Is obesity a disability - actual or perceived - under the *Disability Discrimination Act* 1992?

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1. Introduction

Discrimination law, being a relatively young area of our legal system, is still expanding to meet the changing perceptions and needs of society. The increasingly sophisticated amendments to Australian anti-discrimination legislation over the last decade indicate a growing awareness of the power of the legislature to protect individuals from the injustice of arbitrary and prejudiced exercises of power. However, while discrimination based on sex, marital status, pregnancy, race, age, or disability, has been recognised and addressed by Australian law, there has been very little discussion in this country of prohibiting discrimination experienced by those persons who do not conform to society's perceptions as to what is an ideal size. Victoria is the only Australian jurisdiction to pass legislation which addresses the issue of discrimination based upon 'physical features',[1] a term defined to mean a 'person's height, weight, size or other bodily characteristics'.[2] For persons outside the state of Victoria, there is seemingly no redress for discrimination which cannot be conveniently placed under one of the existing umbrellas of protection. The reluctance of legislatures (both here and overseas) to create appearance discrimination laws, has lead to questions about the status of obesity as a disability. Australian case law is inconclusive in answering these questions, but the American legislation, which bears some similarity to the *Disability Discrimination Act* 1992 (Cth) (the 'DDA'), has sparked off a volley of cases denying or confirming obesity as a disability entitled to protection from discriminatory practices.

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1 *Equal Opportunity Act* 1995 (Vic), s. 7.

2 Id, s. 4.

This article seeks to examine in detail the American position with a view to better understanding the possible operation of the DDA as a means of redress for overweight persons discriminated against in Australia.[3] This involves consideration of the so-called 'perceived disability' theory which has been the subject of American case law and presumably arises from the language of the DDA which talks of a disability 'imputed to a person'.[4] The appropriateness of using disability discrimination legislation in order to bestow rights of fair treatment upon obese, yet otherwise healthy, individuals is also appraised.

2. Obesity as an Actual Disability under the Disability Legislation

The Presence of an Actual Disability under the DDA

'Disability' is defined extensively under section 4 of the DDA and includes factors which may affect both an individual's physical abilities and mental functions. Of the seven possible characteristics of disability listed, it is difficult to accommodate obesity within at least five,[5] but feasible to do so in the remaining two which are:

> (a) total or partial loss of the person's bodily or mental functions; or
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> ...

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3 Due to the insidious nature of most discrimination, but particularly that which is based upon a subjective response to an individual's personal appearance, gathering any sort of statistics in relation to the occurrence of weight-based discrimination is extremely hard. What is available is information about the health of Australians which indicates that as many as 383.2 males in every thousand are overweight and 80.7 of those are obese. While the overall number of overweight women per thousand is significantly lower at 257.9, the occurrence of obesity is slightly more common than in men, with 84 women in every thousand having this classification. The boundaries of 'overweight' and 'obese' in these results were determined by reference to body mass, which is derived by dividing the individual's weight by the square of their height. A score over twenty-five indicated that the person was overweight and a score over thirty indicated obesity. See *National Health Survey - First Results*, ABS Catalogue No.4392.0, 1995 at 14 and 27.

4 DDA, definition of 'disability', s. 4(k).

5 These are subsections (b), (c), (d), (f) & (g). The first talks of loss of a body part, subsections (c) & (d) relate to the presence in the body of debilitating organisms causing disease or illness, while the latter two are concerned with mental disorders.

(e) the malfunction, malformation or disfigurement of a part of the person's body;[6]

Neither of these definitions stand out clearly as embracing obesity within their meaning. However, they are sufficiently broad to accommodate the physical effects of an obese condition. The Equal Opportunity Board of Victoria (the 'Board'), in considering one of the few obesity discrimination cases to arise in the Australian jurisdiction,[7] held that obesity *per se* did not come within any of the alternative definitions of 'impairment' in the *Equal Opportunity Act* 1984 (Vic) which included subsections identical to s. 4(a) and (e) of the DDA.[8] However, the Board specifically stated that its decision did not mean that 'obesity of such an extent that it does lead to either a total or partial loss of part of the body or, indeed, a malfunction of a part of the body could not found a complaint'.[9] This statement has yet to be put to the test and, to date, no one has successfully made out a disability discrimination case based upon obesity in Australia.

Even though the remarks of the Board in *Cox* seem to indicate that it will only be a matter of time before such a claim is made, the decision offers very little hope to the majority of obese persons whose condition is not so extreme that they are deprived the use of their bodies in some way. It is only the extreme cases, or the 'morbidly obese', who can derive comfort from that judgment. The rest of the population who have been medically diagnosed as obese[10] and also, of course, those who have not but are

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6 DDA, definition of 'disability', s. 4.

7 *Cox v. The Public Transport Corporation* (1992) EOC ¶92-401 (*Cox*).

8 *Equal Opportunity Act* 1984 (Vic) s. 4(a), (c) and (d), definition of 'impairment'. Note that this Act has since been repealed and replaced by the *Equal Opportunity Act* 1995 (Vic) which protects 'physical features' including weight from discrimination: fns 1 & 2. However, in *McCarthy v. Metropolitan (Perth) Passenger Transport Trust (Transperth)* (1993) EOC ¶92-478 the Equal Opportunity Tribunal (WA) was more open to the idea that 'obesity *per se* could constitute an "impairment"' under the relevant statute which was significantly different. This will be discussed in more detail later in the paper.

9 Fn. 7 at 78,862.

10 'The definition of obesity that is generally accepted by the medical profession, and hence the law, is derived from actuarial tables compiled by various insurance companies. A person is judged to be 'obese' or 'moderately obese' if she exceeds her ideal weight by 20%, 'gross' or 'seriously obese' if she exceeds her ideal weight by 30 to 35%, and 'morbidly obese' if she exceeds her optimal weight by 100% or 100lbs': Paul, J. & Howard, R., 'Incomplete and Indifferent: The Law's Recognition of Obesity Discrimination' (1995) 17 *Advocates'*

popularly perceived as such, remain unprotected by anti-discrimination legislation.

This general lack of recognition of obesity as a disability under the defined heads of the DDA may not, however, be the end of the matter for obese persons seeking redress. The definition of 'disability' concludes by saying that the term 'includes a disability that is imputed to a person'.[11] It is unclear how much assistance this may provide, but it may be possible for an obese person to claim they have been discriminated against because their employer or some other person perceived that they suffered from a disability. In determining the likelihood of such an argument being successful in Australia, it is instructive to consider the recent case law and discussion from the United States which suggests a 'theory of perceived disability'.

The Presence of an Actual Disability under the American Legislation

The *Americans with Disabilities Act* 1990[12] (the 'ADA') defines 'disability' simply as 'a physical or mental impairment that substantially limits one or more of the major life activities of [such] an individual'.[13] The wording of this provision is clearly different from that employed in the DDA which contains no reference to a limitation of 'major life activities'. Under Commonwealth law there is no requirement that the condition affect an individual's ability to enjoy and participate in life to a significant degree before it will attract the operation of the protective provisions. In this sense, the DDA definition is clearly less onerous to prove successfully than that of the ADA. However, despite the additional qualification present in the ADA

Quarterly 338 at 339. See also Raote, G.J., 'Job Discrimination Based on Weight Encouraged by the Legislature and the Judicial System' (1995) 26 *UWLA Law Review* 365 at 373.

11 Fn. 4. All states, except Tasmania, have legislative provisions prohibiting discrimination on the ground of an imputed or perceived disability or, even wider, attribute (see *Equal Opportunity Act* 1995 (Vic) and *Anti-Discrimination Act* 1991 (Qld)). However, the case law relating to incidents of discrimination due to an imputed characteristic is scant. See *Schlipalius v. Petch & Anor* (1996) EOC ¶92-810 (imputed impairment due to a presumption of HIV infection) and *Lovejoy v. Myer Stores Ltd & Anor* (1996) EOC ¶92-813 (imputed schizophrenia). A less clear example is *Wheatley v. Smyth* (1994) EOC ¶92-655 where the Board had to consider the distinction between an imputed mental illness and an assessment of personal characteristics.

12 42 USC §12101.

definition, the concept of the condition depriving the individual of a body function seems common to both. This is not to suggest that the two provisions are identical or even substantially similar. It is merely to acknowledge that they classify a medical condition as a disability by reference to the functional effects of that condition. Thus, under both legislative schemes, it is difficult to include obesity *per se* as a disability with any certainty. There are some American cases which have decided that obesity, without more, is a disability, but these have concerned other statutes which have not emphasised impairment and its effects, but rather have stored significance in the medical diagnosis of the obesity.[14] Clearly this is a much broader standard and comparatively easier to satisfy than those provided by either the ADA or the DDA.

As shall be seen in the discussion of cases below, in considering statutes drafted in similar terms to the ADA[15] the courts have been prepared to accept obesity as a disability only in cases where the impairment can be said to arise from a physiological cause. The fact that the person is obese *per se* does not attract the operation of the disability discrimination provisions. The obesity must be grounded in a physiological condition.[16] This narrow recognition of obesity as a disability is criticised by writers who maintain that in the 'vast majority of instances obesity has multiple causes and is

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13 42 USC §12102(2)(A).

14 See, for example, *State Division of Human Rights v. Xerox Corp.* 480 N.E.2d 695 at 698 (N.Y. 1985). In this case the claimant's argument that she had been discriminated against on the basis of her disability was accepted by the Court although the medical examination revealed no other conditions except obesity. Significantly though, the statute in question, the *New York Human Rights Law*, does not define disability in relation to loss or impairment of function, but instead talks of 'merely diagnosable medical anomalies which impair bodily integrity'. Dunworth, K.B., '*Cassista v. Community Foods, Inc.*: Drawing the Line at Obesity?' (1994) 24 *Golden Gate University Law Review* 523 at 534. See also *Gimello v. Agency Rent-A-Car Sys.* 594 A. 2d 264 (N.J. Super. Ct. App. Div. 1991).

15 Namely the *Fair Employment and Housing Act* Cal. Labor Code §1735 and the *Rehabilitation Act of 1973* 29 USC § 701.

16 For a concise summary of the developing medical opinion on obesity as a physiological condition, see Byers, J.R., '*Cook v. Rhode Island*: It's Not Over Until the Morbidly Obese Woman Works' (1995) 20 *Journal of Corporation Law* 389 at 399.

better understood through an interdisciplinary model that may include physiological, cognitive, social and cultural variables.'[17]

However, the ADA also provides that 'disability' includes 'being regarded as having such an impairment'[18] which would seem strongly analogous to the DDA's 'imputation' of disability to a person. This part of the American definition has become the focus for those attempting to have obesity, in general, recognised by the anti-discrimination laws. The argument is that this subsection recognises that disability discrimination will have occurred where the discriminator perceives the individual's obesity as a disability and treats him or her unfavourably as a result. Such a view may be seen as an attempt to sneak obesity through the legislative back door of the ADA, relying as it does on the perception of a disability rather than the actual classification of obesity as such. However, the 'perceived disability' approach has met with mixed success in American courts and thus could well be raised under the Australian legislation at some time in the not too distant future.

3. The Perception of Disability: US Case Law

A Narrow View of the Theory of 'Perceived Disability'

There are numerous cases from American jurisdictions which deny recognition of obesity as a disability,[19] but the most significant of recent times is that decided by the California Supreme Court in *Cassista v. Community Foods. Inc.*,[20] which concerned alleged discrimination, due to weight, in regard to the plaintiff's application for employment at a health food store. The plaintiff had been told that 'there was some concern about your weight'. The plaintiff then brought an action against Community Foods Inc. under the *Fair Employment and Housing Act*[21] (the 'FEHA'), which defines disability in a similar fashion to the ADA.

On the primary issue as to whether weight could be considered a disability, the appeal court answered in the affirmative, but only 'if medical evidence demonstrates that [the weight] results from a physiological condition

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17 Paul & Howard, fn. 10 at 342.

18 42 USC §12102(2)(C).

19 As should be clear from fn. 14, this is not always the case where state laws do not define disability in terms of function and ability.

20 22 Cal.Rptr.2d 287 (Cal. 1993) (*Cassista*).

affecting one or more of the basic bodily systems and limits a major life activity.'[22] In short, an 'individual who asserts a violation of the FEHA on the basis of his or her weight must adduce evidence of a physiological, systemic basis for the condition.'[23] The plaintiff failed to provide such evidence and, in fact, to have done so would have been contradictory to her main contention - that she was actually in good health, despite her weight.

Clearly then, any argument based upon discrimination of an actual disability was doomed to failure. However, the plaintiff argued that, regardless of the actual status of obesity as a disability, she could still recover under the legislation because Community Foods had perceived her as being disabled and had thus discriminated against her. The Supreme Court, while agreeing with the notion of perceived disability, denied the plaintiff a remedy on the basis that Community Foods did not perceive her as possessing a disability as defined by the legislation - that is, a physiological disability. The Court stated that 'it is not enough to show that an employer's decision is based on the perception that an applicant is disqualified by his or her weight.' The applicant must be 'regarded as having or having had a ... physiological disease or disorder affecting one or more of the bodily systems.'[24] Additionally, the Court concluded that the plaintiff did not actually

> fit within the class of handicapped or disabled persons protected by the FEHA. The record is devoid of any evidence that [the] plaintiff's weight is the result of a physiological condition or disorder affecting one or more of the body systems. ... Indeed, [the] plaintiff alleged in her complaint and maintained at trial that despite her weight she is a healthy, fit individual. Thus she demonstrated neither an actual nor a perceived handicap within the meaning of the FEHA.[25]

The Court's reasoning in this case has been severely criticised for its reading down of the 'perception' basis of disability discrimination to the actual

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21 Fn. 15.

22 Martin, C.J., 'Protecting Overweight Workers against Discrimination: Is Disability or Appearance the Real Issue?' (1994) 20 *Employee Relations LJ* 133 at 137.

23 Fn. 20 at 297.

24 Ibid.

25 Id at 298.

requirements for disability under the legislation.[26] Such an approach seems to defeat the purpose of the 'perception' part of the definition, which was added so as 'to protect people who are denied employment because of an employer's perceptions, whether or not those perceptions are accurate. It is of little solace to a person denied employment to know that the employer's view of his or her condition is erroneous.'[27] Nevertheless, the *Cassista* approach was endorsed in a later decision by the Californian Court of Appeals in *Jimeno v. Mobil Oil Corporation*,[28] when considering the same provisions of the FEHA. For a claimant to successfully argue a case based upon a 'perceived disability', she or he 'must (1) actually have a 'physiological disease or disorder affecting one or more of the bodily systems' *and* (2) be 'perceived by the employer [as having] a physiological disorder within the meaning of the FEHA, even if it is not in fact disabling.'[29] Note, however, the regulations to the Act make it clear that the physiological disorder the person has, or is perceived to have, need not be one which 'substantially limits one or more major life activities'[30] before she or he can allege discrimination by perception of a disability.

Dunworth has described the *Cassista* decision as 'unreasonable' and concludes that the result of the Court's interpretation[31] is that a case of 'perceived disability' discrimination can only be successful when the discriminator has correctly perceived the individual's actual condition as being one which is classified as a disability under the legislation - that is, some form of physiological disorder. The idea that a victim of perceived disability discrimination must actually be disabled in accordance with the statutory definition in order to seek redress is both illogical and unhelpful.

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26 For example, see Dunworth, fn. 14 at 544 and Raote, fn. 10 at 385.

27 *E.E.Black, Ltd. v. Marshall* 497 F. Supp. 1088 at 1097 quoted in Dunworth, fn. 15 at 529. See also Martin, fn. 23 at 138 who claims that it was Congress' intention to 'protect people from discriminatory actions based on "myths, fears and stereotypes" about disability, even when a person does not have a substantially limiting impairment.'

28 66 F.3d 1514 (1995).

29 Id at 1520.

30 Ibid.

31 Dunworth regards the decision as flawed and at variance with basic rules of statutory interpretation, since the definition of 'impairment' is not expressed to be exhaustive and so why should the perceived condition fall precisely within the words of the subsections: Dunworth, fn. 14 at 542-4.

A Wider View of the Theory of 'Perceived Disability': Cook

The courts will find discrimination based upon a perception of disability when the discriminator sees the obesity as a physiological disorder and hence treats the complainant unfavourably. This much we have already gleaned from *Cassista* and it is demonstrated by the decision of *Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals*,[32] although the Court in that case did not think it necessary that the complainant actually possess an impairment under the legislation. The fact that different pieces of legislation were involved in the two cases does not adequately explain this difference, as the definition sections of California's FEHA and the federal *Rehabilitation Act*[33] are strikingly similar, both to each other and also to that which is provided by the ADA.[34]

In that case Bonnie Cook reapplied for her job, as an attendant at a group home for the mentally retarded which was operated by the defendant. As part of her reapplication, Cook was required to undergo a physical examination, whereat the physician pronounced her to be morbidly obese and stated that her condition would interfere with activities such as walking, lifting, bending and so on. The defendant refused to hire Cook, showing 'conclusively that MHRH[35] treated the plaintiff's obesity as if it actually affected her musculoskeletal and cardio-vascular systems'.[36] Cook brought an action alleging discrimination on the basis of disability - both actual and perceived - under the terms of the *Rehabilitation Act* which governs discrimination against persons with disabilities in the public sector.[37]

Given Cook's spotless record of employment in the job it was difficult for her to successfully make out that her obesity was an impairment which 'substantially limited' her major life activities, though the Court was of the view that her obesity could be said to arise from a physiological cause. Despite the lack of a 'major life activities' requirement in the DDA, a complainant under that legislation in Cook's position would still be unable to prove an actual disability, unless her obesity contributed to a loss (total or

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32 10 F.3d 17 (1st Cir. 1993)

33 29 USC §701.

34 For a discussion of the relationship between the various key pieces of American legislation raised in these cases see Raote, fn. 10 at 373-6.

35 *Department of Mental Health, Retardation, and Hospitals* (MHRH).

36 10 F.3d 17 at 23.

37 The ADA (passed in 1990) effectively covers both sectors.

partial) of function or a malfunction of her body. While this is clearly an easier test than substantial limitation of a major life activity, it does not seem from the facts of *Cook*, that the complainant could have shown an appropriate degree of loss or malfunction in order to successfully claim discrimination on the basis of an actual disability.[38]

Thus, the Court was concerned with whether discrimination through a perception of disability had occurred. This could be proved in one of two ways:

> (1) that she [Cook] had a physical or mental impairment that did not necessarily limit major life activities but that [was] treated ... as constituting such a limitation, or alternatively, (2) that she did not possess any of the enumerated impairments but was treated by the recipient as having such an impairment.[39]

It is to be noted that the first way in which perception of disability may be made out is essentially that which was required by the Court in *Cassista* and which the complainant failed to satisfy due to a lack of evidence that her obesity could be attributed to a physiological cause. The Court in that case did not view the second alternative, where the individual suffers from no impairment covered by the legislation, as a possibility in making out the 'perception of disability' argument.

Upon examination of the evidence, the *Cook* court was of the view that the jury could reasonably decide, on either ground, that the complainant was discriminated against due to the perception of MHRH that she was disabled. Regarding the first line of argument, in addition to the testimony of the defendant's physician which demonstrated MHRH's perception that Cook had a physiological disorder, the defendant also clearly perceived Cook as being substantially limited in her ability to engage in 'major life activities'. This was shown by MHRH's rejection of Cook for the position, the Court stating that a pattern of rejection was not necessary when the reasons given

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[38] Recall the words of the Equal Opportunity Board in *Cox v. The Public Transport Corporation* discussed at the text accompanying n.8. It is submitted that a complainant in Cook's position who is obese, but seemingly not limited in her abilities and functions, would not be found to possess an actual disability.

[39] Brucoli, A.M., *'Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals:* Morbid Obesity as a Protected Disability or an Unprotected Voluntary Condition', (1994) 28 *Georgia Law Review* 771 at 790.

for the single rejection were such that they indicated the complainant was unqualified for a number of other positions.[40] Because Cook could actually perform the work activities without difficulty and had done so in the past, the perception that her disability was a substantial limitation was incorrect. Thus, she could show that she had been discriminated against due to a perception of her as being disabled within the full meaning of the statute, when that was not in fact the case.

Alternatively, the second avenue of proving 'perception of disability' was also open to Cook, reflecting the fact that 'the debate regarding the cause of obesity is inconclusive'.[41] Under this approach, the complainant need not show any actual impairment - substantially limiting or otherwise - in order to seek redress under the legislation. As Brucoli states, the 'cause of the underlying obesity is irrelevant; the perception of the employer is paramount.'[42] This is clearly the easier of the two paths, the question being simply whether the employer regarded the obese employee as being impaired. The Court readily found this to be the case in MHRH's treatment of Cook.

Reconciling Cassista and Cook: Can it be Done?

Martin has written that 'on the surface, it appears that the *Cook* and *Cassista* decisions go in opposite directions. In fact, the cases are rather easily reconcilable.'[43] Both statements are inaccurate. First, the courts in the two cases do not adopt diametrically opposing positions. Both take the view that a complainant may bring an action for discrimination based upon a perception of disability, where the individual possesses a physiological disorder, leading to their obese condition, and the discriminator perceives that the individual is substantially limited in pursuing 'major life activities', when that is not in fact the case.

Secondly, the cases are not easily reconcilable because the Court in *Cook* supports a second and co-existing view of the 'perception of disability', which was denied to Cassista in her case and which would presumably have made a great difference. Under this alternative view the complainant need show only that the discriminator perceived a disability which was the reason

40 10 F.3d 17 at 26.
41 Brucoli, fn. 39 at 800.
42 Id at 797.

for the unfavourable treatment. The fact that the individual's obesity cannot be linked to the definition of disability under the legislation is irrelevant. Despite Martin's attempt to explain the different outcomes of the decisions as a matter of varying levels of evidential proof of a physiological disorder,[44] he ignores the fact that if the *Cassista* Court had not adopted such a narrow approach, the complainant could well have successfully argued a 'perception of disability' case without compromising her basic stance that she was not in any way impaired.

The approaches taken in the two decisions are unquestionably dissimilar. The insistence by the Court in *Cassista* and later in *Jimeno v. Mobil Oil Corporation*, that the complainant must actually be impaired in order to base his or her discrimination action upon a perceived disability is an illogically narrow reading of the statute which gives limited support to the legislature's stated intentions.[45] In this sense, the wider reading from *Cook* is to be preferred. However, there seems little need to adopt a two-limbed approach to the 'perception' test, as this will often involve overlap.[46] Essentially such an action boils down to whether the discriminator perceived a person as disabled within the meaning of the legislation, whether their obesity has an underlying physiological cause or not.

This was recognised in the decision of *Smaw v. Commonwealth of Virginia Department of State Police,*[47] where the Court stated simply that 'a plaintiff can make out a cognizable perceived disability claim by demonstrating that she was treated by her employer as if she had an impairment that substantially limits a major life activity'.[48] This would encompass both situations - where the complainant has an impairment, but the discriminator incorrectly perceives that it presents a substantial limitation, and also where the complainant has no impairment whatsoever. The end result of such a test is that attention is focussed upon the discriminator - did he or she perceive the individual as being disabled in accordance with the statutory definition?

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43 Martin, fn . 22 at 138.
44 Ibid.
45 Fn. 27.
46 This was evidenced in *Cook*.
47 862 F.Supp. 1469 (1994) (*Smaw*).
48 Id at 1474.

The American case law is instructive as it presents two possible interpretations of the 'perceived disability' theory which place obese persons at something of a crossroads. On the one hand, there is the finding in the *Cassista* case which effectively prevents all but a few claims of obesity enjoying protection under the disability discrimination legislation. On the other hand lies the more expansive approach of the Court in *Cook* which does not involve consideration of the individual's actual condition at all. Which of these paths the American courts will finally decide upon remains unsettled. However, the more developed case law on this topic in America provides those seeking to understand the extent and operation of the Australian legislation with an opportunity to consider the options.

For the purpose of understanding the possibilities offered by the DDA, it is obvious that the first limb of the 'perception' test from *Cook*, which was applied in isolation by the Court in *Cassista*, can be disregarded. The absence of an additional 'major life activities' requirement in the DDA means that situations of a technically disabled person being discriminated against on the basis of a perception that she or he is substantially limited in 'major life activities', when that is not in fact the case, will not arise. Rather, the single requirement present in the DDA definitions based upon malfunction or loss of function, means that the reasoning behind the second limb in *Cook*, or the decision in *Smaw*, is more appropriate: was the individual perceived as disabled under the Act when they were actually without any form of disability? The simplicity of this interpretation is appealing and avoids any cumbersome qualifications such as those applied by the Court in *Cassista*. Does Australian case law indicate that such a wide interpretation will be adopted?

4. The Imputation of Disability: Australian Case Law

There have only been two Australian cases which consider the issue of obesity and disability discrimination. Neither has dealt with the matter conclusively and neither has involved the DDA. Despite those considerations, the cases do shed interesting light on the possibility of 'perceived disability' as a basis of recovery for obesity discrimination.

Cox's Case

The first case is that of *Cox v. The Public Transport Corporation,*[49] which concerned a complaint made by an obese man who was refused employment as a tram conductor with the defendant, which considered him at risk of a heart attack and thus unfit for the position. Apart from the complainant's obesity, there were no other factors present in his case to increase his risk of cardio-vascular disease and he was 'in all other respects healthy'.[50] The complainant based his complaint upon two arguments. First, that he was discriminated against on the basis of his obesity, which is an impairment within the terms of the legislation, or secondly, that the discrimination was due to imputed characteristics of an impairment, i.e. cardio-vascular disease.[51]

The issue was decided by reference to the *Equal Opportunity Act* 1984 (Vic) (the 'EOA') which prohibited discrimination on the basis of an impairment as defined in section 4:

> 'Impairment' means -
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> (a) total or partial loss of a bodily function;
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> (aa) the presence in the body of organisms causing disease;
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> (b) total or partial loss of a part of the body;
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> (c) malfunction of a part of the body; and
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> (d) malformation or disfigurement of a part of the body-
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> and includes-
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> (e) in relation to a person with a past or present impairment, an impairment which presently exists or existed in the past but has now ceased to exist; and
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> (f) an impairment which is imputed to a person.[52]

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[49] (1992) EOC ¶92-401.

[50] Id at 78,859.

[51] Id at 78,860.

[52] The definition is similar in a number of material respects to the DDA s. 4 definition of 'disability' in both what will constitute an impairment/disability and that it may be 'imputed to a person'. Note that the 1984 Act has since been repealed and replaced by the *Equal Opportunity Act* 1995 (Vic) which defines 'impairment' more extensively and has covered the issue of imputation in a separate provision which defines discrimination in general. Section 7(2) says

The Equal Opportunity Board rejected the complainant's first proposition, stating that obesity, *per se*, was not covered by any of the sub-sections of the 'impairment' definition. This part of the judgment was discussed earlier and the result was a rejection of obesity as an impairment unless it affected a person's body to such an extent that they came within any of the descriptions of the definition section.

It is the Board's consideration of Cox's second contention, that his case was one of imputed disability discrimination, which is of interest, especially in light of the American responses to this issue. Unfortunately, the Board in *Cox's* case did not have to consider precisely the same question as their American counterparts, due to the complainant's failure to show that what he was perceived as possessing (a heightened risk of cardio-vascular disease) was an impairment under the above definition.

The respondent cleverly argued that 'an imputation of a higher risk of cardio-vascular disease or heart condition cannot be said to be an imputation of impairment, on the basis that the imputation is not that, as a matter of fact, the Complainant has cardio-vascular disease or, indeed, has a heart condition, but that he has a higher risk of contracting such a problem in the future than somebody who is not of his obesity'.[53] This is an attractive approach, in that it is logical that the imputation must be of a condition which is defined as an impairment under the EOA - not just a risk of future impairment. It does, however, seem to avoid the purposes of the legislation upon a technicality. A similar argument brought in relation to the DDA would presumably not meet with success, as that Act prohibits discrimination based upon a 'disability that may exist in the future'.[54] The Board in *Cox* did not have a similar provision before them and were convinced by the respondent's submission. In order to obtain relief under the Act, the imputation drawn about Cox must have been that he had a presently

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that discrimination on the basis of an attribute may occur whether or not the person had that attribute at the time of the discrimination (sub-s. (a)) and includes discrimination on the basis 'of a characteristic that is generally imputed to a person with that attribute'. Thirteen attributes are listed in s. 6, including impairment.

53 Fn. 49 at 78,861. Note that the respondent is referring to imputation of an impairment although the complainant based his action upon the imputation of a characteristic.

54 DDA, definition of 'disability', s. 4(j).

existing heart condition, as that would be imputation of an impairment recognised by the definition provision.

By accepting the respondent's argument the Board had no need to consider whether, had the imputation been of an impairment in section 4, it would have been necessary that Cox actually possessed the condition which was imputed to him. Essentially, this would have required the Board to determine the expansiveness of the 'perceived disability' theory and to make a decision on facts similar to those which faced the courts in the cases of *Cassista* and *Cook*.

However, the *Cox* decision contains a rather ambiguous passage which seems to suggest that a narrow *Cassista* approach to imputation/perception of impairment is to be applied, that is, the complainant must actually be impaired. The Board stated that for the complainant to have been successful, 'he had first the necessity to establish ... that he had an impairment within the terms of Section 4 of the Act, because it was on the basis of an alleged impairment that he based his claim for discrimination.'[55] While this is true in relation to the complainant's first contention, there seems to be no reason why he must show that he has an impairment in order to bring his second claim based upon imputation of impairment, unless the Board seeks to limit the scope of the 'perceived disability' theory in the fashion of the Court in *Cassista*. However, we should be wary of inflating the significance of this passage. In the following sentence, the Board returned its attention to the substance of the case before it and sought to clarify its meaning by stating:

> in other words, unless the Board was satisfied that Mr Cox established on the evidence that his obesity or his higher risk of cardio-vascular disease was, indeed, an impairment within the terms of Section 4, then it did not matter what other evidence he had established in relation to unfair treatment by the Respondent.[56]

If we read the first sentence in light of the second (as it appears we are intended to do) then the first sentence does not constitute an indication that a narrow theory of 'perceived disability' is to be preferred, but rather is a clumsy paraphrasing of the reason for the Board's rejection of Cox's claim.

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55 Fn. 49 at 78,862.

56 Ibid.

In summary, the decision in *Cox* is significant for the following reasons only:

- Obesity *per se* is not recognised under the definition employed by the *Equal Opportunity Act* 1984 (Vic), nor, presumably, those similar to it - namely that of the DDA;
- An increased risk of cardio-vascular disease is not an actual impairment;
- An imputation of increased risk of cardio-vascular disease is, therefore, not an imputation of an impairment.

The applicability of the second and third reasons to decisions made under the provisions of the DDA is dubious given the broad definitional scope of that Act, which includes conditions that may exist at some later time. Nevertheless, *Cox's* case is instructive in demonstrating the approach which may be made to this kind of problem when a similar action is brought under the Commonwealth legislation.

McCarthy's Case

The case of *McCarthy v. Metropolitan (Perth) Passenger Transport Trust (Transperth)*[57] is of less significance than the *Cox* decision, for two reasons. First, the definition provided by the legislation is markedly different from anything yet examined, and second, obesity is not the sole basis of the discrimination claim, but rather takes a supporting role to pregnancy and sex.

The case concerned a refusal to employ McCarthy as a bus driver because of concerns that her overweight condition was an impairment due to the increased risk of heart problems. However, it was alleged by the complainant, and the Equal Opportunity Tribunal (the 'Tribunal') found it to be the case, that the paramount reason for the rejection of McCarthy was her pregnancy. The Tribunal was satisfied that the complainant's pregnancy:

> was a significant - and probably the major - factor in Dr W's assessment of her as unfit to perform the duties of a bus operator. The other significant factor was her weight ... We

[57] (1993) EOC ¶92-478 (*McCarthy*).

> are satisfied that had she not been pregnant, Dr W would have passed Mrs McCarthy as medically fit.[58]

As a result, the Tribunal did not engage in lengthy consideration of the obesity issue, which they found very difficult to determine in light of the inconclusive medical knowledge in the area.

The most significant thing about the *McCarthy* decision is that the Tribunal distinguished *Cox* and said that 'it may be that obesity *per se* could constitute an "impairment".'[59] While this is hardly a conclusive statement, it nevertheless concedes a possibility so far not recognised in Australian law. The reason for the Tribunal's view on this matter owes a lot to the much more flexible definition of 'impairment' existing under the *Equal Opportunity Act* 1984 (WA) which, for the purposes of the *McCarthy* case, read as follows:

> 'impairment' in relation to a person, means one or more of the following conditions -
>
> (a) any defect or disturbance in the normal structure or functioning of a person's body;
>
> (b) any defect or disturbance in the normal structure or functioning of a person's brain; or
>
> (c) any illness or condition which impairs a person's thought processes, perception of reality, emotions or judgment or which results in disturbed behaviour,
>
> whether arising from a condition subsisting at birth or from an illness or injury and includes an impairment which presently exists or existed in the past but has now ceased to exist.[60]

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58 Id at 79,475.

59 Id at 79,478.

60 *Equal Opportunity Act* 1984 (WA), s. 4 (as amended). The definition of impairment was amended further by the *Equal Opportunity Amendment Act* 1992 s. 6 which replaced the last paragraph of the quoted definition and substituted the following:

> includes an impairment-
> (d) which presently exists or existed in the past but has now ceased to exist; or
> (e) which is imputed to the person.

The Tribunal was reluctant to conclusively determine whether obesity *per se* was covered by this definition because of a lack of definite medical evidence presented before it.

> [The] evidence on whether Mrs McCarthy's "overweight" condition amounted to a defect or disturbance in the structure of her body or its functioning was that the matter is controversial at the moment, although there definitely seem to be other factors involved with obesity which are not just purely a matter of over-eating or caloric intake; but [the witness] could not be more specific and there is presently no actual proof of that.[61]

The *McCarthy* decision does not discuss the imputation of an impairment, due to the unavailability of that argument under the legislation at the time the complaint was brought.[62] The case may be seen as offering a degree of hope to those who want obesity recognised as a disability, but the disparity between the Western Australian statute and the DDA means its significance is certainly not great.

Perception of Disability under the DDA - A Narrow or Wide Theory?

It is clear from the foregoing that it is difficult to predict with any certainty how the 'perceived disability' theory will operate in the context of the DDA. The opportunity to consider this issue exhaustively has yet to arise in Australia. The American courts have had that opportunity, but demonstrate that there is more than one way of approaching the issue of perceived or imputed disability.

However, an adoption of the narrow application of the 'perceived disability' theory by Australian courts should be avoided. This is not because of the arguments which Dunworth made in regard to statutory interpretation when

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Until that time, the concept of imputed impairment was limited by the words of s. 66A (inserted by the *Equal Opportunity Amendment Act* 1988) to situations where the individual actually was disabled. A person could be discriminated on the ground of 'a characteristic that is generally imputed to persons having the same impairment as the aggrieved person.' (sub-s. (1)(c)).

61 Fn. 57 at 79,478.

62 See fn. 60.

she criticised the *Cassista* decision,[63] but simply on the basis that it is illogical that, in order to successfully argue a case of imputed disability discrimination, the complainant must be impaired in some way. The focus in such cases should rest upon the perception of the discriminator, not the health of the discriminatee. The adoption of a wide approach to the imputation of disability would be in pursuance of the objects of the DDA, namely, 'to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community'.[64] To sanction inappropriate prejudices and stereotypes only when they are applied with accuracy by the discriminator, but to turn a blind eye when they are employed erroneously is hypocritical and sends an inconsistent message to the community about the unacceptability of discriminatory behaviour.

5. Further Considerations

Despite all of the foregoing, it may well be that disability discrimination legislation is not the answer to the problem of society's prejudice against obesity. The complainants in the cases examined - both American and Australian - were reluctant to be classified as unhealthy or unfit just because they were obese. They were, in effect, saying that they were not disabled - yet they were obliged to rely on the disability discrimination legislation or be unprotected. The difficulty, then, which they faced in arguing that obesity *per se* was a disability, was painfully apparent, and despite ongoing medical research in the area, it would seem that the law will be some time in recognising obesity as an actual impairment.[65] There is the *obiter dicta* from *Cox's* case which suggests that particularly severe obesity may fall within the existing definitions of 'impairment', but that brings to mind the

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63 Fn. 32. These arguments do not apply in regard to the DDA because it gives an exhaustive definition of 'disability'.

64 DDA, s. 3(c). By way of example, in the case of *Waters v. Public Transport Corporation* (1991) 103 ALR 513 at 524, Mason CJ and Gaudron J preferred a reading of the Victorian *Equal Opportunity Act* 1984 which was 'more apt to secure the attainment of the statutory objects'. The application of such a purposive approach would seem entirely appropriate in determining the position of perceived disability under Australian law.

65 However note Convy's belief that the 'meaning of "disability" will be continually explored, both judicially and legislatively, and the term may come to include many classes of people who are currently unprotected'. Convy, C., 'Civil Rights' (1993) 21 *Pepperdine Law Review* 271 at 276.

problem of providing redress for 'the morbidly obese, [while] there is no protection for other overweight people.'[66] The lack of protection for 'other overweight people' stems from a distinct failure on their part to show that they are disabled.

It is to these people that the 'perceived disability' theory presents a picture of hope. By showing that they are perceived as disabled they receive the protection they would be entitled to if they were actually impaired. This, however, raises concerns about the misuse of legislative protection originally extended to those in real need of equality of opportunity due to actual disability. 'Others have expressed the view that if there is a significant increase in claims filed based on more and more dubious circumstances, the public will become more cynical and protection for the truly vulnerable and disadvantaged may be in jeopardy.'[67]

As it is, 'perceived disability' is seen as the only means to combat the real basis of discrimination against overweight people - their appearance[68] - which is currently not protected by most anti-discrimination laws.[69] For persons outside Victoria and unable to take advantage of that state's prohibition of 'physical features' discrimination, the DDA remains their best option. But as several commentators have pointed out, this legislation leaves the way open for employers to refute 'perceived disability' discrimination claims by saying that they realize the obese person is healthy but 'they simply perceive her as a fat-and-ugly person whom they do not wish to hire'.[70] Ultimately, the only way to avoid this kind of behaviour is with the passage of legislation confronting appearance discrimination directly.

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66 Smith, S., Executive Director of the National Association to Advance Fat Acceptance, quoted in Martin, fn. 22 at n.1.

67 Martin, fn. 22 at 140.

68 Martin, fn. 22; Passaglia, C.T., 'Appearance Discrimination: The Evidence of the Weight' (1994) 28 *The Colorado Lawyer* 341.

69 See 'Facial Discrimination: Extending Handicap Law to Employment Discrimination on the basis of Physical Appearance' (1987) 100 *Harvard Law Review* 2035.

70 Arrigo-Ward, M.J. 'No Trifling Matter: How the Legal System supports Persecution of the Obese' (1995) 10 *Wisconsin Women's Law Journal* 27 at 58. See also, Byers, fn. 16 at 411.

6. Conclusion

While the medical researchers continue to debate the causes of obesity, lawyers would be best advised not to follow the scientific discussion, which presumably will not resolve the matter finally in all cases due to the relevance of other factors.[71] Rather, the law should concern itself with the basis of the discriminating act - is it because the individual is perceived as being disabled or merely unsightly? If the latter only, then the DDA is a clumsy, and perhaps inappropriate, means of redress. However, the discrimination may occur for both reasons or be solely related to disability. It is for these cases that the 'perceived disability' theory should be available - regardless of the complainant's actual physical or mental condition - and a complaint brought in such a situation is an entirely legitimate application of the protective provisions of the DDA. This not only provides redress for those individuals who are discriminated against due to the ignorance of others, but it promotes a sense in the community that disability discrimination is unacceptable whether the individual concerned is impaired or not.

[71] Paul & Howard, fn. 10 at 342; Dunworth, fn. 14 at 544.