

Has the Full Federal Court removed rights for persons accompanied by Assistance Animals and Guide Dogs?

**Re; The State of Queensland (Queensland Health) v. Che Forest
[2008] FCAFC 96 (6 June 2008)**

On 6 June 2008 the Full Federal Court, by a two to one majority¹, reversed the decision of Collier J. in the Federal Court in a decision delivered 22 June 2007 finding that the State of Queensland had unlawfully discriminated against Mr Forest by not allowing Mr Forest to attend the Cairns Base Hospital and Smithfield Community Health Centre (to obtain dental treatment) accompanied by his assistance animals².

The Facts

Mr Che Forest resides in the Cairns region. He has an unusual mental illness characterised as an anti-social/personality disorder. He exhibits erratic behaviour making it difficult for him to communicate and present him in public. Mr Forest approximately 10 or 11 years ago trained a border collie/kelpie dog named “buddy” to accompany him in public. Soon Mr Forest went everywhere in public with buddy, providing him with the confidence to venture in public. As Buddy neared the end of his working life, Mr Forest trained a boxer named “Knuckles” to take over the role of his assistance animal. Mr Forest formed an organization to train assistance animals (animals to alleviate the effects of a disability other than a guide dog for a person with a visual or hearing disability).³

On 16 November 2004 Mr Forest was refused entry to the Cairns Base Hospital in the accompaniment of his dog Knuckles. On 17 November 2004, and on three subsequent occasions early in 2005, Mr Forest was further refused entry to the Smithfield Community Health Centre for dental treatment when accompanied by both Buddy and Knuckles. Mr Forest brought his discrimination complaint as two complaints pursuant to the 1992 Commonwealth Disability Discrimination Act (DDA). They were dealt with together⁴.

Mr Forest was restricted to reliance upon Federal disability discrimination legislation (DDA) as the 1991 Queensland Anti-Discrimination Act (ADA) does not apply to his particular situation. The dictionary provided in the first schedule of the ADA defines “guide dog” as having the meaning given to it by section 3 of the Guide Dogs Act of Queensland (1972)⁵. Section 3 of the Guide Dogs Act of Queensland (1972) defines “guide dog” to have the following exclusive meaning, “*means a dog trained at an approved institution and used as a guide by a blind person or as an aid by a deaf person*”⁶.

¹ State of Queensland (Queensland Health) v. Che Forest [2008] FCAFC 96 (6 June 2008) Emmett and Spender JJ for Black CJ in dissent

² Forest v. Queensland Health [2007] FCA 936

³ Forest v. Queensland Health [2007] FCA 936 per Collier J. at paragraphs 11-20

⁴ Forest v. Queensland Health [2007] FCA 936 Collier J. paragraphs 1-20

⁵ Anti-Discrimination Act of Queensland (1991) schedule/ Dictionary commencing p129

⁶ Guide Dogs Act (Queensland 1972) section 3 definitions

Section 9 of the DDA is in wider terms than the ADA and is applicable throughout Australia and is in the following terms:- “*Guide dogs, hearing assistance dogs and trained animals,*

- (1) *For the purposes of this Act a person (discriminator) discriminates against a person with:*
- (a) *a visual disability; or*
 - (b) *a hearing disability; or*
 - (c) *any other disability;*
- (Aggrieved person) if the discriminator treats the aggrieved person less favourably because of the fact that the aggrieved person possesses or is accompanied by;*
- (d) *a guide dog;*
 - (e) *a dog trained to assist the aggrieved person in activities where hearing is required or because of any matter related to that fact; or*
 - (f) *any other animal trained to assist the aggrieved person to alleviate the effects of the disability,...*⁷

Queensland Health had a policy allowing guide dogs for a person with a visual disability and assistance animals for a person with a hearing disability to enter their facilities but prior to the initial refusals of Mr Forest with his animals did not have an assistance animal’s recognition policy. A policy was subsequently developed enabling Queensland Health full discretion to allow or deny access to their facilities for a person with an assistance animal.

Findings of Collier J. in the Federal Court;

Collier J. found that:

- (1) Mr Foster had a disability within the meaning of section 4 of the DDA as his anti-social personality disorder affected thought processes, emotion, judgement or resulted in disturbed behaviour⁸.
- (2) The complaint of indirect discrimination pursuant to section 6 of the DDA was made out as it was unreasonable to impose the hospital policy to enable the respondent within it’s own discretion to assess whether an animal is an assistance animal as there are no objective criteria that Mr Forest could utilize to determine if he would be allowed to enter the respondent’s facilities with his dogs.⁹
- (3) Section 9 was an independent discrimination section not requiring direct or indirect discrimination to be established.¹⁰
- (4) Section 9 of the DDA was also established as Mr Forest’s dogs were not ill behaved and they were trained to alleviate the effects of Mr Forest’s disability within the meaning of section 9(1)(f) of the DDA.¹¹

Findings of the Full Federal Court;

The State of Queensland Appealed with the matter being heard over one day in January 2008 by Spender, Emmett JJ and Black CJ. Emmett and Spender JJ

⁷ Section 9 Disability Discrimination Act (Commonwealth 1992)

⁸ Definition of disability Discrimination Act (1992 Commonwealth) and paragraphs 30-40 Collier J. Forest v. Queensland Health [2007] FCA 936

⁹ Forest v. Queensland Health [2007] FCA 936 at paragraphs 65-85

¹⁰ IBID paragraphs 26-30

¹¹ Forest v. Queensland Health [2007] FCA 936 paragraphs 89 to 128

delivered a joint judgement, hence, forming the majority of the court. Emmett and Spender JJ found:

- (1) That Collier J. had incorrectly applied the requirements of section 6 of the DDA (indirect discrimination) to the facts. Collier J. had not indicated what proportion of persons with Mr Forest's disability could not meet the term or indeed how Mr Forest could or could not meet the term as well as the percentage of persons in Mr Forest's group who would use an assistance animal, the proportion of persons in the base group without Mr Forest's disability who could comply with the term.¹²
- (2) For discrimination to be established pursuant to section 9 of the DDA it was insufficient for the less favourable treatment to be on the grounds that Mr Forest was accompanied by an assistance animal. It was also necessary to establish that the less favourable treatment, the exclusion from the Cairns Base Hospital and Smithfield's Community Health Centre was on the grounds of his psychiatric disability and this could not be established. Paragraph 115 of the joint judgement of Emmett and Spender JJ. States:

*“While it may be that Queensland Health discriminated against Mr Forest within the meaning of section 9(1), because it treated him less favourably because of the fact that he was accompanied by his dogs, it did not do so on the ground of his psychiatric disability... Queensland Health did not discriminate against Mr Forest on the grounds of his disability even though it may have discriminated against Mr Forest within s. 9 of the Act. It follows that there was no unlawful conduct on the part of Queensland Health.”*¹³

Black CJ disagreed with the majority treatment of section 9 of the DDA. He did not find that there should be an additional requirement for section 9 to find the less favourable treatment must also be on the grounds of the aggrieved person disability. This would disadvantage a person not being admitted into a taxi or a building with a guide dog.¹⁴ Black CJ would have referred the matter back to the trial judge to ascertain if the less favourable treatment was because the dogs were dangerous or if they were assistance animals.

Implications of the Full Federal Court decision

It is respectfully submitted that the majority reasoning leads to absurd and unwanted consequences. It will have the effect of denuding section 9 of the DDA of much of its effect. Absurd consequences will result. In 2006 the Federal Disability Discrimination Commissioner, Mr Graeme Innes in Perth was refused entry into a taxi on two occasions in the same day. Graeme Innes AM is a person who is blind and uses a guide dog to assist with mobility. It is highly unlikely that Mr Innes was refused entry into the taxi because of his visual disability; it would be due to the accompaniment of his guide dog. Ms Haar was not refused access to the inside tables in a McDonalds Restaurant because she was a person who had a visual disability but rather because she was accompanied by her guide dog.¹⁵ Colin McNamara was not refused accommodation in a motel in Cleveland until he

¹² State of Queensland (Queensland Health) v Che Forest [2008] FCAFC 96 (6 June 2008) paragraphs 119-122

¹³ Ibid Spender and Emmett JJ paragraph 115

¹⁴ Ibid per Black CJ at paragraph 25

¹⁵ Haar v. Maldon Nominees [2000] FMCA 5 (23 October 2000)

disclosed that he was a person who is blind and would be accompanied by his guide dog¹⁶

It is respectfully submitted that the majority of service providers or accommodation providers would not even be aware that a person has a visual, hearing or other disability without the presence of the guide dog or assistance animal. It is the presence of the guide dog or assistance animal that leads to the denial of the service.

There are legislative gaps in the drafting of section 9(1)(f) of the DDA. These were noted by Collier J. in the last three pages of her decision.¹⁷ Section 9(1)(f) is in very general terms. It does not specify the level of training for the assistance animal, who should provide the training, is an institution required for such training, how can a service provider objectively ascertain that an assistance animal is indeed an assistance animal. Any animal including a dingo could be an assistance animal pursuant to section 9(1)(f) of the DDA. Section 9(1)(f) of the DDA may have the effect of devaluing the status of a guide dog for a person with a visual disability. The majority of the Full Federal court may have had this in mind through their interpretation. Unfortunately this appears to have gone too far. Although the ratio of this decision may be restricted to an interpretation of section 9 of the DDA only regarding assistance animals as this was the subject matter of the case, the proposals of the majority were much wider. They applied their “on the grounds of the aggrieved person’s disability test” to all portions of section 9 and by implication to section 7 and 8 of the DDA dealing with the provision of palliative Aids and interpreters and readers for persons with disabilities.¹⁸

The clear words in section 9 of the DDA bespeak a simple three-step process for its application. This is:-

- (1) Ensure that the aggrieved person has a disability within the meaning ascribed in section 4 of the DDA.
- (2) Identify that the aggrieved person is accompanied by a trained guide dog or trained hearing dog or an assistance animal that is trained to alleviate the effects of a disability (other than a visual or hearing disability).
- (3) Determine if the less favourable treatment is because the aggrieved person is accompanied by a guide dog or assistance animal.

The legislature did not see fit to place an additional requirement that, once those three steps are met, one should then check that the less favourable treatment was on the grounds of the disability, as provided in section 5 of the DDA.¹⁹

This is an example where it may be appropriate to apply a short form of syllogistic reasoning. The aggrieved person maintains a guide dog or assistance animal in their company only because of his or her disability and a need to attenuate the effects of impairment. It is the fact of the presence of the guide dog or assistance animal that triggers the less favourable treatment. Therefore, it is because of the disability that the less favourable treatment has occurred. This would be similar to

¹⁶ *McNamara v. Golonaise Pty Ltd and James* [2006] QADT 7 (22 March 2006)

¹⁷ *Forest v. Queensland Health* [e2007] FCA 936 per Collier J at paragraphs 173-176

¹⁸ Disability Discrimination Act (Commonwealth 192) sections 7 and 8

¹⁹ Disability Discrimination Act (Commonwealth 1002) section 5

stating that an employee was not dismissed because of their epilepsy but because of his or her seizure. It is only because of the epilepsy that a seizure occurred.

It is likely that the reasoning of the majority of Spender and Emmett JJ in *Forest* will have the greatest impact on complaints of *direct* discrimination (where the person has been refused access to the restaurant or taxi because of their guide dog or assistance animal). Complaints of *indirect* discrimination in this area²⁰ provided that the requirements of section 6 of the DDA are correctly applied. It is however the complaints of direct discrimination that are nearly entirely removed by the majority reasoning in *Forest*. Those cases of direct discrimination were amongst the most obvious cases of discrimination and were once the most difficult to defend. What will the future hold in this area?

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²⁰ *Sheehan v. Tin Caqn Bay Country Club* [2002] FMCA 95 (9 May 2002)