

Report of inquiry into a complaint of discrimination in employment and occupation

Discrimination on the ground of trade union activity

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Introduction

This is the third report to the Attorney-General on inquiries by the Human Rights and Equal Opportunity Commission (the Commission) into complaints of discrimination and violations of human rights under the *Human Rights and Equal Opportunity Commission Act 1986* (the Act).

In 1989 the *Human Rights and Equal Opportunity Commission Regulations* declared a number of additional grounds of discrimination for the purposes of the Act with effect from 1 January 1990.¹ These additional grounds relate to the International Labour Organisation *Discrimination (Employment and Occupation) Convention 1958* (ILO 111). The subject of my earlier reports, age discrimination, is one of those grounds. The subject of this report, discrimination based on trade union activity, is another.

The rights of workers and employees to establish, join and participate in trade union activity without interference and discrimination are recognised in a number of international treaties including the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, *ILO Convention (No.87) Concerning Freedom of Association and Protection of the Right to Organise* 1948 and *Convention (No.98) Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively* 1949. Discrimination on this ground is also prohibited in *Convention (No.135) Concerning Protection and Facilities to be Afforded to Workers Representatives in the Undertaking* 1971 and *Convention (No.151) Concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service* 1978. Protection against discrimination on the ground of trade union activity under these instruments also includes protection against discrimination for not joining or participating in these activities.

1 SR 1989 407, notified in the Commonwealth of Australia Gazette on 21 December 1989. See Appendix C.

The declaration of this ground under the Act promotes and protects the basic human rights of freedom of association and to form and join trade unions. Anti-discrimination laws in Victoria, Queensland, Western Australia, the ACT and the NT also prohibit discrimination on the ground of trade union activity or the related grounds of political belief or industrial activity. New South Wales is considering coverage. The State and Territory laws make this discrimination unlawful and provide an enforceable right to compensation for victims of this form of discrimination.

Under the federal Act, however, this discrimination is not unlawful and there is no enforceable remedy. Complaints may be made to the Commission which will attempt to conciliate them. If these attempts are unsuccessful and discrimination is found, recommendations for compensation and changes to policies and practices can be made but there is no mechanism for enforcement. The only step is to report to the Attorney-General who is required to table the report in parliament. That is the basis of this report. This is the first case where, having reached these final stages, the respondent has accepted my recommendation for the payment of compensation to the complainant. I welcome this response and congratulate the respondent, Australia Post, on it.

In previous reports to the Attorney-General I have recommended the enactment of comprehensive national laws to prohibit discrimination on the ground of age to resolve inadequacies in the federal legislation. This need extends to all grounds specified in or under ILO 111 that are not already the subject of more effective federal legislation.² In addition to trade union activity and age the grounds include religion, political opinion, social origin, medical record, criminal record and sexual preference. I consider that the time has come for the enactment of comprehensive federal anti-discrimination law to ensure effective protection from discrimination on any prescribed ground in or under ILO 111 through enforceable remedies.

The complaint: Kong v Australia Post

Summary

Outline of complaint

The Commission received a complaint under s.31(b) of the *Human Rights and Equal Opportunity Commission Act 1986* from Ms Shirley Kong early in 1995.³

The complainant alleged discrimination by Australia Post on the ground of trade union activity as defined in the Act.

Attempts to conciliate the complaint were unsuccessful and the Commission took written and oral submissions from each of the parties.

The complainant submitted, in summary, that her participation in trade union activities as Women's Liaison Officer was improperly taken into account by employees of the respondent in assessing her application for promotion.

The respondent submitted, in summary, that Ms Kong was unsuccessful in her application for promotion for reasons other than her trade union activity.

² See the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984* and the *Disability Discrimination Act 1992*.

³ The Commission's functions to inquire into acts and practices that may be inconsistent with or contrary to any human right or that may constitute discrimination are described in Appendix A.

Findings and recommendation

On 17 April 1997 I issued notice of my findings and recommendations in relation to the complaint under s.35(2) of the Act.

I found that the complainant, Ms Kong, suffered discrimination in employment within the terms of the *Human Rights and Equal Opportunity Commission Act 1986* because her work as Women's Liaison Officer was taken into account improperly in assessing her application for higher duty as a Senior Mail Officer. I found therefore that the act complained of was based at least in part on the complainant's trade union activity. I did not find, however, that she was denied promotion solely because of this improper consideration of her trade union activity.

I recommended that the respondent, Australia Post, pay the complainant, Ms Kong, the sum of \$2000 as compensation for injury suffered as a result of the discrimination.

The respondent's reply

Under section 35(e) of the Act I am required to state in my report to the Attorney-General whether the respondent has taken or is taking any action as a result of the findings and recommendations.

In response to the recommendations Australia Post has advised the following

Australia Post has noted the finding of the Commission that the complainant, Ms Kong, suffered discrimination in employment in that her role as Women's Liaison Officer was taken into account improperly in assessing her application for a position as a Senior Mail Officer.

As the Commissioner is aware from the submissions of Australia Post, Mr Ferros and Mr Lamendola, the managers who spoke to Ms Kong and whose comments and decisions Ms Kong alleges were discriminatory, have denied that Ms Kong's role as Women's Liaison Officer was taken into account in their assessment of her suitability for the position. Australia Post investigated this matter following Ms Kong's complaint to the Commission, and submitted statements from the managers as to their position.

Australia Post supports its managers' assertion that Ms Kong's trade union activities were not taken into account in assessing her suitability for the position. Notwithstanding this view, in the interests of settling this matter we accept the Commissioner's finding and the recommendation that the sum of \$2000 be paid to Ms Kong as compensation for injury suffered as a result of the discrimination. Arrangement will be put in place to facilitate payment to Ms Kong.

As the Commissioner is aware, Australia Post has in place a policy on workplace harassment and discrimination, a copy of which is attached to this letter. This policy is rigorously applied, and all staff are required to attend information sessions on the meaning and application of the policy. This training is carried out regularly, and procedures are in place for staff alleging harassment and discrimination to seek the assistance of management. We will continue to enforce the policy to staff in an effort to ensure a workplace free from discrimination and harassment.

Reasons for the decision

The nature of the complaint

On 8 November 1994 Ms Shirley Kong complained to the Victorian Equal Opportunity Commission of discrimination in employment based on trade union activity. Because her employer was a federal

authority, Australia Post, the complaint was referred to the Commission at Ms Kong's request early in 1995. It was accepted under s.32 of the Act.

The complainant has been employed by Australia Post since 1986. In October 1994 she was a Mail Officer at the International Mail Centre in Melbourne. She applied for higher duties as a Senior Mail Officer Grade 2. She was unsuccessful in her application, being ranked 62 out of 78 applicants and being assessed as not yet suitable for promotion to Senior Mail Officer. She states that in discussions afterwards on 14 October 1994 with Mr Con Ferros and Mr Vincent Lamendola, two members of the selection panel, she was informed that she was not promoted because she needed to show a higher commitment in the area of leadership skills and that on several occasions she had left staff to participate in union activities and attend meetings on equal employment opportunity. She alleges that she was told that she needed to determine what her priorities were, the union or promotion. She complains that in assessing her application for promotion standard selection procedures were not followed by the selection panel as trade union activities were introduced into the assessment. She also complains that she informed the relevant managers in Australia Post about the matter but that no action was taken to address her concerns.

The respondent's response

Australia Post denies that trade union activities were considered in the selection process.

Conciliation

Attempts at conciliation were unsuccessful.

Submissions and evidence

As a result of inquiries and investigation into this complaint I formed the preliminary opinion that Australia Post had discriminated against Ms Kong on the basis of trade union activity.

Pursuant to sections 33 and 27(a) of the Act, I invited Australia Post to make submissions orally or in writing or both in relation to the Ms Kong's complaint. Australia Post elected to make oral submissions and further written submissions in addition to its written submissions made earlier in the inquiry. As a matter of procedural fairness Ms Kong was also invited to participate in the process.

On 17 October 1996 I convened the inquiry in Melbourne. I took evidence from Ms Kong and witnesses both on her behalf and on behalf of Australia Post. I also heard oral submissions from Ms Kong and from Australia Post.

The basis of the findings and recommendations

Issues to be determined

Clearly Ms Kong was employed by Australia Post and the decision of the selection panel was an act within the terms of the Act. The only issues for determination therefore were

- whether the decision of the selection panel concerning Ms Kong was based on her trade union activity
- if so, whether the decision was a distinction that nullified or impaired her equality of opportunity and
- if so, what injury Ms Kong suffered as a result of the decision.

Was the decision based on trade union activity?

Ms Kong must establish that the treatment she experienced was a consequence of a distinction based on trade union activity. She does not have to prove that her trade union activity was the sole reason for the decision of the selection panel. Rather she has to establish that the trade union activity was a factor in the panel's decision.

In her evidence Ms Kong said that she was women's liaison officer at her workplace. She said that she was active in this role to the point of incurring some hostility from her supervisors and others at the International Mail Centre because of her diligence in raising and pursuing issues of concern to women workers there.

1. Conversations with members of the selection panel

On 14 October 1994 after the selection process was completed Ms Kong spoke to two members of the selection panel, Mr Ferros and Mr Lamendola, in the training room at the International Mail Centre. She said that they told her to "see what your priorities are, union or promotion".

In evidence before the Commission, Ms Kong described the conversation in greater detail. She said that she asked Mr Ferros and Mr Lamendola what they meant in saying that she needed to be fully committed. She said one of them replied

Oh, that is because you involved with union activities. We don't like it ... Because you're women's liaison officer is not suitable to be in the high duty, to act on high duty, because you're involved with union activities. Some time you will get a phone call if we guess that you SMO (senior mail officer). This is very inconvenient. Maybe some time the union ring you, you might leave your job. We don't like it. Maybe some woman need you. You will leave your job. We don't like it.

Ms Kong said she asked why there were already some Senior Mail Officers who held union positions. She said that Mr Lamendola replied

Because they are already SMO. We can't do anything about it. You haven't been accepted. You only acting. We can do something about it. If you want to be promotion or you want to be liaison officer, is up to you. You have to choose which one you prefer. If you want to be women's liaison, you will never be, get accepted. If you want to be SMO you have to resign as a woman liaison officer and fully commit yourself in the higher duty.

Ms Kong said that she told two other employees, Mr Patrick Leneghen and Mr Adrian Zelesco, about this conversation and that they had accompanied her at a further conversation in which Mr Ferros and Mr Lamendola reiterated their views. Mr Leneghen and Mr Zelesco provided written statements to the Community and Public Sector Union at the time of the events. They also provided written statements to the Commission and gave evidence at the hearing. Their statements to the union express "serious concern" that trade union activity had been taken into account in Ms Kong's assessment. They refer in these statements to their conversation with Mr Ferros and Mr Lamendola.

Before the Commission Mr Leneghen said

I didn't actually believe that two senior supervisors of Australia Post would make the statements that Shirley alleged that they did. So after Shirley approached me for advice, and you have a written document to that effect, I actually asked Con, Con Ferros and Vince Lamendola, who are approachable people, and asked them did they actually say that and they actually both

confirmed that the above interpretation is to be correct and that they could see no problem with it.

Mr Leneghen expanded on his recollection of this conversation.

THE COMMISSIONER: What did you say to them that Shirley said to you that they agreed with?

MR LENEGHEN: “Did you say that Shirley didn’t get promoted because of her women’s liaison officer activities and that she had to choose between one and the other?”

THE COMMISSIONER: And they said?

MR LENEGHEN: “Yes, and we see nothing wrong with that.” I said, “Well,” I said, “You erred.”

Later Mr Leneghen was asked again about this conversation.

THE COMMISSIONER: ... could you tell me again? What did you actually say to the two of them together?

MR LENEGHEN: “Shirley has come up to me and said this is what you’ve told her on why she didn’t receive the high marks in her assessments.” I would have said something like, “You didn’t say that, did you?” and they said, “Yes, we did. What’s the problem?” and I said “Well, that’s – what’s all this? That’s contrary to everything I know about Australia Post.”

In his evidence Mr Zelesco told the Commission

I actually heard Vince Lamendola telling Shirley that she would have a better chance of promotion if she resigned or she didn’t continue as the women’s liaison officer.

Mr Zelesco said that Ms Kong was told that she was not

up to scratch because she spends other time on other duties and if she – she would have a better chance if she relinquished her liaison officer job.

He said that Mr Lamendola had explained the assessment to Ms Kong and

Con Ferros was in full agreeance ... he didn’t argue the point or change the story or have a different view; he was in agreeance.

Australia Post presented a statement signed by Mr Lamendola and Mr Ferros. They denied the allegation that Ms Kong was denied higher duties because of her trade union activities. Their statement said

Our view - as documented in our debriefing paper was that Ms Kong “needs to display a higher commitment” to one of the main tasks of a SMO - specifically leadership skills. ... On several occasions when in charge of a work group Ms Kong neglected her SMO duties in favour of other pursuits.

It is our strong belief that these other pursuits are strictly irrelevant to the assessment of staff pursuing higher duties as a SMO. That these pursuits involved Shirley’s commitments to “trade union” activities – specifically Women’s Liaison Officer and Harassment Contact Officer is beside the point...

In our role as assessors of staff suitable for promotion to SMO it is not that trade union activity and team leader are mutually exclusive activities. It is our contention however that Ms Kong has disadvantaged herself by behaving as if they are.

Australia Post did not call Mr Lamendola and Mr Ferros to give oral evidence, either to be cross-examined on their written statement or to refute what other witnesses had said about the conversations on 14 October. Ms Taft, Australia Post's legal adviser for Victoria, advised the Commission that they had both left Australia Post. I indicated to the representatives of Australia Post that the Commission had Ms Kong's account of what had occurred and corroboration from two other persons who had had personal discussions with Mr Ferros and Mr Lamendola. In the absence of those two persons I thought that Australia Post had difficulty in disputing Ms Kong's version of events. I asked whether Australia Post wanted to adjourn the proceedings to enable the two former employees to be called to give evidence. After considering this suggestion during a brief adjournment Ms Taft for Australia Post advised

[W]e don't think there's any point served in bringing them in to argue the statement when we understand from them that they accept the complaint as being accurate in terms of what was said and then they clarified it by what they meant in their statement.

Under the circumstances therefore the accounts given by Ms Kong, Mr Leneghen and Mr Zelesco of the conversations with Mr Ferros and Mr Lamendola were not challenged as to their fundamental content and I accept them as substantially correct.

2. Ms Kong's performance as women's liaison officer

Australia Post sought to explain the comments made by Mr Ferros and Mr Lamendola in terms of dissatisfaction with how Ms Kong performed in her role as women's liaison officer.

A significant part of the concern was Ms Kong's alleged propensity to leave her operational position without advising her supervisor. Mr Chris Butteriss, manager of the International Mail Centre, said

From the time I commenced in early 94 at the International Mail Centre I received reports of problems with regards to Shirley being absent from her working position ... Every supervisory person who came in contact with Shirley has had a problem with her being absent from her working position; not that she is absent but the fact that she has not informed anybody that she was absenting herself and, as I said, that has occurred with every single supervisory person.

Mr Butteriss referred to several incidents in which he alleged that Ms Kong had left her position without informing her supervisor that she was doing so. Ms Kong denied this and, when asked whether she knew of these concerns, she said that she did not. Mr Butteriss, however, said in response to a question from Ms Kong

I have had discussions with you myself. I have had discussions with you in the presence of a number of supervisory officers who have had the same problem and the same situation each time has been on the time when you want to leave the operational area, that you remind your supervisory officer of what you're doing.

Ms Kong said that Mr Butteriss had never raised the issue with her, that it had never been raised with her by her supervisors and that she had never been involved in a meeting with either Mr Butteriss or her supervisors where it had been suggested, formally or informally. Mr Leneghen in his evidence said that he had not heard any concern expressed about Ms Kong leaving her position until twelve months after the events. Mr Zelesco said that Mr Ferros and Mr Lamendola had not raised the issue but that he had some recollection of Mr Butteriss having done so at some time.

Ms Dianne Mawby, Australia Post's human resources consultant in the letters business unit, responded to comments from Ms Kong before the Commission

... the point that I'm trying to make is that you were absent from the floor on numerous occasions to ring me personally. I know you were because I spoke to you. All right, you came to see me on occasions. Now, I don't know that you spoke to your supervisors about those absences.

Ms Kong replied that she had.

Mr Leneghen and Mr Zelesco provided an alternative interpretation of alleged hostility towards Ms Kong. They spoke of her raising strongly and repeatedly issues of concern to women at the International Mail Centre. Mr Leneghen said

... in the case of women's liaison officers it's a very sensitive area that she works in because she's dealing with entrenched attitudes in what some might say is male-dominated workplaces, and both the two gentlemen (Mr Ferros and Mr Lamendola) were from the same school as I was – old-fashioned school – and they found it difficult to accept that, so Shirley would have rubbed a lot of people up the wrong way because they don't want to get used that way, and some of her activities actually ... brought on two things – or helped to bring on two things – the exposing the management or work supervisors to a charge of drinking on the job.

After describing some incidents which Ms Kong had raised, Mr Leneghen said

Shirley became very unpopular with management and certain union officials and staff in attempting to, in my opinion, address some of the problems at the International Mail Centre.

Mr Zelesco told the Commission

Shirley is very thorough. Sometimes her English is not the best and she may say or make comments that are misunderstood or not understood properly by someone else. However, her intentions are good and as Pat (Leneghen) said she has ruffled quite a few feathers at the IMC because if a certain person is doing the wrong thing, or a group of people, she's not scared to say so, she – and she cops a lot of flack. She gets abused. She gets – you know, people call her names behind her back. She receives a bit of treatment for it and yet she's prepared to do it.

3. Assessment of Ms Kong's application

The evidence presented to the Commission ultimately turns not on different versions of what was said but on the proper interpretation to be placed upon it. Australia Post contends that Ms Kong was unsuccessful because of her poor work performance. Its representatives pointed to the alleged deficiencies in leadership skills. In their written statement Mr Ferros and Mr Lamendola indicate that Ms Kong was unsuccessful because she “needs to display a higher commitment to leadership to one of the main tasks of a SMO - specifically leadership skills”.

Although Ms Kong was rated poorly on the “leadership skills” criterion (8 out of 20) it was not her lowest score. In fact she was rated lower on “problem solving – judgement” (5.7 out of 15) and on technical knowledge (3.5 out of 10). Yet nothing was made of these deficiencies in the conversations Ms Kong, Mr Leneghen and Mr Zelesco had with Mr Ferros and Mr Lamendola, in the written statements to the Commission or in oral evidence and submissions to the Commission. The decision makers appear to have been pre-occupied throughout with Ms Kong's performance, including her

performance of her functions as women's liaison officer, and to have attached little importance to her perceived unsuitability on other grounds.

4. Finding

Clearly some staff at the International Mail Centre had difficulty working with Ms Kong. The evidence establishes that there were personality clashes, disputes as to complaints raised by Ms Kong as Women's Liaison Officer and tension with her supervisors about the ways in which she performed her role. However, the evidence also establishes that these issues were not brought out explicitly in the conversations after the selection process was completed but rather that the focus was on Ms Kong having to choose between promotion and continuing in her liaison role.

Having heard the evidence and submissions and considered written statements I am satisfied that members of the selection panel were pre-occupied by Ms Kong's work as women's liaison officer in assessing her application for higher duty as a senior mail officer. I find therefore that their decision was affected at least in part by improper consideration of her trade union activity.

Did the distinction nullify or impair equality of opportunity?

The Act requires that for discrimination to be found the complainant must show that the distinction, exclusion or preference has had the effect of "nullifying or impairing equality of opportunity or treatment". Having found that the assessment of Ms Kong's application was affected by her trade union activity I must now consider whether this distinction has nullified or impaired her equality of opportunity.

Ms Kong was entitled to have her application determined according to the selection criteria for the position and on no other basis. Taking into account impermissible criteria such as trade union activity may not nullify equality of opportunity but it certainly impairs it. Whether the applicant would have been successful had assessment not been affected by the impermissible criteria is an issue that goes to the injury suffered, not to the question whether equality of opportunity was nullified or impaired. The fact is that Ms Kong was not treated as she was entitled to be treated.

I find that the decision impaired Ms Kong's equality of opportunity.

What injury was suffered as a result of the discrimination?

In considering what, if any, injury Ms Kong suffered as a result of the discrimination I have to consider, among other things, whether she would have been successful or significantly more successful in her application had the improper ground not been taken into account.

Following the selection process Ms Kong appealed to the Australia Post Promotions Appeals Board. The Board is an independent body with an external chairman, one member nominated by Australia Post and one member nominated by the union. The Board disallowed Ms Kong's appeal.

Following the selection process in October 1994 Ms Kong made two further applications for promotion, one in 1995 and another in 1996. On both occasions she was again unsuccessful. On both occasions she appealed to the Board. Both appeals were disallowed. Finally later in 1996 Ms Kong applied once more and was successful in achieving a higher ranking, 3 out of 55 applicants. She continued to act as Women's Liaison Officer throughout this time. Australia Post said she did so with its support.

There were no allegations and no evidence of any discrimination in the later selection processes. Because of this later history I must conclude that Ms Kong would not have been successful in her

application in October 1994 if there had been no improper discrimination. Although, as I have found, her trade union activity was improperly taken into account, her application did not fail for that reason.

Ms Kong did suffer injury, however. Her evidence indicated the distress and embarrassment she felt because of the discrimination. She described being “very upset” at the time. I was satisfied from her evidence that she had experienced some emotional harm. However the compensation that I should award will be small as the discrimination did not affect her promotional opportunities and did not of itself cause lasting injury.

Notice of findings of the Commission

The Commission finds that the complainant, Ms Kong, suffered discrimination in employment within the terms of the *Human Rights and Equal Opportunity Commission Act 1986* because her work as Women’s Liaison Officer was taken into account improperly in assessing her application for higher duty as a Senior Mail Officer. I find therefore that the act complained of was based at least in part on the complainant’s trade union activity.

The Commission recommends that the respondent, Australia Post, pay the complainant, Ms Kong, the sum of \$2000 as compensation for injury suffered as a result of the discrimination.

Appendix A: Functions of the Human Rights and Equal Opportunity Commission

The Commission’s functions

The Commission has specific legislative functions and responsibilities for the promotion of human rights and the elimination of discrimination under the Act. In particular the Commission is conferred with functions to inquire into acts or practices that may be inconsistent with or contrary to any human right or that may constitute discrimination - s.11(1)(f) and s.31(b).

The Commission is also conferred with functions

- to promote an understanding, acceptance and public discussion of human rights and equality of opportunity and treatment in employment and occupation in Australia – s.11(1)(g) and s.31(c)
- to advise on laws that should be made by the Parliament or action that should be taken by the Commonwealth on matters relating to human rights and equality of opportunity and treatment in employment and occupation – s.11(1)(j) and s.31(e)
- to advise on what action, in the opinion of the Commission, needs to be taken by Australia to comply with the provisions of the *International Covenant on Civil and Political Rights* (ICCPR) or any relevant international instrument and on matters relating to equality of opportunity and treatment in employment and occupation – s.11(1)(k) and s.31 (e).

The Act implements in part Australia’s obligations under the ICCPR and the International Labour Organisation *Discrimination (Employment and Occupation) Convention 1958* (ILO 111). Each of these instruments is scheduled to the Act. The full text of ILO 111 is at Appendix B.

The Commission's jurisdiction and complaint handling functions

Part II Division 4 of the Act confers functions on the Commission in relation to equal opportunity in employment in pursuance of Australia's international obligations under ILO 111.⁴

The Commission can inquire into complaints of discrimination in employment and occupation against any employer and attempt to effect a settlement – s.31(b) and s.32 (b).

Where conciliation is unsuccessful or is deemed inappropriate, and the Commission is of the opinion that an act or practice appears to constitute discrimination, the Commission is required to provide an opportunity to the parties to make written and/or oral submissions in relation to the complaint – s.27 and s.33.

Where, after the inquiry, the Commission finds discrimination the Commission is required to serve notice setting out the findings and the reasons for those findings – s.35(2)(a). The Commission may include recommendations for preventing a repetition of the act or practice and for the payment of compensation or the taking of any other action to remedy or reduce the loss or damage suffered as a result – s.35(2)(b) and (c).

However, it is not unlawful to breach the principles of non-discrimination protected under the Act and the Commission does not have power to enforce its recommendations. If the Commission makes a finding of discrimination it must report on the matter to the federal Attorney-General under s.31(b)(ii) who subsequently tables the report in Parliament in accordance with s.46 of the Act. This is effectively the only power which the Commission can exercise if a complaint proves to be non-conciliable.

The Human Rights Commissioner (the Commissioner) performs the Commission's function of inquiring into any act or practice that may constitute discrimination as defined by the Act – s.8(6).

Discrimination in employment and occupation

Under the Act discrimination means:

- (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
- (b) any other distinction, exclusion or preference that:
 - (i) has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
 - (ii) has been declared by the regulations to constitute discrimination for the purposes of this Act;
 but does not include any distinction, exclusion or preference:
- (c) in respect of a particular job based on the inherent requirements of the job; ...⁵

ILO 111 prohibits discrimination on certain specified grounds.⁶ Those grounds are contained in the Act in subparagraph (a) of the definition of discrimination. ILO 111 also provides that ratifying States may address discrimination on additional grounds.⁷ The Act provides in subparagraph (b)(ii)

⁴ Ratified by Australia in 1973.

⁵ S.3(1).

⁶ Art 1(1)(a).

⁷ Art 1(1)(b).

of the definition of discrimination for the adoption of regulations to declare additional grounds in accordance with this provision in ILO 111. Under this power the *Human Rights and Equal Opportunity Commission Regulations* in 1989 declared trade union activity as a ground of discrimination for the purposes of the Act with effect from 1 January 1990.⁸ (The full text of the Regulations is set out in Appendix C.)

It is an accepted principle in domestic law that where a statute contains language that derives directly from an international instrument, such as the Act does, it should be interpreted in accordance with the interpretation the language has been given at the international level.⁹ The comments of the International Labour Conference Committee of Experts on the Application of Conventions and Recommendations (the Committee of Experts) are relevant to the interpretation of the Act's definition of discrimination.

According to the Committee of Experts there are essentially three elements to the definition of discrimination in ILO 111

1. an objective factual element, being the existence of a distinction, exclusion or preference which effects a difference in treatment in comparison with another in the same situation;
2. a ground on which the difference of treatment is based that is declared or prescribed;
3. the objective result of this treatment, that is, a nullification or impairment of equality of opportunity or treatment in employment or occupation.

Further the Committee of Experts has expressed the view that “the adoption of impersonal standards based on forbidden grounds” and “apparently neutral regulations and practices [that] result in inequalities in respect of persons with certain characteristics” also constitute discrimination.¹⁰

The Committee of Experts has commented on the ILO 111 provision of “any distinction, exclusion or preference in respect of a particular job based on inherent requirements of the job”. To be an inherent requirement the condition imposed must be proportionate to the aim being pursued and must be necessary because of the very nature of the job in question. The Committee stated for example that the exception “refers to a specific and definable job, function or task. Any limitation within the context of this exception must be required by characteristics of the particular job, and be in proportion to its inherent requirements.”¹¹

The Committee of Experts has agreed that an intention to discriminate is not necessary for a finding of discrimination under ILO 111.¹²

8 SR 1989 407, notified in the Commonwealth of Australia Gazette on 21 December 1989.

9 *Koowarta v Bjelke-Petersen & Others* (1981) 153 CLR 168 at 265 (Brennan J); *Minister for Foreign Affairs and Trade & Ors v Magno and Another* (1992) 112 ALR 529 at 535-6 (Gummow J).

10 International Labour Conference, *Equality in Employment and Occupation: General Survey by the Committee of Experts on the Application of Conventions and Recommendations* ILO, Geneva, 1988, at 23.

11 *Ibid*, at 138.

12 *Ibid*, at 22.

Appendix B: International Labour Organisation Discrimination (Employment and Occupation) Convention (1958)

The General Conference of the International Labour Organisation,
 Having been convened at Geneva by the Governing Body of the International Labour Office, and
 having met in its Forty-second Session on 4 June 1958, and
 Having decided upon the adoption of certain proposals with regard to discrimination in the field of
 employment and occupation, which is the fourth item on the agenda of the session, and
 Having determined that these proposals shall take the form of an international Convention, and
 Considering that the Declaration of Philadelphia affirms that all human beings, irrespective of race,
 creed or sex, have the right to pursue both their material well-being and their spiritual
 development in conditions of freedom and dignity, of economic security and equal opportunity,
 and
 Considering further that discrimination constitutes a violation of rights enunciated by the Universal
 Declaration of Human Rights,
 adopts this twenty-fifth day of June of the year one thousand nine hundred and fifty-eight the
 following Convention, which may be cited as the Discrimination (Employment and Occupation)
 Convention, 1958:

Article 1

1. For the purpose of this Convention the term “discrimination” includes:
 - (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
 - (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employer’s and worker’s organisations, where such exist, and with other appropriate bodies.
2. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.
3. For the purpose of this Convention the terms “employment” and “occupation” include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

Article 2

Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

Article 3

Each Member for which this Convention is in force undertakes, by methods appropriate to national conditions and practice:

- (a) to seek the co-operation of employers’ and workers’ organisations and other appropriate bodies in promoting the acceptance and observance of this policy;
- (b) to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy;
- (c) to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy;
- (d) to pursue the policy in respect of employment under the direct control of a national authority;
- (e) to ensure observance of the policy in the activities of vocational guidance, vocational training and placement services under the direction of a national authority;

- (f) to indicate in its annual reports on the application of the Convention the action taken in pursuance of the policy and the results secured by such action.

Article 4

Any measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State shall not be deemed to be discrimination, provided that the individual concerned shall have the right to appeal to a competent body established in accordance with national practice.

Article 5

1. Special measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination.
2. Any Member may, after consultation with representative employers' and workers' organisations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination.

Article 6

Each Member which ratifies this Convention undertakes to apply it to non-metropolitan territories in accordance with the provisions of the Constitution of the International Labour Organisation.

Article 7

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 8

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.
2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.
3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

Article 9

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.
2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 10

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.
2. When notifying the members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 11

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

Article 12

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 13

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides:
 - (a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 9 above, if and when the new revising Convention shall have come into force;
 - (b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.
2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 14

The English and French versions of the text of this Convention are equally authoritative.

Appendix C: Human Rights and Equal Opportunity Commission Regulations

Statutory Rules 1989 No. 407

Human Rights and Equal Opportunity Commission Regulations

I, THE GOVERNOR-GENERAL of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, hereby make the following Regulations under the *Human Rights and Equal Opportunity Commission Act 1986*.

Dated 21 December 1989.

BILL HAYDEN
Governor-General

By His Excellency's Command,

LIONEL BOWEN
Attorney-General

Citation

1. These Regulations may be cited as the Human Rights and Equal Opportunity Commission Regulations.

Commencement

2. The Regulations commence on 1 January 1990.

Interpretation

3. In these Regulations, unless the contrary intention appears:
 - “**Impairment**” means:
 - (a) total or partial loss of a bodily function; or
 - (b) the presence in the body of organisms causing disease; or
 - (c) total or partial loss of a part of the body; or
 - (d) malfunction of a part of the body; or
 - (e) malformation or disfigurement of a part of the body;
 - “**marital status**” has the same meaning as in the *Sex Discrimination Act 1984*;
 - “**the Act**” means the *Human Rights and Equal Opportunity Commission Act 1986*.

Other distinctions, exclusions or preferences that constitute discrimination

4. For the purposes of subparagraph (b)(ii) of the definition of “discrimination” in subsection 3 (1) of the Act, any distinction, exclusion or preference made:
 - (a) on the ground of:
 - (i) age; or
 - (ii) medical record; or
 - (iii) criminal record; or
 - (iv) impairment; or
 - (v) marital status; or
 - (vi) mental, intellectual or psychiatric disability; or
 - (vii) nationality; or
 - (viii) physical disability; or
 - (ix) sexual preference; or
 - (x) trade union activity; or
 - (xi) one or more of the grounds specified in subparagraphs (iii) to (x) (inclusive) which existed but which has ceased to exist; or
 - (b) on the basis of the imputation to a person of any ground specified in paragraph (a); is declared to constitute discrimination for the purposes of the Act.

Note

1. Notified in the *Commonwealth of Australia Gazette* on 21 December 1989.