRIBUNAL TREATMENT OF STANDARDISED TESTS AND PROFESSIONAL QUALIFICATION AND EMPLOYMENT

As noted, Australia courts have had little involvement in challenges to employment or professional licensure on the basis of standardised testing. Three examples have been identified which may provide an indication of how courts will receive such materials and treat the testing outcomes as evidence justifying an employment-related decision: *Siddiqui v AMC and Commonwealth Minister for Health*,¹⁹ involving an internationally-qualified doctor with United Kingdom (UK) experience seeking full accreditation in Australia but failing a multiple-choice test on numerous occasions; *Hail Creek Coal*,²⁰ involving a number of workers denied employment on the basis of performance on a battery of psychometric tests on abilities identified by management as essential to their work;²¹ and *CFMEU v BHP*,²² regarding an experienced train driver, Mr Brandis, similarly denied employment on the basis of a psychologist's assessment, using a battery of psychometric tests, of his suitability for employment.

Each of these cases offers a little insight into how the courts might consider the making of significant decisions regarding proficiency on the basis of one, or more, standardised tests. A major difference between the first case, *Siddiqui*, and the last two, *Hail Creek Coal* and *CFMEU v BHP*, is that the tests to be completed by *Siddiqui* have face validity²³ in terms of the medical knowledge they were to assess. In the last two, the industrial commissions hearing the cases were not convinced such a valid relationship was established.

Siddiqui was heard in the Human Rights and Equal Opportunity Commission (HREOC) on grounds including racial discrimination under the *Racial Discrimination Act 1975* (Cth). Dr Siddiqui was an overseas trained medical doctor with experience in overseas English-speaking countries and in Australia. However, as his training institution was not accredited by the Australian Medical Council (AMC), he was required to complete examinations to show equivalence of professional skill and knowledge to gain full accreditation. The examinations were on medical knowledge and professional skills and consisted of two parts: the first a multiple-choice test (MCT); the second, case appraisal and individualised assessment of his knowledge and expertise. A successful pass on the MCT was prerequisite to acceptance to complete the second part of the examination. A fee of \$750 was payable for the each attempt at the MCT.²⁴

Dr Siddiqui failed to 'pass'²⁵ the MCT on three consecutive occasions, but then was successful in 'passing' on a further three occasions. On these latter three occasions, his pass was not sufficiently high to meet a new quota imposed on the number of foreign doctors to be admitted to practise in Australia.²⁶

HREOC did not identify grounds for discrimination but in the first instance took a broad interpretation of human rights,²⁷ finding use of the MCT as a ranked entry requirement and the imposition of the quota were 'unlawful' action by the AMC,²⁸ the result of which was an impairment of Dr Siddiqui's right as an overseas trained doctor (OTD) to the 'human right to work' and exclusion from 'higher remuneration for his services'.²⁹ He was awarded damages of \$50,000, including payment for 'hurt and humiliation', with the order he should be allowed to proceed to the second phase of assessment.³⁰ The AMC was successful on appeal, with the decision overturned by the Federal Court of Australia on the basis that discrimination should have been the only grounds for consideration, and that claim was not met.³¹ The court noted discrimination through the tests and/or quotas would only be established if the results showed that OTDs of Indian origin were a lower proportion of all OTDs gaining admission, and the quota requirement 'had a disproportionate adverse impact on OTDs of Indian national origin' with the

comparator OTDs from other nations.³² Impairment of the ‘right’ to work had to be considered in the context of a specific group.³³ Thus, contrary to the US where disparate impact claims generally fail as long as a test’s design and implementation are neutral and generally applicable, this case offers some consideration by Australian commissions of tests and professional licensure and disparate impact considerations under Australian antidiscrimination law. The consideration of HREOC also considered the impact of using such a test as a professional licensure requirement on a ‘notional right’ to employment and livelihood.

The two other cases heard by industrial courts, *Hail Creek Coal*³⁴ and *CFMEU v BHP*,³⁵ considered outcomes from standardised aptitude and skills testing used for employment-related decisions. The tests in these cases did not on the face have validity related to the actual work activity to be undertaken, but were stated to measure aptitudes and personality factors identified by the employer as essential to the job. In each case, the potential employees for the available positions all had substantial prior work experience and expertise in the positions, but performed poorly on the standardised test procedures.³⁶

Management of Hail Creek had determined that its positions required:

1. the ability to be multi-skilled; 2. the ability to work in a multi-skilled team environment; and 3. the ability to actively participate in Hail Creek Coal’s safety system known as PASS (Positive Attitude Safety System) ... and that these attributes require the ability to think laterally, communicate effectively and demonstrate reading, listening, problem solving and forward planning skills.³⁷

The Australian Industrial Relations Commission (AIRC) noted that while an employer can specify a range of requirements relevant to the selection of employees, ‘that does not mean that the employer’s requirements are essential to the position [and] ... are not necessarily inherent requirements’, and did not accept that the broad range of skills specified by the employer were inherent requirements of the position,³⁸ or, conversely, the determinant of significance of requirements would be that an ‘unsuitable’ applicant would be ‘incapable of performing the inherent requirements of the position’. The focus of the AIRC was whether the employer had established that any of the unsuccessful candidates were unsuitable for the position for which they applied.³⁹ The AIRC made specific comments about the identified position requirements, including:

Some of the Equipment matters specified are highly subjective and no real basis has been advanced for regarding them as inherent requirements for the positions. For instance, it is not apparent to us why a candidate for a position as a Mobile Operator must demonstrate “*emotional intelligence and wisdom*”. Nor is it made clear how much emotional intelligence and wisdom is required. Some of the characteristics specified amount to little more than a thinly disguised attempt to reinstate managerial prerogative into the selection process in respect of the persons who are named in the *Preference Order*.⁴⁰

With respect to the standardised test evidence, the AIRC stated:

... [while] we are not of the view that this material has nothing to do with the suitability of the challenged persons to do the job for which they have applied ... we recognise that the material does not provide a direct measure of a candidate’s capacity *to actually do* the job. Rather the results measure a candidate’s percentile ranking against a reference group and enable predictions to be made about which applicants are likely to perform better than others.⁴¹

In considering each individual case, the AIRC noted the practical work experience of the applicants in mining, and contrasted it with the psychometric test outcomes.⁴² The AIRC found for the plaintiff with seven of the applicants to be given positions, as required under the industrial preferential employment agreement.

The *Hail Creek* reasoning has a long history of acceptance in the US in employment. In *Griffis v Duke Power Co*,⁴³ a unanimous US Supreme Court invalidated a coal company's requirements of a high school diploma and passage of two tests (Wonderlic Personnel Test and the Bennet Mechanical Comprehension Test) for hiring or promotion to any position other than manual labour. In invalidating the use of these requirements, the Court observed that 'neither [test] was directed or intended to measure the ability to learn to perform a particular job or category of jobs'.⁴⁴ In the context of this case where the requirements had the effect of limiting the hiring and promotion of black workers, the Court opined that 'the facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or fixed measures of capability'.⁴⁵

The second industrial hearing in Australia involving standardised tests for an employment-related decision, discussed here, involved failure to appoint a train driver, Mr Brandis, to a position as engine driver. Although a complaint at first instance was lost, the union, on his behalf, was successful on appeal that the employer had 'unreasonably refused to employ' Mr Brandis as a driver.⁴⁶ One of the grounds given for the failure to appoint the driver was a psychologist's report based on standardised tests that said Mr Brandis was

not recommended for employment in the position of Rail Transport Technician given he does not have an appropriate level of problem solving and learning capacity and will find that his decisions are rules (sic) more by his emotions and training than the evidence at hand.⁴⁷

The Commissioner hearing the original complaint was noted not to have considered the psychologist's report as a matter 'that he ought to behind'.⁴⁸ The psychologist conducting the testing was not aware that Mr Brandis had been an engine driver for 30 years and had been held as competent and experienced. The Commission on appeal stated:

That assessment was entirely wrong because Mr Brandis has successfully operated the trains for BHPB on the railways for many years, and was doing so at the time of the report and after it. Curiously the report had no effect on his purported employment with IW because he continued to drive locomotives, even after it was received ... [h]e was continuing to drive locomotives at the time of the hearing at first instance.⁴⁹

and

It is difficult to understand how a competent engine driver who had driven locomotives for many years and who remained in employment training the newly selected officers and who had inferably and inevitably, one would suggest, dealt with changes in plant, machinery and procedures over that period, could have been so erroneously assessed as he was.⁵⁰

The Commission's considerations in this appeal, therefore, as in *Hail Creek*, indicate that suitability of assessments based on standardised tests of cognitive performance or emotional profile are matters to be attended to in evidence. Such tests should have demonstrated job-related validity when suitability for employment is at stake, not just as relevant to the position but also as to how well performance in the work is indicated.

In summary, these three employment-related cases, where decisions have been made on the basis of assumed work-related standardised tests, demonstrate that Australian courts and tribunals will pay attention to the use of tests when they are used for employment-related decisions. *Siddiqui* indicates that standard expectations of non-discrimination, including indirect discrimination, will be considered, with possibly some consideration under human rights of a ‘right to employment’ and notional ‘fairness’ to the potential employee. *Hail Creek* and *Brandis* show also that Australian courts will consider the appropriateness of tests to be used for employment-related decisions, including the degree to which the tests have job-related validity and are appropriate representations of workskills for positions.⁵¹

What these cases did not need to consider, or did not address, were technical quality issues for the tests used: the degree to which the tests had established their validity to measure what they represented was being measured; the ‘cut-scores’ used to determine success or failure for employment suitability; or, discriminatory bias, either direct or indirect. These issues are discussed later in this article with respect to the proposed Queensland teacher licensure tests. However, this brief discussion of employment-related decisions based on standardised tests provides a starting point for how the proposed licensure tests for Queensland teachers might be considered, if a legal complaint were to be raised.

III AREAS OF LAW THAT MAY IMPACT ON STANDARDISED TEST COMPLAINTS IN AUSTRALIA

Employment rights and conditions are serious legal matters in Australia, even for potential employees. In discussion below, a number of assessment issues and legislative requirements in Australia that may give rise to a cause of action are discussed. However, first, it is important to consider an area of common law that influences Australian court or tribunal decisions in matters such as employment — the *Briginshaw* standard of proof⁵² enshrined in the *Evidence Act 1995* (Cth).

The *Briginshaw* standard of proof principle is stated frequently in considerations of matters affecting livelihood and anti-discrimination cases. Essentially, standards of proof state that criminal matters are resolved by the courts by consideration of evidence to a determination that is ‘beyond reasonable doubt’, while civil matters are decided ‘on the balance of probabilities’. However, for the balance of probabilities, the ‘cogency of the evidence required to attain that standard varies according to the nature and seriousness of the allegation in issue’ and consequences of the outcome.⁵³ While case law still commonly refers to the *Briginshaw* standard, particularly in tribunal and commissions that are not bound by the rules of evidence,⁵⁴ it is also stated in section 140 of the *Evidence Act 1995* (Cth):

S 140 Civil proceedings: standard of proof

- (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
- (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
 - (a) the nature of the cause of action or defence; and
 - (b) the nature of the subject matter of the proceeding; and
 - (c) the gravity of the matters alleged.⁵⁵

Considerable case law exists on claims of unfair dismissal and in employment law contexts where the *Briginshaw* principle has been applied to the quality of the evidence and facts to determine if the outcome was fair to the worker.⁵⁶ Such hearings include teacher professional misconduct in education.⁵⁷ Further, in these cases, the burden of proof can shift to the employer to show that any treatment of the complainant was not harsh, unjust or unreasonable but necessary and appropriate. These matters have related in general to actions taken by employers with existing or dismissed employees. Court consideration of the impact of the introduction of a new test that prevents a person who met previous teacher registration requirements from practising in the profession could be expected to examine the justification, the nature of the new test, and outcome very seriously.⁵⁸ However, while considerations for those seeking to enter a profession should require similar seriousness, again, no clear precedents exist.

IV POSSIBLE GROUNDS FOR APPLICANTS WHO ARE DENIED REGISTRATION IN QUEENSLAND BASED ON NEW LITERACY, NUMERACY AND SCIENCE TESTS

Drawing on US case law and Australian common law and statutory law, three issues arise that may give rise to a cause of action by an applicant for teacher licensure in Queensland who has successfully graduated from a teacher education program but whose registration or licensure is denied on the basis of failure to 'pass' the new tests:

- discrimination law, where the applicant can demonstrate that they have been subjected to unlawful discrimination in the way the test has been developed or implemented;
- validity of the tests and wrongful decision; and
- lack of opportunity to learn and adequate notice and wrongful decision.

A Complaint Under Anti-Discrimination Law

The US grounds of adverse or disparate impact of tests on classes of individuals parallel a discrimination challenge under various anti-discrimination acts in Australia. Discrimination law in Australia is a complex area and the following discussion identifies a starting point for consideration of a range of issues that could arise both for a potential Queensland teacher who fails the new licensure tests and for the potential registration authority, the Queensland College of Teachers.

Queensland teacher applicants are covered by both the *Anti-Discrimination Act 1991* (Qld), and the *Racial Discrimination Act 1975* (Cth) and *Disability Discrimination Act 1992* (Cth). The Queensland act prohibits actions that are directly⁵⁹ or indirectly⁶⁰ discriminatory. Further, for direct discrimination, the need for special services or facilities to address any impairment is irrelevant.⁶¹ The *Anti-Discrimination Act 1991* (Qld) prohibits discrimination in administration of state laws,⁶² 'arrangements made for deciding who should be offered work'⁶³ and by a qualifying body in a pre-qualification area.⁶⁴

Unless clear direct discrimination requirements are put in place such as different conditions for different cultural groups, discrimination challenges against the teacher registration tests will draw on claims of indirect discrimination. Indirect discrimination in standardised tests such as those proposed can occur in two ways: the content of the test may be discriminatory; and/or the form of testing may be discriminatory.⁶⁵ Discriminatory content includes bias through the use of material as stimulus that is culturally-inappropriate for some groups. For example, in the past, English reading comprehension tests for children and adults have used stimulus materials based

on English folklore such as Robin Hood. Clearly this content advantaged those from Australian and English white cultural heritages and disadvantaged others, particularly recent migrants to Australia from non-English speaking backgrounds. Other examples of discriminatory bias include materials that are gender stereotyped and may favour men over women and vice versa. Good test developers will try to ensure that material is culturally-neutral to avoid such discrimination. However, stimulus materials and question content in tests that are not sensitive to diverse cultural backgrounds of applicants for teacher registration could have adverse impact on such applicants, affecting outcomes in ways that are not reasonable.

Another major area of indirect discrimination occurs with test format. Various accommodations will need to be provided for applicants who are hearing-impaired, visually-impaired or have fine or gross physical motor skill impairments.⁶⁶ Universities in Queensland have successfully graduated teacher education students with such disabilities, students who have also successfully gained employment in the past. Failure to make such accommodations or to fail to employ a person on the basis of disability would clearly breach both the *Anti-Discrimination Act 1991* (Qld) and the *Disability Discrimination Act 1992* (Cth).

An issue that will arise and need consideration by the QCT for the test development is the range of conditions defined as disability. In the *Disability Discrimination Act 1992* (Cth) these include: loss of bodily or mental functions, loss or part of body, presence of organisms causing or capable of causing disease or illness; disorders that affect thought processes, perceptions of reality, emotions or judgment that may result in disturbed behaviour.⁶⁷ Most importantly, they include ‘*a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction*’.⁶⁸

Under both the *Anti-Discrimination Act 1991* (Qld) and the *Disability Discrimination Act 1992* (Cth), the QCT will need to consider accommodations in the new tests for teacher education graduates who have diagnosed dyslexia or dyscalculia. Again, Queensland universities and teacher education programs make accommodations for such students under requirements of the anti-discrimination legislation and these students are successful graduates. These disabilities are accommodated in the administration of the teacher licensure tests in England; candidates recognised as dyslexic receive up to 25 per cent extra time. The administration authority indicates that ‘[f]urther provisions may be made in exceptional circumstances’, allowing for accommodations in general to be made on a case by case basis.⁶⁹

Anti-discrimination acts and the disability discrimination acts do not require accommodations or adjustments that are unreasonable or that would create financial hardship.⁷⁰ However, if a new condition on employment is introduced by a state government, affecting the potential livelihood of an individual or group of individuals, it would seem unlikely that a claim of unjustifiable hardship by the state government would be successful.⁷¹

Our discussion of US case law⁷² showed that where accommodations have been found to defeat the purpose of the licensure testing, claims of discrimination have been unsuccessful.⁷³ The Australian *Disability Discrimination Act 1992* (Cth) also allows exceptions to employers in employee selection for ‘inherent requirements’ of particular work.⁷⁴ However, the burden for establishing unjustifiable hardship, unreasonable adjustments and inherent requirements shifts to the employer. The determination of inherent requirements must take into consideration the potential employee’s ‘past training, qualifications and experience relevant to the particular work’.⁷⁵ As noted, a graduate of a teacher education program in Queensland applying for teacher registration will have already successfully completed school practicum experience and had their capacity to work in this environment attested to by schools. While the skills to be assessed by

the teacher licensure tests have been introduced as public policy to improve teacher quality, no evidentiary basis as to their inherent nature for the work of teaching has been established, and no evidentiary basis of the status of skill level of current teachers in Queensland or the ‘threshold’ standard to be a successful teacher has yet been identified.

Therefore, the QCT will need to decide its stance on accommodations for dyslexia and dyscalculia, being mindful not only of the different English and US positions, but also of past graduates with these conditions who will have gained registration and may be successful teachers, and students already admitted to teacher education programs with such identified disabilities. If there are already successful teachers with dyslexia, a change in registration requirements against such a condition for future teachers may be unjust. The QCT should need to establish that lack of dyslexia is an inherent requirement to be a successful teacher, or the threshold at which the degree of this condition affects satisfactory teaching performance.⁷⁶

An important Queensland case on point is *Flannery v O’Sullivan* where Mr Flannery, a high-performing applicant for the Queensland Police Service, was denied admission on the basis of poor eyesight. The Queensland standard for admission for acuity was higher than other states. The applicant claimed discrimination on the basis of a physical disability, limited acuity. The respondent claimed exemption on the basis that, as well as grounds of unjustifiable hardship and occupational health and safety, the eyesight standard was a genuine occupational requirement. The Tribunal President noted that to state the requirement was a genuine occupational requirement was ‘to confuse whether he can perform genuine occupational requirements with his means of doing so’. It was also noted that eyesight deteriorates with age and many serving police officers needed to wear glasses after their admission. The President also noted:

There is no evidence that any person, whether a member of the public or another police officer, has ever had his or her health or safety put at risk by a police officer suffering from myopia. The Queensland Police Service was not able to provide any evidence of this ever having occurred.⁷⁷

Given the applicant’s high level of qualification for admission on every other ground, the respondent was ordered to take the steps to admit the applicant as a policy recruit. This precedent would appear to put the onus on the employer to establish that a potential teacher cannot have a dyslexic condition if they are to be a successful teacher, or more broadly, the connection between passing the new licensure tests and teaching success in the Queensland context.

A further area of potential indirect discrimination is on the basis of racial or language grounds. *The Racial Discrimination Act 1975* (Cth) makes unlawful any act which has the effect of ‘nullifying or impairing ... any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life’ on the basis of race or ethnic identity (direct discrimination),⁷⁸ including requiring a person to comply with a condition or requirement ‘which is not reasonable having regard to the circumstances of the case’ (indirect discrimination)⁷⁹. The use of teacher licensure tests in both the US and in England has been found to have disparate impact, in fact if not in law, on minority groups on the basis of language background and ethnicity. In both countries, the proportion of applicants for teacher licensure from minority groups who fail the licensure tests are much higher than for Caucasian background and English-speaking applicants. In England, the report on the 2001 implementation showed that following multiple attempts, overall 98 per cent of test takers passed the numeracy test, and 99 per cent passed the literacy tests. Eighty-one per cent and 90 percent of test takers passed the numeracy and literacy tests respectively on the first attempt. However, results showed that applicants with English as a

second language required more attempts than the average, as did applicants who self-identified as members of ‘specified ethnic minorit[ies]’. Seven per cent fewer applicants with English as a second language passed after two attempts than English-first-language applicants (89% and 96% respectively).⁸⁰ While candidate numbers are small, results showed that Black Caribbean trainees had success rates of only 70 per cent.⁸¹ The agency undertook statistical analyses that indicated that items in the tests were not culturally or gender biased. However, they were also to examine if a relationship existed between potential teacher withdrawals from teacher education courses and test failure.⁸²

Evidence of disparate impact and differential pass rates are not sufficient evidence to establish discrimination. Test developers should undertake both professional expert analyses and statistical analyses to examine reasons and justify such differences. However, educationally, if the new registration tests lead to failure to register a considerable proportion of teacher education graduates from diverse cultural backgrounds, both race and language, the diversity of cultural experience of students in schools will be affected.⁸³ In Queensland, in particular, the learning achievements of Indigenous students in rural areas are a major concern. Could the introduction of teacher licensure tests in Queensland have the same adverse impact on teacher education graduates from Indigenous backgrounds as shown in both the US and England?⁸⁴ This is another issue that the Queensland College of Teachers still has to consider.

B *Validity of the Tests and Wrongful Decision*

Given Australia’s very limited experience in dealing with such forms of tests for such purposes, the issue of the validity of the tests and, hence, the decision based on the outcome on the tests will be the most innovative challenge for our courts and tribunals to consider. The discussions in the decisions in *Siddiqui*, *Hail Street Coal* and *CFMEU v BHP* above reflect commissions who have considered the effects and propriety of standardised tests in livelihood, ‘right to work’ and employment contexts. In *Siddiqui*, the content of the tests was not in question. In *Hail Street Coal* and *CFMEU v BHP*, the content of the tests for their own purpose was not in question, but their validity in identifying skills that were ‘inherent requirements’ for the work under consideration was questioned, and, indeed, rejected. The decisions showed that the commissions did not consider them to have weight in determining employment suitability.

Clearly, on the face, the proposed teacher registration tests in Queensland have face validity⁸⁵ as related to the proposed employment. They are also similar to tests in place in other countries. However, the developers of the test will need to address many issues and decisions during test development. Without going into these in detail, the tests will need to have high validity in matching both the curriculum of *all* teacher education programs that have already been accredited and monitored by the Queensland College of Teachers, and the appropriate levels of skills for the work to be performed. Considerable development, piloting and analysis work must be undertaken.

As Australia has not had a history of such forms of tests being developed and used for such purposes, we have not developed statements of standards of quality that must be met in test development, implementation and use. The widespread use of such tests in the US, and subsequent litigation, have led to the development by expert educational researchers, psychometricians, psychologists and statisticians of published US professional standards for test development for both psychological and educational testing. These standards have been incorporated in US legislation as the expected professional and technical expectations for test development and use considered by most US courts.⁸⁶

Test development and implementation for such high stakes purposes, therefore, as the licensure of a teacher, should be required to show evidence that careful consideration of job-related validity and appropriateness of content, as well as nondiscriminatory effects, have occurred, are documented, and can be demonstrated. Such development clearly requires considerable time as well as human and financial resources. In addition to the validity of the content, the test developers and implementers of standardised tests have to take care with the reliability of the scores obtained from the tests. As such tests are developed using statistical models, and usually result in a numeric score, two issues in their implementation arise. First, for a purpose such as individual licensure, the QCT and developers will need to identify the appropriate 'cut-score' that determines whether a candidate has achieved the required standard for admission — the 'threshold of competence' identified as the basis for the amendment to the *Education (Queensland College of Teachers) Act*.⁸⁷ Again, this requires careful consideration and an evidentiary base to support the decision. Second, standardised testing is an imprecise science, and all scores have associated 'measurement error', that is, a range is usually specified for a score.⁸⁸

Trialing of a single 2½ hour combined test will occur in March 2011. The format for full implementation of the licensure testing will be three individual tests. At the time of writing, no full trialing and validation process has been indicated to be taking place prior to full implementation. This appears to be the final field trialing for the test. The degree to which the test developers will be able to identify appropriate validation evidence is already limited by the speed of the development in Queensland.

What grounds then may an unsuccessful test-taker have for appeal for a wrongful decision. Consider an applicant for teacher registration who has graduated from a teacher education program but has not met the licensure test requirements for registration. A challenge to the decision may be possible on the basis of the technical quality of the tests, and reliability of the decision, taking into account the *Briginshaw* standards for grave matters such as livelihood.

Under the *Education (Queensland College of Teachers) Act 2005* (Qld), the QCT makes the decision about the suitability of an applicant for registration or permission to teach and advises the applicant of that decision.⁸⁹ This is an appealable decision with the Act specifying the process for such an appeal. An applicant who fails to be approved and is not satisfied with the decision must first request an internal review of the decision within 28 days after notice, stating the grounds for the review.⁹⁰ The QCT must establish a review committee to handle the application for review, but should not include a person involved in making the original decision.⁹¹ The review committee confirms, amends or substitutes another decision for the applicant.⁹²

If the decision is still to deny registration for the applicant, the applicant has a right of appeal to the Queensland Civil and Administrative Tribunal, provided directly by the *Education (Queensland College of Teachers) Act*, but also, in general, through the *Judicial Review Act 1991* (Qld), as the decision is made by a Queensland Government authority under legislation.⁹³ An applicant who considers that the licensure tests do not meet the appropriate standard for the decision made would state this as the reason for review. Most importantly, while QCAT must observe the rules of natural justice, it is not bound by the rules of evidence, and may adopt an inquisitorial role to establish the basis for the decision.⁹⁴ Considerations by QCAT on a review of a decision are 'to produce the correct and preferable decision' and to conduct 'a fresh hearing on the merits'.⁹⁵

An application based on the merits of the quality of the test and its implementation should require QCAT to consider the evidentiary basis for the development of the tests both in terms of content validity, the maintenance of appropriate professional test development standards, the

appropriateness of cut-scores, and the reliability of scores for decision-making as to incompetence to teach. If the QCT does not ensure high professional standards in the development of the licensure tests, QCAT would be open to find, as in the US decision *Richardson v Lamar County Board of Education*,⁹⁶ that not only was the test content invalid, but the cut-score setting was ‘so riddled with errors that it can only be described as capricious and arbitrary’.⁹⁷ QCAT might not only find that the decision not to register the applicant was wrongful and should be set aside, it may also ‘make, to the chief executive of the entity in which the reviewable decision was made, written recommendations about the policies, practices and procedures applying to reviewable decisions of the same kind’,⁹⁸ ensuring that standards and principles for such test development should be implemented in Australia. Any consideration by QCAT of the quality of tests for employment-related decisions, and the processes and evidence required to demonstrate that such tests are based on quality test development standards, would appear to be a precedent in Australia for this context of testing.

C *Opportunity to Learn, Adequate Notice and Wrongful Decision*

A third ground for appeal by those who are denied teacher registration on the basis of ‘failing’ the new licensure tests may be open to teacher graduates. If appropriate professional standards in test development and implementation for the new Queensland tests are in place, there is still a class or classes of students who should have grounds to appeal against a decision that they will not be registered or licensed on the basis of test scores.

Opportunity to learn, and adequate notice, were established as valid grounds for the delay of implementation of standardised testing for high stakes purposes in the seminal US case series *Debra P v Turlington (Debra P)*.⁹⁹ The plaintiffs were twelfth grade or future twelfth grade public school students in Florida who had failed or may fail a new system of standardised tests of functional literacy skills, to be introduced as a requirement for a high school diploma in addition to school attendance and school-assessed achievement. While the claim was based on US constitutional grounds and racial discrimination,¹⁰⁰ a core argument was that information about the content of the tests would be provided at a point that would allow teachers and students just over one year of instructional time to address the content. While the argument made by the authorities was that students should have developed the skills during their earlier schooling, the argument accepted by the court was that students were not aware of the *significance of the skills* as a requirement for certification, or the need to retain the knowledge to be tested in a form suitable for recall on the tests. The initial court in *Debra P* found the notice of the test ‘inadequate’. Based on expert testimony, the court stated that four to six years was desirable between announcement of such a policy change and implementation and gave a four year injunction against the use of the test as a diploma requirement.¹⁰¹ The *Debra Pi* challenge involved tests of basic skills.

Current understanding is that the new Queensland testing requirements commence from Semester 2 (July-December 2011) for those graduating from teacher education programs, and intending to teach. At the conclusion of 2010, the content and form of the tests were still not known to teacher education institutions and teacher education students. Students who graduate at the end of 2011 will have already completed most of their training without appropriate information on the content and format of tests before the commencement of Semester 2 2011. They will not have had access to practice materials for the tests. As noted, a restricted form of field trial will be undertaken in March 2011. At the time of finalising this article in February 2011, graduating or near-graduating students were being invited by the Queensland College of Teachers, through Schools of Education, to participate in the field trial, with the encouragement

Field trialling presents an ideal opportunity for you to experience the test processes and the nature of test questions prior to the actual implementation of pre-registration testing in August 2011.¹⁰²

The proposed Queensland tests involve not only basic literacy and numeracy skills but also pedagogical skill content in specific discipline areas — content clearly related to an entire teacher education program. Students will have considered such content during their early years of study and addressed it during different forms of university assessment as well as school practicum experiences. To introduce new tests of such content in a different format (multiple choice, online) within such a short time frame for these students would appear to be denial to the teacher education students of ‘opportunity to learn’ and adequate notice.

In England, the recommendation for teacher licensure tests in numeracy, literacy and ICT was made in 1998. Work on the tests commenced in 1999. Different requirements and timelines were put in place for graduates in 2001, 2002 and after 2002, including different test requirements and a period of five years to 2008 when graduates could be employed as an unqualified teacher until they passed the tests.¹⁰³ It would appear in England, due consideration as to adequate notice was put in place. QCT consideration of this matter in Queensland is not known at this time.

A teacher education graduate at the end of 2011 who fails the QCT tests and fails to gain registration by the QCT would appear to have good grounds for a review of that decision, both initially through the QCT, and externally through QCAT, following the processes outlined above, on the basis that the introduction of the tests did not provide adequate notice and that the decision made is unfair or unreasonable. The student was not aware that the areas studied in the early years of their program would be assessed in such a manner as a requirement for registration.

Further, the class of graduates from all institutions graduating in 2011 and 2012, and possibly 2013 to 2014, may have direct recourse, under the *Judicial Review Act 1991* (Qld), through a Queensland court for a determination that adequate notice and deferred timelines should be put in place before the testing commences. The *Judicial Review Act 1991* (Qld) provides a range of grounds by which aggrieved persons¹⁰⁴ may seek relief for a proposal to engage in conduct of making a decision.¹⁰⁵ This would be a preferable outcome to waiting until individuals in these cohorts fail the test and lose opportunities for employment and livelihood.¹⁰⁶

V CONCLUSION

Additional testing requirements in order to gain teacher registration or licensure have been in place for teacher education graduates in the US and England for some years. The argument for their introduction in Queensland is on the basis of public policy and the public interest, to improve teacher quality and student learning outcomes.¹⁰⁷ Without addressing the substantive merit of this argument, this discussion has focused on legal issues that arise from such testing. In the US, case law identifies areas that authorities must satisfy in the development of appropriate tests, considerations in terms of due process and recognition of cultural diversity, as well as the limits that may be imposed on accommodations for those with disabilities. However, given the work of experts in developing quality guidelines for such tests and their appropriate use, and particularly for licensing purposes, US courts to date have generally been very light in their consideration of detail in such challenges.

In Australia, we have no precedent for the use of such forms of tests for such high stakes purposes for individuals. This discussion has considered the legal issues that could arise, and the causes of action and procedures that would allow a complaint to be heard.

With limited experience of claims in our courts, commissions and tribunals against the outcomes of use of standardised tests, it is difficult to know how they will respond to a claim by a person qualified in a traditional sense, and employable in other states and territories in Australia, against failure to be employed as a teacher in Queensland because they did not pass the new tests. However, we should be able to rely on the *Briginshaw* standard that any initial complaint will be heard as a serious matter. It will be interesting to follow the test implementation and any legal considerations that emerge. If we are to see an increase in such standardised test processes in Australia, it is important that, as in the US, and as desired in the UK, clear expectations of professional standards in test development and implementation are developed for Australian education contexts, and incorporated and considered in Australian law, either through legislation or case law, both for individual and other uses to which the outcomes of such tests are now being put.

Keywords: teacher registration/licensure/certification; standardised tests; professional test standards; legal issues; administrative law; Queensland and Australia.

ENDNOTES

- 1 Ralph Mawdsley and Joy Cumming, 'Certification of Teachers, Pre-Service Teacher Education, Tests and Legal Issues in Australia and the United States of America (US): Part A Context and US History' (2011) 16(1) *International Journal of Law and Education* 47.
- 2 The Council of Australian Government (COAG), *National Partnership Agreement on Improving Teacher Quality* (2008) specifies the outcome 'national consistency in teacher registration' [26(e)] and 'accreditation/certification of Accomplished and Leading Teachers' [26(f)]. See also statement, Queensland, *Parliamentary Debates*, Legislative Assembly, 45 February 2010, 465 (Hon Watt): 'Queensland will lead Australia in requiring preservice teachers to sit a test and demonstrate threshold knowledge and skills before being registered.'. National Professional Standards for Teachers were launched by the Australian Institute for Teaching and School Leadership on 9 February 2011 <www.aitsl.edu.au/ta/go/home/op/preview/pid/797> at 11 February 2011.
- 3 Queensland, *Parliamentary Debates*, Legislative Assembly, 9 February 2010, 53 (Hon GJ Wilson). ('The testing requirements will only relate to new applicants for Queensland teacher registration from late 2011').
- 4 See, eg, *Legal Profession Act 2007* (Qld) s 21(b).
- 5 Australasian Faculty of Public Health, The Royal Australasian College of Physicians, 'Assessment' <<http://www.racp.edu.au/page/racp-faculties/australasian-faculty-of-public-health-medicine/education-and-training/assessment/>> at 6 July 2010.
- 6 Overseas-trained teachers who do not have English as a first language are required to provide English language assessment results to gain registration in Australia. However, various modes of assessment are available and are not restricted to multiple-choice language tests. See, eg, NSW Institute of Teachers, *Policy for English Language Testing of New Scheme Teachers for Provisional and Conditional Accreditation* NSW Institute of Teachers <<http://www.nswteachers.nsw.edu.au/IgnitionSuite/uploads/docs/English%20Language%20Requirements%20Policy%20Final%202010.pdf>> at 7 July 2010.
- 7 *Siddiqui v AMC and Commonwealth Minister for Health* [1995] HREOCA 21 (7 August 1995) ('*Siddiqui*').
- 8 While clear guidelines on the professional use of such tests do not appear to exist in Australia, such guidelines are published in other countries. However, various commentaries on the appropriate use of such testing from a legal perspective are provided by CCH (see, eg, CCH [¶5-500] 'The Role of Testing' — 'Tests should be used in conjunction with other selection techniques such as interviewing, reference checking and study/verification of qualifications and past experience, in order to make an overall assessment of the candidate's suitability.').

- 9 Australian educators and the community associate assessment of learning in schools and higher education with holistic, curriculum-based performance assessments and assignments, requiring substantial work to be produced by students. Examples of standardised assessments in Australia are public examinations which follow these principles, even for high-stakes certification purposes. By contrast, while US higher education institutions have also in general undertaken similar assessment practices, standardised psychometric tests such as multiple choice tests are referred to as traditional testing, and performance assessments as ‘alternative assessment practices’ (see, eg, Fritz Mosher and Lauren Jones Young, ‘Preface’ in Pamela Moss, Diana Pullin, James Gee, Edward Haertel and Lauren Jones Young (eds), *Assessment, Equity, and Opportunity to Learn* (2008) (Cambridge University Press) vii, viii). Hence this form of licensure testing imports a US culture does not reflect Australian educational assessment culture.
- 10 The threshold is an identified performance for ‘passing’, known in test development terms as a ‘cut-score’. The basic expectation is that this score denotes a point of demarcation for those who are below or above an adequate level of performance.
- 11 Mawdsley and Cumming, above n 1.
- 12 See, *ibid*, endnote 59, for discussion of US concepts of direct and indirect discrimination.
- 13 Geoff Masters, *A Shared Challenge. Improving Literacy, Numeracy and Science Learning in Queensland Primary Schools* (Australian Council for Educational Research, 2009). As noted in the companion article, Dr Masters is the Director of the Australian Council for Educational Research (ACER), Australia’s predominant test development organisation.
- 14 *Ibid* viii [Recommendation 1].
- 15 J. Joy Cumming, ‘Assessment Challenges, the Law and the Future’ in Claire Wyatt-Smith and Joy Cumming (eds), *Educational Assessment in the 21st Century. Connecting Theory and Practice* (2009) (Dordrecht) 157, 162–3.
- 16 See, eg, *New South Wales v Commonwealth of Australia* [2006] HCA 52 (‘Workchoices Case’ allowing Federal Government to enact legislation related to industrial relations under its Constitutional corporations power, citing to *Electrical Trades Union of Australia v Queensland Electricity Commission* (1986) 16 IR 292, [640], allowing a dispute about Queensland state legislation with respect to essential electrical services to be considered within a Queensland tribunal; *Pape v Commissioner of Taxation* [2009] HCA 23; and at a more local government level, *Romsey Hotel Pty Ltd v Victorian Commission for Gambling Regulation & Anor (Occupational and Business Regulation)* [2009] VCAT 2275, supporting a local government authority decision to reject gambling in a small rural town on the basis of social impact.
- 17 Queensland, *Parliamentary Debates*, Legislative Assembly, 9 February 2010, 52 (Hon GJ Wilson).
- 18 Indeed, as noted in Mawdsley and Cumming, above n 1, and discussed below, recent research indicates a negative impact of teacher licensure testing on some student learning outcomes (Dan Goldhaber & Michael Hansen, ‘Race, Gender, and Teacher Testing: How Informative a Tool Is Teacher Licensure Testing?’ (2010) 47 *American Educational Research Journal* 218).
- 19 (*Siddiqui*) [1995] HREOCA 21 (7 August 1995).
- 20 *Hail Creek Coal Pty Ltd and Construction, Forestry, Mining and Energy Union re Hail Creek Preference of Employment Order 2003 - re Applications for relief from clause 4 of the Hail Creek Preference of Employment Order 2003 - PR948938* [2004] AIRC 670 (12 July 2004) (‘*Hail Creek*’).
- 21 A ‘Preference of Employment Order 2003’ was issued under s 89A(7) of the then *Workplace Relations Act 1996* (Cth) which gave the applicants preference in appointment to vacant positions for which they were suitable.
- 22 *The Construction, Forestry, Mining and Energy Union of Workers v BHP Billiton Iron Ore Pty Ltd and Integrated Group Ltd t/as Integrated Workforce (CFMEU v BHP)* [2005] WAIRComm 1797 (20 January 2005) [9]. The CFMEU represented the engine driver, Mr Brandis.
- 23 Test validity has been discussed briefly in the companion article, Mawdsley and Cumming, above n 1, as US case law has considered the appropriateness of content of teacher licensure testing, a focus on content validity. ‘Face’ validity of a test is often an initial consideration — examination of the test indicates that the focus of questions appears to be related to the area the test represents it is

- measuring. It is the lowest validity expectation when establishing test suitability and quality. Tests used for employment purposes should be able to demonstrate more rigorous validation processes and data in terms of job skills requirements and performance of individuals already doing the work.
- 24 HREOC found this repeated payment troublesome. It is standard practice in US and England for applicants for teacher licensure to be allowed multiple payments to take tests with payment each time. The question of number of times to be allowed to take the test, and payment, for Queensland graduates who may have limited income and university fee debts are not discussed in this article, although it was not unnoticed in the Parliamentary Debates: ‘... an overwhelming majority of teacher graduates in Queensland have been unable to obtain a full-time teaching ... It would be particularly galling if they have to pay the cost of the test in order to be registered but when they get registered there is no job for them anyway.’ (Queensland, *Parliamentary Debates*, Legislative Assembly, 24 February 2010, 462 (Hon Flegg)).
- 25 The marking schedule, identification of the appropriate score for ‘passing’, the ‘cut score’, or score reliability were not at issue in the case. Possible language bias of the multiple choice questions which could disadvantage an English as a second language speaker were not considered. These issues are discussed later in this paper as issues that might arise for the new Queensland teacher licensure tests.
- 26 Originally a pass/fail outcome, the test was changed to a ranking score to allow this selection. Again, any technical issues related to this change in scoring were not challenged or discussed.
- 27 HREOC relied on s 25Z(4) of the then Act to declare the actions unlawful and to make orders for compensation for injury through humiliation. The Act has since been modified. It implements the *International Convention on the Elimination of all Forms of Racial Discrimination* as a Schedule.
- 28 ‘[W]e regret to have to say that we were disappointed in the apparent inability of the respondents to appreciate the depth of the sense of injustice that the experience of the complainant has induced. ... Frankly, we find it scandalous that Dr Siddiqui should have satisfied the minimum requirements of the MCQ examination with a margin to spare on no less than three occasions but been prevented by the quota from proceeding to the clinical examination’: *Siddiqui* [1995] HREOCA 21 (unpaginated).
- 29 Ibid: ‘Every human being, as we have seen, has the right to equality before the law including the right to work consistently with his/her qualifications and experience.’.
- 30 Dr Siddiqui was eventually allowed to complete the second form of examination, a performance appraisal, but failed on four occasions. A further complaint of victimisation and racial discrimination was dismissed: *Siddiqui v Australian Medical Council* [2000] HREOCA 2 (20 January 2000).
- 31 *Australian Medical Council v Sir Ronald Wilson, Elizabeth Hastings, Jenny Morgan, Dr B Siddiqui and Commonwealth Minister of Health* [1996] FCA 1618 (17 July 1996).
- 32 Ibid [68] (Indirect discrimination, discussed later, or adverse or disparate impact in US terms).
- 33 Ibid [73]. Although not argued in the complaint, evidence showed such disparate impact, or indirect discrimination based on Indian origin compared to other OSD nationalities, had not in fact occurred: *ibid* [78].
- 34 *Hail Creek Coal Pty Ltd and Construction, Forestry, Mining and Energy Union re Hail Creek Preference of Employment Order 2003 - re Applications for relief from clause 4 of the Hail Creek Preference of Employment Order 2003 - PR948938* [2004] AIRC 670 (12 July 2004) (‘*Hail Creek*’).
- 35 *The Construction, Forestry, Mining and Energy Union of Workers v BHP Billiton Iron Ore Pty Ltd and Integrated Group Ltd t/as Integrated Workforce (CFMEU v BHP)* [2005] WAIR Comm 1797 (20 January 2005) [9]. The CFMEU represented the engine driver, Mr Brandis.
- 36 The selection process followed 5 steps: ‘1. A review of application forms 2. Interviews 3. Assessment test (involving personality profiling, psychometric testing (Applied Reading Test, Spatial Relations Test, Abstract Reasoning Test, Personality Profile Test) the Accident Risk Management Questionnaire and experiential exercises) 4. Coal Mine Workers’ Health Scheme examination 5. Approval by the Site Senior Executives and General Manager.’: *ibid* [67].
- 37 (*Hail Creek*) [2004] AIRC 670 [7], [8].
- 38 *Ibid* [130], [131].
- 39 *Ibid* [155], the Preference Order placed the onus of establishing unsuitability on the employer.
- 40 *Ibid* [129].

- 41 Ibid [156] (emphasis added). As the test results were reported as percentiles, no ‘cut-off’ points were identified as the critical standard to be met for employment. The determination of unsuitability was based on the psychologist’s reports and the management’s decisions. While not discussed here, it is of interest that the Commission reported its own statement of the inherent requirements of the positions: ibid [125].
- 42 For example, ‘The assessment centre results must also be balanced against ... 13 years experience at the Blair Athol mine and the fact that he is competent to operate a range of plant and equipment. Mr Finger worked in a team environment while employed at Blair Athol.’: ibid [493].
- 43 401 US 424 (1971). This case is regarded in international jurisprudence as giving birth to the concept of disparate impact, known more broadly in international law as indirect discrimination.
- 44 Ibid 428.
- 45 Ibid 433.
- 46 *The Construction, Forestry, Mining and Energy Union of Workers v BHP Billiton Iron Ore Pty Ltd and Integrated Group Ltd t/as Integrated Workforce (CFMEU v BHP)* [2005] WAIRComm 1797 (20 January 2005) [9]. The CFMEU represented the engine driver, Mr Brandis, who had been employed as an engine driver in part by another company, related to the company against whom the complaint was made. While issues revolved about implied contractual relations, Mr Brandis ‘underwent pre-employment interviews, psychological testing and “reference” checks’ in the application process (ibid [24]). Overall, the finding was that Mr Gibbons held an implied contract with BHP, that he was already an employee, that he should not have had to apply for a job, and the selection process was ‘simply invalid’: ibid [285].
- 47 Ibid [271].
- 48 Ibid [29].
- 49 Ibid [272].
- 50 Ibid [274].
- 51 This may also include consideration of legitimate or inherent requirements for work, which can be used to defeat discrimination claims. This area is addressed below.
- 52 *Briginshaw v Briginshaw* (1938) 60 CLR 336.
- 53 Ibid 362.
- 54 See, eg, *New South Wales Nurses’ Association (on behalf of Colin Prior) and South Eastern Sydney and Illawarra Area Health Service* [2007] NSWIRComm 164; *Wood v Watkins* [2007] QDC 115.
- 55 Of the three matters to be considered under s 140 of the *Evidence Act 1995* (Cth), ‘gravity of the matter’ is stated third, and may be interpreted as the least significant, factor, an inconsistency with most interpretations of the *Briginshaw* standard.
- 56 Given policy arguments that may be raised with respect to the Queensland teacher tests of protecting the public safety, an example of the application of the *Briginshaw* principle of direct relevance is the reinstatement of a commercial pilot’s licence. The licence had expired and the pilot, due to a number of incidents, had been denied renewal or reissue on the basis he was not a fit and proper person to hold a licence (*Re Edward Carl Von Nida and Secretary To the Department of Aviation* [1985] AATA 217 (16 August 1985) — ‘As the applicant’s livelihood depends upon his holding a commercial pilot licence, the consequences of the alleged contraventions being found to have been proved are most serious for him. Weighty evidence is required to prove them.’: ibid [20].) The Tribunal revisited the evidence for all of the alleged incidents, found that a 12 month suspension would have been sufficient, that that time had elapsed, and the licence should be renewed.
- 57 See, eg, Victorian Institute of Teaching, Formal Hearing 38, August 2006; Victorian Institute of Teaching, Formal Hearing 36 (July 2006) (and specifically, ‘Applying *Briginshaw*, on the balance of probabilities the Teacher made an error of judgement and should probably have been more diligent in ensuring the veracity of the information he provided in his CV’: ibid 18); see also *Burgess v Board of Teacher Registration Queensland* [2003] QDC 159.
- 58 A related area in common law is ‘restraint of trade’ in employment contract law. Essentially, courts will read down clauses in employment, or business sale contracts, that are seen to be not reasonable and to overly restrict opportunities for a former employee or business owner to conduct similar business and

their opportunities for a livelihood. See, Lord Macnaghten in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Company, Limited* [1894] AC 535, *Buckley v Tutty* (1971) 125 CLR 353. Restraint of trade has been incorporated into statute law in NSW with the *Restraints of Trade Act 1976* (NSW). Restraint of trade cases again indicate the seriousness with which the right to a livelihood is considered in legal matters. However, it currently applies to existing employment or business purchase contracts, not potential employees.

- 59 *Anti-Discrimination Act 1991* (Qld) s 10(1) Direct discrimination on the basis of an attribute happens if a person treats, or proposes to treat, a person with an attribute less favourably than another person without the attribute is or would be treated in circumstances that are the same or not materially different. Attributes for which discrimination is prohibited include: sex; race; impairment; religious belief or activity; political belief or activity; gender identity; sexuality; family responsibilities (s 7).
- 60 *Anti-Discrimination Act 1991* (Qld) s 11(1) Indirect discrimination on the basis of an attribute happens if a person imposes, or proposes to impose, a term — (a) with which a person with an attribute does not or is not able to comply; ... (c) that is not reasonable.
- 61 *Anti-Discrimination Act 1991* (Qld) s 10(5).
- 62 *Anti-Discrimination Act 1991* (Qld) s 21: ‘A person who has power to grant ... a qualification or authorisation that (whether by itself or together with other qualifications or authorisations) is needed for, or facilitates, the practice of a profession ... must not discriminate (a) in granting, renewing or extending a qualification or authorisation or failing to do so; or (b) in the terms on which a qualification or authorisation is granted, renewed or extended.’.
- 63 *Anti-Discrimination Act 1991* (Qld) s 14(a). Similar standards in the *Disability Discrimination Act 1992* (Cth) are in ss 5,6.
- 64 *Anti-Discrimination Act 1991* (Qld) s 10(5).
- 65 An examination of the issue of assessment format versus intended assessment content is discussed in J. Joy Cumming and Graham Maxwell, ‘Contextualising Authentic Assessment’ (1999) 6(2) *Assessment in Education: Principles, Policy and Practice* 177, 192-3.
- 66 As for students, basic accommodations include provision of aural texts, large-print versions of questions, amanuenses, additional time and rest breaks for those with attention-deficit disorders. It should be noted that for school students, the *Disability Standards for Education 2005* (Cth) require consideration of alternate assessment forms in consultation with the students, not just accommodations (Standards 3.4, 3.5).
- 67 *Disability Discrimination Act 1992* (Cth) s 4.
- 68 *Disability Discrimination Act 1992* (Cth) s 4(f) (emphasis added).
- 69 Training and Development Agency for Schools (TDA), ‘Special Arrangements for Candidates Assessed As Dyslexic’ <http://www.tda.gov.uk/skillstests/specialarrangements/assessed_dyslexic.aspx> at 12 July 2010. The TTA reported that nearly 6 per cent of tests were adapted (Teacher Training Agency (TTA), ‘QTS Skills Tests in Numeracy and Literacy (Academic Year 2001/2) Reports on National Results Data’ (2003), 3).
- 70 *Disability Discrimination Act 1992* (Cth) s 4 (an adjustment is reasonable ‘unless making the judgment would impose an unjustifiable hardship on the person’), s 11 ‘unjustifiable hardship’ requires consideration of all circumstances, including s 11(a) ‘the nature of the benefit or detriment likely to accrue to, or be suffered by, any person concerned’.
- 71 See, eg, *Finney v Hills Grammar (sic) School* [1999] HREOCA 14 (20 July 1999) where an exception based on hardship was not found, and the financial status of the school (‘the School was not badly off financially’ [5.1.3(f)(xiv)]) was noted.
- 72 Mawdsley and Cumming, above n 1.
- 73 *Falchenberg v New York State Department of Education*, 642 F Supp 2d 156 (SDNY, 2008) (‘*Falchenberg*’), aff’d, 338 Fed Appx 11(2d Cir, 2009), cert denied, 130 S Ct, 1059 (2010).
- 74 *Disability Discrimination Act 1992* (Cth) s 21A(1).
- 75 *Disability Discrimination Act 1992* (Cth) s 21A(2)(a).
- 76 [1993] QADT 2 (27 April 1993).
- 77 *Ibid*.

- 78 *Racial Discrimination Act 1975* (Cth) s 9(1).
- 79 *Racial Discrimination Act 1975* (Cth) s 9(1A).
- 80 See Teacher Training Agency (TTA), ‘QTS Skills Tests in Numeracy and Literacy (February–September 2001) Reports on National Results Data’ (undated) 8 <<http://www.tda.gov.uk/>> at 10 June 2010. In the 2002–2003 report, results for minority groups report gaps in passing rates between ‘other than white’ ethnicity trainees and ‘white’ ethnicity trainees of approximately 15% (numeracy), 12% (literacy), and 6% (ICT) with ‘other than white’ trainees having the lower pass rate. The gaps were greater for first attempt pass rates (Teacher Training Agency (TTA), *QTS Skills Tests in Numeracy, Literacy and Information and Communications Technology (Academic Year 2001/02)* (2003) 8, 14 <<http://www.tda.gov.uk/upload/resources/pdf/q/qts-resultsdata-2001-02.pdf>> at 10 June 2010).
- 81 Ibid 24. Differences in pass rates according to language background showed 10% fewer NESB applicants passed (83%) than ESB applicants (93%) on two attempts for literacy and 12% for numeracy (83%, 95%) (ibid 24, 25).
- 82 Ibid 33.
- 83 It is hypothesised at this point that the form of testing to be undertaken, through multiple-choice format and online, may be a source of disadvantage to speakers of non-standard English or those with other cultural language and educational experiences. For example, the current National Assessment Program — Literacy and Numeracy results in Australia consistently identify Indigenous students’ achievement as at a lower level than non-Indigenous students, across Australia. However, the impact of test format on capacity to demonstrate underlying knowledge has not been investigated. Australian education policy expects Indigenous children to maintain Aboriginal English while also learning Standard Australian English effectively: ‘Teachers must equip Aboriginal students with the skills and knowledge needed to code switch from one dialect of English to the other, according to demand and context.’: New South Wales Department of Education and Training, (2008) ‘Supporting Aboriginal Students Overview’ <www.schools.nsw.edu.au/learning/7-12assessments/naplan/teachstrategies/yr2008/numeracy/aboriginal_students/NN_AbSt_O.htm> at 10 January 2011. Multiple choice items use a restrained and idiomatic form of Standard English that requires further code-switching between Standard Australian English and question format. Indigenous Australians are not the only cultural group to use non-Standard English forms.
- 84 The justification of the introduction of teacher licensure testing in Queensland to improve the quality of teaching and student achievement outcomes is not a focus of this paper. However, it should be noted that the recent US research, previously cited, using a large evidentiary database, shows that Black teachers who had achieved poorly on the licensure tests but were still employed as teachers were as successful in raising the achievements of Black and Hispanic students as the highest performing White teachers were with White students — the relationship between the cultural background of the teacher and student was more important for learning outcomes than licensure test scores. For further details, see Dan Goldhaber & Michael Hansen, ‘Race, Gender, and Teacher Testing: How Informative a Tool Is Teacher Licensure Testing?’ (2010) 47 *American Educational Research Journal* 218. Such research also examined the possible deterrence of minority applications to teacher education by the test requirements, the focus also of the English research to be undertaken. It is possible that any potential removal of Indigenous teachers through the application of such tests and formats from the Queensland teacher education pool will effect indirect discrimination on Indigenous students in Australia by denying them access to Indigenous teachers.
- 85 See, explanation of face validity, above n 24.
- 86 The standards are the American Educational Research Association (AERA), American Psychological Association (APA) & National Council on Measurement in Education (NCME) *Standards for Educational and Psychological Testing* (1999). This publication was a revision of 1985 standards and is currently under further revision, although a new publication date has not been announced. The current standards list 264 standards for good practice, with one section of 17 standards devoted to ‘employment and credentialing’ tests including teacher licensure tests. They were set as legislative guidelines in 1978/9 (Diana Pullin, ‘Judicial Standards’ in George Madaus (ed), *The Courts, Validity and Minimum Competency Testing* (1983) 3, 8. See, also, Glenn Fulcher and Ron Bamford, ‘I Didn’t

- Get the Grade I Need. Where's My Solicitor?' (1996) 24 *System* 437, for consideration of the limited status of guidelines in the UK and the need for the development of similar standards and importation into UK law.
- 87 Geoff Masters, *A Shared Challenge. Improving Literacy, Numeracy and Science Learning in Queensland Primary Schools* (2009); Queensland, *Parliamentary Debates*, Legislative Assembly, 9 February 2010, 52 (Hon GJ Wilson).
- 88 Again, as statistical and probabilistic models are being used in test construction, this range is itself usually at a probability or confidence level of, say, 95% and there is a 5% chance that an observed score on the test is really indicative of achievement outside that range. If 1 000 teacher registration applicants take the tests in a year, statistically some 50 may be wrongly classified at this confidence level. Further, errors of measurement are greater for individual scores than for group scores (cf the current National Assessment Program — Literacy and Numeracy tests used to rate schools), and when a cut-score is used for a high stakes decision, it is expected that higher precision of measurement around the cut-score is attained by the use of more items that reflect that level of performance (cf a test used to provide a range of scores from low to high achievement). For discussion of probable score ranges and test score interpretation see Margaret Wu, 'Interpreting NAPLAN Results for the Layperson' <http://www.edmeasurement.com.au/_docs/NAPLAN_ForLayPerson.pdf> at 19 July 2010.
- 89 *Education (Queensland College of Teachers) Act 2005* (Qld) s 20, s 230B. Notice for unsuccessful application but provide information as to the reasons (s 21(3)9a).
- 90 *Education (Queensland College of Teachers) Act 2005* (Qld) s 210.
- 91 *Education (Queensland College of Teachers) Act 2005* (Qld) s 211.
- 92 *Education (Queensland College of Teachers) Act 2005* (Qld) s 212.
- 93 *Education (Queensland College of Teachers) Act 2005* (Qld) s 213(2) 'If the review decision is not the decision sought by the applicant, the college must give the applicant a review notice that complies with the QCAT Act, section 157(2)'. *Queensland Civil and Administrative Tribunal Act 2009* s 157(2) requires written justification as to the reason for the decision. An issue may arise as to whether the QCT will be able to hear the internal review, given the QCT has been given the statutory responsibility for the licensure test development and implementation (*Education (Queensland College of Teachers) Act 2005* (Qld) s 230A). The *Judicial Review Act 1992* (Qld) provides for review of decisions of an administrative character made under an enactment (s 4(a)), where 'making of a decision' includes 'giving, suspending, revoking or refusing to give a certificate' (s 5(b)). This right to review is in addition to the rights provided by the *Education (Queensland College of Teachers) Act 2005* (Qld).
- 94 *Queensland Civil and Administrative Tribunal Act 2009* s 28(3).
- 95 *Queensland Civil and Administrative Tribunal Act 2009* s 20.
- 96 729 F Supp. 806 (MD Ala, 1990).
- 97 Ibid 820.
- 98 *Queensland Civil and Administrative Tribunal Act 2009* s 24(3).
- 99 *Debra P v Turlington*, 474 F Supp. 244 (MD Fla, 1979); aff'd in part and rev'd in part, *Debra P v Turlington* 644 F 2d 397 (5th Cir, 1981); rem'd, *Debra P v Turlington* 564 F Supp. 177 (MD Fla, 1983); aff'd, *Debra P v Turlington* 730 F 2d 1405 (11th Cir, 1984).
- 100 The initial case was founded on a discrimination claim based in constitutional law that a practice would preserve, or carry forward, effects of prior illegal school segregation on racial grounds. Here the students may not have sufficient educational experience in their prior schooling to be prepared adequately for the proposed tests (Jay Heubert and Robert Hauser (eds), *High Stakes Testing for Tracking, Promotion and Graduation* (1999) (National Academy Press) 55-57).
- 101 *Debra P v Turlington*, 474 F Supp 244 (MD Fla, 1979).
- 102 Queensland College of Teachers (QCT), *Information Update—Field Trialling of the QCT Pre-registration Test for Aspiring Primary Teachers – March 2011* (Feb 2011) (QCT).
- 103 See <http://www.tda.gov.uk/skillstests/about/whohastopassqtstests/test_regulation_changes/how_changes_affect_you.aspx> at 12 June 2010. (Note that the change of government in England means that further changes could occur.) The English tests are pass/fail results.

- 104 'A person [whose] ... interests are, or would be, adversely affected in or by the matter to which the application relates': *Judicial Review Act 1991* (Qld) s 44.
- 105 *Judicial Review Act 1991* (Qld) s 21. Grounds include possible breach of natural justice. One definition of natural justice is the 'right to have a decision based on logically probative evidence' extrapolated here to mean the basis of the original decision to deny licensure with respect to the quality of the tests. An appeal under the *Judicial Review Act 1991* (Qld) is a complex area of law dependent on whether the decision by the Queensland Government to amend the *Education (QCT) Act* to introduce the tests is seen as having statutory or administrative character, with the latter possibly reviewable under the *Judicial Review Act 1991* (Qld) or common law judicial review (William Lane and Simon Young, *Administrative Law in Queensland* (2001), 26-7, 38). Alternatively, this class of students may be able to seek remedy on the basis the introduction of the tests as licensure requirements is unfair. However, no precedent for such a claim could be identified.
- 106 Other areas of differential treatment as a class are the expected restriction of testing which applies only to Queensland graduates seeking to teach in early childhood settings and primary education, but not secondary education, and the fact that a teacher newly registered at the end of 2011 in another Australian jurisdiction or New Zealand will not be required to take the tests under the *Mutual Recognition (Queensland) Act 1992* and the *Trans-Tasman Mutual Recognition (Queensland) Act 2003* ((Queensland, *Parliamentary Debates*, Legislative Assembly, 9 February 2010, Explanatory Notes on the Introduction of the Child Care and Another Act Amendment Bill 2010, 10 (Hon GJ Wilson)).
- 107 A major concern at the time of writing is the expectation that all graduates will be required to sit the tests and pay test fees, at a time when few teacher education graduates are gaining employment with the Queensland state education department. Tanya Chilcott, 'No Full-Time Job for 9/10 Teaching Graduates' *The Courier-Mail* (Brisbane), 27 January 2011 <www.couriermail.com.au/news/queensland/no-full-time-job-for-910-teaching-graduates/story-e6freoof-1225823727433> at 27 January 2011. Primary education teaching, the focus of the testing, is especially an area where there is no current teacher shortage. This, of course, also begs the question as to why the employers are not able to select the most able students on the basis of their university course results and school practicum reports, rather than through the imposition of a new test.