GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY N 1366 of 1999

BETWEEN:	THE COMMONWEALTH OF AUSTRALIA APPLICANT
AND:	HUMAN RIGHTS & EQUAL OPPORTUNITY COMMISSION FIRST RESPONDENT
	ANDREW HAMILTON SECOND RESPONDENT
JUDGE:	KATZ J
DATE OF ORDER:	15 DECEMBER 2000
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

The application be dismissed.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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	ANDREW HAMILTON **SECOND RESPONDENT**
JUDGE:	**KATZ J**
DATE:	**15 DECEMBER 2000**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 There is before the Court an application for review, which application has been brought by the Commonwealth under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ("the JRA"). There are two respondents to that application, the Human Rights and Equal Opportunity Commission ("the Commission") and Mr Andrew Hamilton. However, both of those respondents have chosen to take no part in the present proceeding and so the Commonwealth's only "opponent" before me has been the presumption of validity which applies in the proceeding. (Compare, in a situation in which the Commission chose to take no part in a proceeding similar to the present and the second respondent appeared in person, Einfeld J's statement, "*That means that the court became the contradictor of the Commonwealth*": *Commonwealth of Australia v Human Rights and Equal Opportunity Commission* (1999) 57 ALD 623 at 625, [9].)

2 The subject of the Commonwealth's application for review is a decision made by the Commission in October 1999, which decision involved the Commission's making both a finding and a recommendation under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ("the Act"). The finding was that the Commonwealth had done an act in

Australian Medical Council v Wilson (1996) 68 FCR 46 cited
James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd [1978] AC 141 discussed
Yager v The Queen (1977) 139 CLR 28 discussed
Commonwealth v Riley (1984) 5 FCR 8 cited
Owners of 'Shin Kobe Maru' v Empire Shipping Co Inc (1994) 181 CLR 404 discussed
Castlemaine Tooheys Ltd v South Australia (1990) 169 CLR 436 cited
Street v Queensland Bar Association (1989) 168 CLR 461 cited
Waters v Public Transport Corporation (1991) 173 CLR 349 cited
Kawitt v US 842 F2d 951 (7th Cir, 1988) discussed
Secretary, Department of Foreign Affairs and Trade v Styles (1989) 23 FCR 251 discussed
Australian Iron and Steel Pty Ltd v Banovic (1989) 168 CLR 165 discussed
X v Commonwealth of Australia (1999) 167 ALR 529 referred to

Discrimination (Employment and Occupation) Convention
ILO Constitution, Arts 26, 28, 29, 32, 33
International Covenant on Civil and Political Rights, Art 5(1)

Valticos & von Potobsky *International Labour Law* 2nd rev ed. at pp. 284-85, 292-93
Leary "Lessons from the Experience of the International Labour Organisation" in Alston (ed.) *The United Nations and Human Rights* at pp. 596-97
ILO Committee of Experts on the Application of Conventions and Recommendations *(Special Survey on) Equality in Employment and Occupation* (1996)
ILO Committee of Experts on the Application of Conventions and Recommendations *(General Survey of) Equality in Employment and Occupation* (1988)
ILO Committee of Experts on the Application of Conventions and Recommendations *Report of the Committee of Experts on the Application of Conventions and Recommendations* (1963)
Swepston "Supervision of ILO Standards" [1997] IJCLLIR 327 at p. 339
ILO Commission of Inquiry (1991) 74 ILO Official Bulletin, Ser B, Supp 3
ILO Commission of Inquiry (1987) 70 ILO Official Bulletin, Ser B, Supp 1

THE COMMONWEALTH OF AUSTRALIA v HUMAN RIGHTS & EQUAL OPPORTUNITY COMMISSION & ANDREW HAMILTON

N 1366 of 1999

KATZ J
SYDNEY
15 DECEMBER 2000

FEDERAL COURT OF AUSTRALIA

Commonwealth of Australia v Human Rights & Equal Opportunity Commission [2000] FCA 1854

HUMAN RIGHTS & EQUAL OPPORTUNITY – discrimination in employment or occupation – whether placing person in particular promotion band constituted discrimination on ground of age – whether Discrimination (Employment and Occupation) Convention definition of "discrimination" covers indirect discrimination – whether "discrimination" excludes distinction, exclusion or preference having rational and proportionate connection to legitimate non-discriminatory objective – whether distinction, exclusion or preference based on inherent requirements of job.

STATUTORY INTERPRETATION – construction of domestic legislative provision implementing international obligation in accordance with construction in international law of international obligation – reliance in construction of international obligation on "la doctrine" and "la jurisprudence" – "loose" construction of international obligations.

STATUTORY INTERPRETATION – use of definition in one statute to construe definition in another.

INTERNATIONAL LAW – International Labour Organisation – functions of ILO Committee of Experts and ILO Commissions of Inquiry.

WORDS & PHRASES – "*requirements*" (of a job).

Administrative Decisions (Judicial Review) Act 1977 (Cth)
Human Rights and Equal Opportunity Commission Act 1986 (Cth) ss 3(1), 3(8), 31(b), 32(1)(b), 35(2), 50
Human Rights and Equal Opportunity Commission Regulations (Cth) regs 2, 4(a)(i)
Naval Forces Regulations 1935 (Cth) regs 21, 102
Naval Defence Act 1910 (Cth) ss 8(1), 17
Defence Instructions (Navy) PERS 52-2
Defence Act 1903 (Cth) s 9A(3)
Sex Discrimination Act 1984 (Cth) ss 5, 6, 7, 7A, 7B
Racial Discrimination Act 1975 (Cth) ss 9(1), 9(2)
Disability Discrimination Act 1992 (Cth) ss 5, 6

Commonwealth of Australia v Human Rights and Equal Opportunity Commission (1999) 57 ALD 623 cited
Commonwealth v Bradley (1999) 95 FCR 218 discussed
Koowarta v Bjelke-Petersen (1982) 153 CLR 168 discussed
Konrad v Victoria (1999) 91 FCR 95 referred to
Fothergill v Monarch Airlines [1981] AC 251 referred to
Somaghi v Minister for Immigration, Local Government & Ethnic Affairs (1991) 31 FCR 100 referred to
Rocklea Spinning Mills Pty Limited v Anti-Dumping Authority (1995) 56 FCR 406 referred to
South West Africa Cases [1962] ICJR 319 referred to
Aboriginal Legal Rights Movement Inc v South Australia (No 1) (1995) 64 SASR 551 cited

June 1995 which had constituted discrimination against Mr Hamilton. The recommendation was that the Commonwealth pay to Mr Hamilton $20,000 by way of compensation for the loss and damage which he had suffered as a result of that discriminatory act.

3 In substance, the Commonwealth's attack in the present proceeding has been on the Commission's finding and it will not be necessary for me to discuss separately in these reasons the Commission's recommendation. Whatever be the result of this proceeding so far as the finding is concerned will also be its result so far as the recommendation is concerned.

4 The Commission's precise finding under attack in the proceeding, as it was notified in writing to the Commonwealth, was that the Commonwealth's "*plac[ing]*" of Mr Hamilton, who was then a Lieutenant-Commander in the Royal Australian Navy ("the RAN"), "*in Promotion Band D at the June 1995 Promotion Board because of the length of time he had remaining in the RAN ... constitute[d] discrimination on the ground of age*".

5 It is convenient for me to begin my discussion of the Commonwealth's attack on that finding by summarising the general legislative context in which that finding was made. (A fuller account of that context can be found in my reasons for judgment in *Commonwealth v Bradley* (1999) 95 FCR 218 at 240-44, [59]-[70], in which reasons I took the view (in dissent) that the Court had no jurisdiction under the JRA in proceedings like the present. The fact that I was in dissent in *Bradley* has no relevance so far as concerns those paragraphs of my reasons in that case to which I have just referred.)

Among the functions of the Commission under the Act is inquiring into any "*act*" that may have constituted "*discrimination*" and forming an opinion (or making a finding, as it is described in subs 35(2) of the Act) whether the act did constitute discrimination: see par 31(b) of the Act. If the Commission's finding is that such act did constitute discrimination, then the Commission notifies the discriminator in writing of that finding: see par 35(2)(a) of the Act; and may recommend to the discriminator that, among other things, compensation be paid to a person who has suffered loss or damage as a result of that discriminatory act: see subpar 35(2)(c)(i) of the Act. Such process of inquiry, opinion formation (or finding-making) and recommendation may be initiated (as it was by Mr Hamilton in July 1996) by the making of a complaint to the Commission: see par 32(1)(b) of the Act.

7 Those acts into which the Commission may inquire under the Act include acts done by or on behalf of the Commonwealth or one of its authorities: see the definition of "*act*" in subs 3(1) of the Act.

8 "*[D]iscrimination*" is also defined in subs 3(1) of the Act. Subject to immaterial exceptions, the term 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...."*

9 As contemplated by subpar (b)(ii) of the definition of "*discrimination*", regulations have been made (under s 50 of the Act) declaring certain distinctions, exclusions or preferences that have the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation, additional to the distinctions, exclusions or preferences set out in par (a) of the definition, to constitute "*discrimination*" for the purposes of the Act: see the *Human Rights and Equal Opportunity Commission Regulations* (Cth) ("the Regulations"). Among such distinctions, exclusions or preferences are (and have been since 1 January 1990: see reg 2 of the Regulations) those "*made ... on the ground of ... age*": see subpar 4(a)(i) of the Regulations. (It is not clear to me why that provision uses the word "*ground*" instead of the word "*basis*", the latter word being the one which is used at the equivalent point in par (a) of the definition of "*discrimination*" in subs 3(1) of the Act. For present purposes, I will proceed on the basis (or ground(!)) that the words were intended to be interchangeable.)

10 The above being the general legislative context in which the Commission's finding regarding the Commonwealth's treatment of Mr Hamilton was made, I turn now to a fleshing out of the circumstances in which the Commission made that finding.

11 The evidentiary material placed before me by the Commonwealth for the purpose of

the present application consisted in substance of two items. One was the Commission's written notification to the Commonwealth of the Commission's finding and recommendation and the other was a document which had, on the Commission's request, been supplied to it by the Commonwealth for the purpose of the Commission's inquiry. I mention immediately that I have found it difficult to discern from the Commission's written notification alone precisely which facts it accepted as established for the purpose of making its challenged finding. Therefore I have pieced together from both of the evidentiary items to which I have just referred an account of those facts on which I infer the Commission proceeded.

12 Mr Hamilton was born on 1 May 1948. In 1985, he acquired the rank of Lieutenant-Commander in the RAN. As of June 1995, his primary qualification to be considered in connection with his possible promotion from that rank to the next senior naval officers' rank was as a Supply Officer.

13 In June 1995, he being then forty-seven years old, Mr Hamilton was considered, not for the first time, for possible promotion to the rank of Commander. (Commander is the naval officers' rank next senior to that of Lieutenant-Commander. Naval officers' ranks senior to that of Commander (in ascending order of seniority) are: Captain, Commodore, Rear-Admiral, Vice-Admiral, Admiral and Admiral of the Fleet: for the ranks of officers (other than chaplains) in the RAN, see the *Naval Forces Regulations 1935* (Cth), reg 21.)

14 In June 1995, s 17 of the *Naval Defence Act 1910* (Cth) provided that the ages for the compulsory retirement of members of the RAN should be as prescribed and reg 102 of the Naval Forces Regulations prescribed such ages for the various ranks of officers in the Permanent Naval Forces. It appears that the retiring age applicable to Mr Hamilton at that time, if he were to be promoted to Commander, would be fifty-five. The same retiring age would also be applicable to him if he were afterwards to be promoted from Commander to the rank next senior, Captain.

15 In June 1995, the formal power of promotion of naval officers resided in the Governor-General: see the Naval Defence Act, subs 8(1). However, in the first instance, consideration of Mr Hamilton's possible promotion to Commander was by a Promotion Board, whose function it was to recommend for the approval of the Chief of Naval Staff (since renamed the Chief of Navy) promotions to Commander. The Promotion Board system

was provided for in *Defence Instructions (Navy) PERS 52-2* ("DI(N) PERS 52-2"), issued on 29 May 1995 pursuant to subs 9A(3) of the *Defence Act 1903* (Cth). According to par 56 of DI(N) PERS 52-2, a Promotion Board consisted of seven persons, as follows:

> *"Chairman— Assistant Chief of Naval Staff — Personnel*
> *Members— Deputy Chief of Naval Staff*
> *Assistant Chief of Naval Staff-Materiel*
> *Maritime Commander*
> *Naval Support Commander*
> *Naval Training Commander*
> *A Rear Admiral from Headquarters Australian Defence Force."*

16 Mr Hamilton was not recommended for promotion to Commander by the Promotion Board in June 1995, although he did receive some votes in his favour.

17 At that time, Mr Hamilton was one of 339 Lieutenant-Commanders considered by the Promotion Board for promotion to Commander. Only sixteen of those so considered were ultimately promoted. Of those sixteen, one was older than Mr Hamilton, being then fifty years old. The ages of those promoted ranged from thirty-four to fifty and their average age was thirty-nine. The average length of time which each of them had spent as a Lieutenant-Commander was 6.5 years.

18 Of the sixteen Commander positions to be filled in June 1995, one was available for a Lieutenant-Commander whose primary qualification was Supply and two were available for Lieutenant-Commanders regardless of their primary qualification. The first type of Commander position was obviously filled by another Supply Officer than Mr Hamilton and one of the two Commander positions of the second type was filled by yet another Supply Officer. It appears that in June 1995, there were a disproportionate number of Lieutenant-Commanders whose primary qualification was Supply, who were being considered for promotion to Commander and who were in the top thirty or so candidates.

19 As to the 323 Lieutenant-Commanders not recommended for promotion to Commander in June 1995, the Promotion Board placed three of them in band A, eighteen of them in band B, 216 of them in band C and 86 of them (including Mr Hamilton) in band D. Placement in a particular band provided the Promotion Board's feedback to those Lieutenant-Commanders not recommended for promotion to Commander and signified the Promotion

Board's assessment of their future prospects of recommendation for promotion, not only to the rank of Commander, but also to higher ranks. To quote from DI(N) PERS 52-2, the Promotion Board's duty, in placing in bands officers not recommended for promotion, was to "*provide in-zone officers ... realistic and candid advice on their competitiveness for promotion*". However, as well as providing officers with such advice, their placement in a particular band was also likely to affect them when they were subsequently being considered by a Promotion Board for recommendation for promotion to Commander.

20 Those Lieutenant-Commanders placed in the various bands appear to have been given the following information regarding their placement:

> *"Band A - **Highly competitive. Promotion very likely.** Assuming that assessed potential remains high and outstanding performance is sustained, relative competitiveness is very likely.*
> *Band B - **Competitive. Promotion probable.** Assuming that assessed potential remains high and excellent performance is sustained, relative competitiveness should improve and promotion is probable.*
> *Band C - **Competitive. Promotion Possible.** Promotion is possible, assuming that assessed potential is high and performance is sustained or improved. Promotion chances are sensitive to numbers being promoted and the individual's performance in a very closely packed field. Officers who have just entered the Promotion Zone will normally be placed in this band until their trend for competitiveness is further assessed at subsequent boards.*
> *Band D - **Competitive. Promotion prospects reduced.** Competitiveness and potential for promotion to Commander and higher ranks is waning relative to peers. This level of competitiveness is also sensitive to numbers being promoted and the individual's performance in a very closely packed field."*

21 Mr Hamilton's placement in band D after the June 1995 Promotion Board led him to lodge an application for redress of grievance. On 8 August 1995, Rear-Admiral Forrest appears to have dealt with that application in writing, saying, among other things,

> *"At the Promotion Board held on 24 June 1995, the Board members considered 340 [sic] Lieutenant Commanders who were in zone and eligible for promotion. The Board's assessment of you was that although you remain eligible for promotion, your competitiveness for higher rank is now reducing relative to your peers, primarily because of the length of time you have remaining in the Service. You were allocated Band D. For Lieutenant Commanders, 'potential for promotion' includes potential for service in the rank of Commander **and** Captain. While there is no doubt you could perform very well in the rank of Commander, particularly in your specialist field, your potential for higher ranks is at best slight. It is the latter aspect in particular which is reducing your competitiveness for promotion relative to your peers."*

22 What was being said in the passage which I have just quoted is to be understood against the background of the following circumstances. Mr Hamilton's next opportunity of being considered by a Promotion Board for recommendation for promotion to Commander would be in December 1995 and, if he were to be recommended for promotion to Commander at that time and ultimately promoted, such promotion would not take final effect until 1 July 1996. On that date, Mr Hamilton would have less than seven years to serve before his compulsory retirement as a Commander. Further, in order to be eligible to be promoted from Commander to Captain, Mr Hamilton would have to serve as a Commander for at least four years. (That requirement was imposed by DI(N) PERS 52-2.) Thus, even if promoted with final effect from Commander to Captain at the instant at which he first became eligible for such promotion (no doubt, an impossibility), he would still have less than three years to serve before his compulsory retirement as a Captain.

23 Perhaps the final matters of a factual kind which I should mention are these: Mr Hamilton was unsuccessfully considered by a Promotion Board for recommendation for promotion to Commander at least twice more after June 1995, in December 1995 and June 1996. On one of those two occasions, one Lieutenant-Commander older than Mr Hamilton (but of whose age in years I am unaware) was promoted to Commander, as had occurred following the June 1995 Promotion Board. Finally, in August 1998, having remained a Lieutenant-Commander until then, Mr Hamilton transferred to the Naval Reserve.

24 In considering whether the Commonwealth's placing of Mr Hamilton "*in Promotion Band D at the June 1995 Promotion Board because of the length of time he had remaining in the RAN ... constitute[d] discrimination on the ground of age*", the Commission broke down into five separate questions the matter for its consideration: first, had there occurred an act or practice within the meaning of the Act; secondly, if so, had it arisen in employment or occupation; thirdly, had there occurred a distinction, exclusion or preference on the ground of age; fourthly, if so, had it had the effect of nullifying or impairing equality of opportunity or treatment; and, fifthly, if so, had the distinction, exclusion or preference in respect of the particular job concerned been based on the inherent requirements of that job. The Commission answered the first four of those questions in the affirmative and the fifth of those questions in the negative. It was the Commission's affirmative answer to the third of those questions and its negative answer to the fifth of those questions which were the focus of the Commonwealth's application for review before me.

25 So far the Commission's treatment of the third of those questions is concerned, in its written notification to the Commonwealth of its finding and recommendation, the Commission began relevantly by setting out what had been the Commonwealth's position before it:

> *"The respondent argues that a decision based on the length of time an officer has remaining in the service is not itself a distinction made on the ground of age. It produces differences between persons of different ages only because of the compulsory retirement age. The respondent states that the application of the criterion has a disparate impact on persons of different ages by reason of an external constraint. It states that the result might in another context be labelled indirect discrimination but argues that it is not discrimination within the meaning of section 3 of the Act."*

26 As I understand the Commission's conclusion regarding that position of the Commonwealth's, it was twofold: first, the Commission accepted that the case before it was one of discrimination of the indirect kind only, as the Commonwealth had argued; but, secondly, the Commission also accepted that discrimination of both the direct and indirect kinds was covered by the definition of "*discrimination*" in subs 3(1) of the Act (read together with the Regulations, when appropriate), so that, for the purposes of the Commission's inquiry, it would proceed on the basis that the Commonwealth had made a distinction, exclusion or preference regarding Mr Hamilton on the ground of age.

27 Before me, the Commonwealth's first submission was that while the Commission had been correct to conclude that the case before it had been one of indirect discrimination only, it had been incorrect to conclude that the definition of "*discrimination*" in subs 3(1) of the Act (read together with the Regulations, when appropriate) included discrimination of the indirect kind.

28 A difficulty which the Commonwealth faced before me so far as concerns the second part of its submission which I have just set out arose from the source of the definition of "*discrimination*" in subs 3(1) of the Act.

29 Schedule 1 of the Act consists of a copy of the English text of the *Discrimination (Employment and Occupation) Convention, 1958* ("the Convention"), which Convention was adopted by the General Conference of the International Labour Organisation ("the ILO") on 25 June 1958: see the definition of "*Convention*" in subs 3(1) of the Act. The Convention

entered into force generally on 15 June 1960 and for Australia in particular on 15 June 1974: see ATS 1974 No 12. Paragraphs 1 and 2 of Art 1 of the Convention provide:

> *"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 employers' and workers' 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."*

30 As was pointed out by Black CJ (with whom Tamberlin J agreed (at 238, [45])) in Bradley at 235, [35], "*The Act was introduced to be the vehicle by which Australia's obligations under the ... Convention ... are implemented (Explanatory Memorandum to the Human Rights and Equal Opportunity Bill 1985 (Cth), outline).*" It is not surprising therefore that the two paragraphs of Art 1 of the Convention which I have quoted in the preceding paragraph of these reasons should be the source of the definition of "*discrimination*" in subs 3(1) of the Act, which definition, in substance, reproduces those two paragraphs.

31 That being the case, the definition of "*discrimination*" in the Act should be construed in accordance with the construction given in international law to the definition of "*discrimination*" in the Convention. Doing so would by no means be novel. In *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, Brennan J was concerned with the proper approach to the construction of subs 9(1) of the *Racial Discrimination Act 1975* (Cth). That provision began by stating, "*It is unlawful for a person to do any act involving ...*" and then concluded, according to Brennan J, by reproducing precisely the words of the definition of "*discrimination*" appearing in Art 1, par 1 of the International Convention on the Elimination of All Forms of Racial Discrimination. Brennan J said (at 264-65; citations omitted),

> *"The Act thus makes part of Australia's municipal law ... a key provision of the Convention. When Parliament chooses to implement a treaty by a statute which uses the same words as the treaty, it is reasonable to assume that Parliament intended to import into municipal law a provision having the same effect as the corresponding provision in the treaty. A statutory provision corresponding with a provision in a treaty which the statute is enacted to*

> *implement should be construed by municipal courts in accordance with the meaning to be attributed to the treaty provision in international law. Indeed, to attribute a different meaning to the statute from the meaning which international law attributes to the treaty might be to invalidate the statute in part or in whole, and such a construction of the statute should be avoided. The method of construction of such a statute is therefore the method applicable to the construction of the corresponding words in the treaty."*

See also *Konrad v Victoria* (1999) 91 FCR 95 at 118, [71] (Finkelstein J).

32 The correctness of that approach in the present case appears to me to be reinforced by the presence in the Act of subs 3(8), which provides:

> *"(8) Except so far as the contrary intention appears, an expression that is used both in this Act and in the Convention (whether or not a particular meaning is assigned to it by the Convention) has, in this Act, for the purposes of the operation of this Act in relation to the Convention, the same meaning as it has in the Convention."*

33 So far as the construction in international law of pars 1 and 2 of Art 1 of the Convention is concerned, there exists a committee created by the Governing Body of the ILO known as the Committee of Experts on the Application of Conventions and Recommendations ("the Committee of Experts"): see *Konrad* at 111, [47] (Finkelstein J). According to Valticos and von Potobsky (the first of those two authors being at the time a judge of the European Court of Human Rights), *International Labour Law* 2nd rev ed. at pp. 284-5, the Committee of Experts,

> *" ... is composed of experts of recognized competence who are completely independent of governments and appointed in their personal capacity. This independence is underlined by the fact that its members are appointed by the Governing Body on the proposal of the Direct[or]-General of the International Labour Office, and not of the governments of their home countries. They are selected from among persons with the highest qualifications in the legal and social fields, as a rule from the judiciary (several of them are or have been chief justices or members of the International Court of Justice), from the field of education (professors of international law, labour law, etc.) or among former statesmen. ...*
> *... The scope of its [that is, the Committee of Experts'] appraisal depends on the terms of the individual Conventions. It is necessarily somewhat wide ... in case of Conventions which lay down standards in general terms ..., since in such cases the Committee cannot determine the conformity of national legislation without forming a conclusion as to the precise meaning to be attached to the international standards. The body of opinions which has evolved in the course of time has acquired considerable weight."*

34 Similarly, according to Leary ("Lessons from the Experience of the International Labour Organisation", in Alston (ed.), *The United Nations and Human Rights* at pp. 596-97), the members of the Committee of Experts "*are prominent judges, professors, and labour law experts*" and the Committee of Experts has "*acquired a reputation for objectivity, competence, and integrity among virtually all ILO member States*", of whom, I add, there were 175 as of 31 October 2000, including Australia: see http://www.ilo.org/public/english/standards/relm/country.htm (accessed 3 December 2000).

35 On numerous occasions, the Committee of Experts has issued reports dealing with the Convention and, in the present matter, for the purpose of construing the Convention (and therefore the Act), the Commission relied on one such report (only), which report was devoted solely to the Convention: *(Special Survey on) Equality in Employment and Occupation* (1996). In that report, the Committee of Experts, when discussing the definition of "*discrimination*" in the Convention, said,

> *"25. Any discrimination — ... direct or indirect — falls within the scope of [the Convention]....*
> *26. Indirect discrimination refers to apparently neutral situations, regulations or practices which in fact result in unequal treatment of persons with certain characteristics. It occurs when the same condition, treatment or criterion is applied to everyone, but results in a disproportionately harsh impact on some persons on the basis of characteristics such as race, colour, sex or religion...."*

36 Reliance by the Commission in construing the Convention (and therefore the Act) on an expression of opinion by the Committee of Experts as to the meaning of the Convention was orthodox: see, for example, *Bradley* at 237, [39] (Black CJ); nor did the Commonwealth submit to the contrary before me. Instead, its complaint was about the utility of the particular expression of opinion by the Committee of Experts relied on by the Commission. That expression of opinion was said in the Commonwealth's written submissions before me to have suffered from three defects: it was "*cryptic*"; it was offered long after the enactment of the Act and Regulations; and it had not been reflected in an earlier report issued in 1988 by the Committee of Experts. Those submissions were in substance repeated orally before me.

37 I reject the submission that the 1996 expression of opinion by the Committee of Experts represented a departure from its opinion in 1988. In its *(General Survey of) Equality in Employment and Occupation* in 1988, the Committee of Experts had said (footnotes

omitted),

> *"28. In referring to 'the effect' of a distinction, exclusion or preference on equality of opportunity and treatment in employment and occupation, the definition given by [the Convention] uses the objective consequences of these measures as a criterion. Indirect forms of discrimination ... consequently come within the scope of the Convention. The concept of indirect discrimination refers to situations in which apparently neutral regulations and practices result in inequalities in respect of persons with certain characteristics or who belong to certain classes with specific characteristics (race, colour, sex, religion, for example)."*

That opinion appears to me to be materially identical to the one expressed in 1996.

38 Furthermore, the genesis of those 1988 and 1996 expressions of opinion by the Committee of Experts can be seen in a report which it had issued as long ago as 1963. At that time, in Pt Three of its *Report of the Committee of Experts on the Application of Conventions and Recommendations*, it had said,

> *"38. Examination of the reports [submitted to the ILO by individual governments] has also shown the need to stress that, by referring to 'the effect' of distinctions, exclusions or preferences on equality of opportunity and treatment, the definition given in [the Convention] is based on the criterion of the objective consequences of these measures. It is therefore important that consideration of this matter [by individual governments in future reports] should not be limited to provisions or practices whose stated aim is to nullify or impair such equality. For example, provisions intended to be applicable to all may, in the concrete cases where they are in fact applied, have effects which are detrimental to equality in respect of employment or occupation. The information available would seem to show that 'discrimination' has for the most part been taken [in the reports submitted by individual governments] to mean direct and deliberate discrimination, and it should be stressed that, when analysing the position and the information in reports, governments should endeavour to give more general consideration to the effect which, from an objective viewpoint, all distinctions, exclusions or preferences, in law or in practice, may have on equality of opportunity or treatment."*

39 As to the submission that the 1996 expression of opinion had occurred too late to be of present assistance, as I have already shown, the Committee of Experts had been expressing the opinion as early as 1963 that discrimination for the purpose of the Convention was not limited to direct discrimination. In any event, I note that the fact that the 1988 report of the Committee of Experts had succeeded the passage of the Act did not deter Black CJ in *Bradley* from using that report as an aid to the construction of the Convention (and therefore of the

Act), nor am I able to think of any good reason why that fact should have deterred him. The opinions of "*experts of recognized competence*" or of "*prominent judges, professors, and labour law experts*" (to repeat the two descriptions of the Committee of Experts which I have already quoted above) as to the meaning of the Convention at the time of its adoption are capable, whenever expressed, of assisting in its proper construction and I have no reason to think that the Committee of Experts was doing other than expressing such an opinion on each of the occasions which I have mentioned. The use of those opinions as an aid to the construction of the Convention is an unexceptional illustration of the use of "*la doctrine*", a process in the construction of international agreements of which Lord Scarman spoke approvingly in *Fothergill v Monarch Airlines* [1981] AC 251 at 294 (and see also *Somaghi v Minister for Immigration, Local Government & Ethnic Affairs* (1991) 31 FCR 100 at 117 (Gummow J)).

40 It is convenient to point out now that, in expressing the opinion that the definition of "*discrimination*" in the Convention extends to indirect discrimination, the Committee of Experts has not been alone. Although the Commission made no reference to the matter in its written notification to the Commonwealth of its finding and recommendation, the same conclusion has also been expressed by a Commission of Inquiry appointed under Art 26, par 3 of the ILO Constitution by the Governing Body of the ILO: for an up-to-date copy of the ILO Constitution, see http://www.ilo.org/public/english/about/iloconst.htm (accessed 3 December 2000).

41 Paragraphs 1 and 4 of Art 26 of the ILO Constitution provide for the filing of a complaint either by a member government of the ILO or by a delegate to the General Conference that a member government of the ILO is not securing the effective observance of any ILO Convention which that government has ratified, while par 3 of Art 26 of the ILO Constitution provides for the appointment by the Governing Body of a Commission of Inquiry to consider that complaint and to report thereon. The Commission of Inquiry is fully to consider the complaint and to report thereon; its report may contain recommendations as to the steps which should be taken to meet the complaint (Art 28 of the ILO Constitution). If a recommendation is made to a government concerned in the complaint, that government is to inform the Director-General of the International Labour Office whether or not it accepts the recommendation and, if not, whether it proposes to refer the complaint to the International Court of Justice ("the ICJ") (Art 29, par 2 of the ILO Constitution). If the complaint is

referred to the ICJ, that court may affirm, vary or reverse any findings or recommendations of the Commission of Inquiry (Art 32 of the ILO Constitution). If a member fails to carry out any recommendations contained in the report of the Commission of Inquiry or in the decision of the ICJ, as the case may be, then the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith (Art 33 of the ILO Constitution).

42 In 1989, a number of delegates to the General Conference jointly filed a complaint against the (then-Ceausescu led) Government of Romania, alleging the failure by it to secure the effective observance of the Convention. The Governing Body appointed a Commission of Inquiry to consider the complaint and to report thereon. (Such Commissions of Inquiry "*are quite rare*": see Swepston, "Supervision of ILO Standards" [1997] IJCLLIR 327 at p. 339.) That Commission of Inquiry consisted of the Chief Justice of the Superior Court of the Canadian province of Quebec as chairman, sitting together with two professors of international law, one Italian and one Yugoslav, the first of whom had formerly been a judge of the European Court of Justice. In its report (see (1991) 74 ILO Official Bulletin, Ser B, Supp 3), which was made after the fall of Ceausescu, the Commission of Inquiry discussed the meaning of "*discrimination*" in the Convention. It first said in Ch 3 of its report, in the course of a general discussion about the requirements of the Convention and, in particular, about the concept of discrimination for the purpose of the Convention,

> *"23. The purely descriptive definition set forth in the Convention contains three elements:*
> - *a factual element (the existence of a distinction, an exclusion or a preference) which constitutes a difference in treatment;*
> - *a criterion which results in the difference of treatment;*
> - *and the objective result of this difference of treatment (the destruction or alteration of equal opportunity and treatment).*
>
> *24. By means of this broad definition, the Convention covers all the situations which may affect equality of opportunity and treatment: discrimination whether intentional or not, direct or indirect, etc."*

Later, when setting out its general conclusions on the complaint, the Commission of Inquiry said,

> *"575. As regards the scope of [the Convention], the Commission would refer to the explanations contained in Chapter 3 of this report. In reference to the effect of distinctions, exclusions or preferences in respect of equality of opportunity and treatment in employment and occupation, the definition provided in the Convention takes as a criterion the objective consequences of*

> *measures taken.... The Convention is not concerned with the intentional nature of the discrimination.... Situations in which apparently neutral regulations and practices result in inequalities to the disadvantage of persons manifesting certain characteristics or belonging to groups which manifest certain characteristics (race, colour, sex, religion, national extraction, etc.) constitute indirect discrimination, which falls within the scope of the Convention."*

43 In *Rocklea Spinning Mills Pty Limited v Anti-Dumping Authority* (1995) 56 FCR 406 at 421, a Full Court of this Court (Spender, Einfeld and Tamberlin JJ) said,

> *"[A]s a broad principle, it is obviously desirable that expressions used in international agreements should be construed, so far as possible, in a uniform and consistent manner by both municipal Courts and international Courts and Panels to avoid a multitude of divergent approaches in the territories of the contracting parties on the same subject matter."*

The references in the passage just quoted to the desirability of Australia's municipal courts construing expressions used in "*international agreements*" consistently with their construction by "*international ... Panels*" occurred in the context of a discussion by the Full Court of a report of the Panel of the GATT Committee on Subsidies and Countervailing Measures, which report had construed the GATT Countervailing Code.

44 No reason appears to me why there should be treated as less significant, in the construction of the Convention, a report by a Commission of Inquiry appointed by the Governing Body of the ILO than the Full Court in *Rocklea* treated, in the construction of the GATT Countervailing Code, a report by the GATT Panel. Valticos and von Potobsky (at 292-93), in discussing the ILO Commission of Inquiry as an institution, emphasise its "*independent nature*", "*impartiality*" and "*thoroughness*" and mention that "*the complaints procedure is quasi-judicial, its primary purpose being to ascertain whether the situation in a given country is in conformity with international obligations assumed*". Of more significance, perhaps, than that view of Valticos and von Potobsky is the fact that in his separate (concurring) opinion in the International Court of Justice at the jurisdictional stage of the *South West Africa Cases* [1962] ICJR 319, Jessup J, in relying on a report by an ILO Commission of Inquiry, referred (at 427-28) to the "*judicial nature*" of such a Commission of Inquiry and to the Commission of Inquiry's having conducted, in the particular "*case*" on which he was relying, a "*judicial investigation*" of a complaint that Portugal, an ILO member, was not securing the effective observance of a particular ILO Convention relating to forced labour which it had ratified. In the circumstances, I consider that the use of the report

of a Commission of Inquiry, such as the one regarding Romania, as an aid to the construction of an ILO Convention is an unexceptional illustration of the use of "*la jurisprudence*", a process in the construction of international agreements of which, like the use of "*la doctrine*", Lord Scarman spoke approvingly in *Fothergill* at 294 (and see also *Somaghi* at 117 (Gummow J)).

45 In the result, there appears to me to be powerful support, certainly in the various expressions of opinion by the Committee of Experts, including that of 1996, but also in the report by the Commission of Inquiry regarding Romania, for the conclusion reached by the Commission in the present matter that the definition of "*discrimination*" in the Convention and therefore in subs 3(1) of the Act does extend to indirect discrimination.

46 I come now to the third of the three criticisms made by the Commonwealth of that passage from the 1996 report of the Committee of Experts which I have quoted at [35] above, namely, that it was "*cryptic*", in the sense, I imagine, of being mysterious or enigmatic. I must confess that, at my first reading of the Commonwealth's written submissions before me, I found that criticism itself somewhat cryptic, since the passage being criticised appeared to me to be sufficiently clear in its meaning to be of assistance as to the proper construction of the Convention (as did the other materials to which I have referred above). However, having heard since the Commonwealth's oral submissions, it now appears to me that the Commonwealth's real complaint about the passage was not that it was cryptic, but rather that it had failed to reconcile that part of the definition of "*discrimination*" in the Convention which dealt with the effect of the distinction, exclusion or preference concerned with that part of the definition which dealt with the distinction's, exclusion's or preference's being "*made on the basis of*" a certain criterion. Particularly by reference to statements in cases construing the notion contained in the Racial Discrimination Act of an act's being "*based on*" certain criteria (see *Aboriginal Legal Rights Movement Inc v South Australia (No 1)* (1995) 64 SASR 551 at 553 (Doyle CJ); *Australian Medical Council v Wilson* (1996) 68 FCR 46 at 58 (Heerey J) and 76-77 (Sackville J)), the Commonwealth submitted in effect that the requirement in the definition of "*discrimination*" in the Convention and the Act that the distinction, exclusion or preference concerned be "*made on the basis of*" certain criteria necessarily excluded the use of that part of the definition which dealt with the effect of the distinction, exclusion or preference so as to encompass, within the definition of "*discrimination*", discrimination of an indirect kind.

47 While I acknowledge that there is some force in the submission which I have just attributed to the Commonwealth, in the end, I have not been persuaded by that submission to construe the definition of "*discrimination*" in the Convention as not encompassing indirect discrimination. As Viscount Dilhorne pointed out in *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141 at 157,

> *"In construing the terms of a convention it is proper and indeed right, in my opinion, to have regard to the fact that conventions are apt to be more loosely worded than Acts of Parliament. To construe a convention as strictly as an Act may indeed lead to a wrong interpretation being given to it."*

To similar effect, Lord Wilberforce stated in the same case (at 154) that words appearing in international agreements may be "*loosely drafted*", in which case they "*cannot be expected to be applied with taut logical precision*". Influenced under the circumstances by the opinions of the Committee of Experts and the report of the Commission of Inquiry to which I have already referred, I treat the relevant words of the Convention as being of that loosely worded type described by both Viscount Dilhorne and Lord Wilberforce. That is an outcome which promotes uniformity and consistency in the construction of the Convention and avoids a multitude of divergent approaches to the Convention by the parties to it, virtues urged by a Full Court of this Court in *Rocklea*.

48 As well as denying significance to the expressions of opinion in 1988 and 1996 by the Committee of Experts as to the meaning of "*discrimination*" in the Convention, the Commonwealth also argued before me that the definition of "*discrimination*" in subs 3(1) of the Act should be construed by reference to certain provisions in, in particular, other Commonwealth anti-discrimination statutes. Attention was drawn to: s 5 of the *Sex Discrimination Act 1984* (Cth) (and should have been drawn also to ss 6, 7, 7A and 7B); and subss 9(1) and (2) of the *Racial Discrimination Act 1975* (Cth). (Attention could also have been drawn to the relevant provisions of the *Disability Discrimination Act 1992* (Cth): see, in particular, ss 5 and 6.) In those Commonwealth Acts, one finds provisions expressly relating to indirect discrimination: see, in particular, subs 9(2) of the Racial Discrimination Act, subss 5(2), 6(2) and 7(2) and s 7B of the Sex Discrimination Act and s 6 of the Disability Discrimination Act. From the existence of express provisions relating to indirect discrimination in those statutes and the absence of any similar express provision in the Act, it was submitted that the proper inference to be drawn was that the Commonwealth Parliament did not intend that the definition of "*discrimination*" in subs 3(1) of the Act should

encompass indirect discrimination.

49 I reject that submission for three reasons.

50 First, ignoring for the moment the source of the definition of "*discrimination*" in subs 3(1) of the Act, in so far as the provisions in the other Commonwealth statutes concerned are definitional provisions, their use to construe the definition of "*discrimination*" in subs 3(1) of the Act is contrary to authority. In *Yager v The Queen* (1977) 139 CLR 28, the argument was made that a particular definition in the *Customs Act 1901* (Cth) was to be construed by reference to a definition of the same subject matter in the *Narcotic Drugs Act 1967* (Cth). As to that argument, Mason J said (at 43),

> *"Although the definition of 'cannabis' and 'cannabis plant' for the purposes of the* Narcotic Drugs Act *differs from that contained in s. 4 of the* Customs Act, *this is of no avail to the applicant. The existence of different definitions of the same subject matter in statutes of the one Parliament is by no means uncommon. A statutory definition exists for the purposes of the particular statute in which it is contained, unless it appears in a statute expressed to have a more general application, such as the* Acts Interpretation Act. *... There is therefore, no legitimate foundation for resorting to the definitions contained in the* Narcotic Drugs Act *for the purpose of modifying or qualifying another statutory definition contained in a different Act of Parliament. There is perhaps even stronger reason for reaching this conclusion when one statute is domestic in character and the other is a statute which gives effect to an international convention and is consequently bound to apply the definitions which the convention contains."*

Mason J's approach in *Yager* was afterwards followed by a Full Court of this Court in *Commonwealth v Riley* (1984) 5 FCR 8 at 23 (Smithers, Sheppard and Wilcox JJ). (See also generally *Owners of 'Shin Kobe Maru' v Empire Shipping Co Inc* (1994) 181 CLR 404 at 420, in which the High Court of Australia (Mason CJ and Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) stated (emphasis added) that,

> *" ... a statutory definition should be approached on the basis that Parliament said what it meant and meant what it said. The consequence of that is that a definition should be read down only if that is* ***clearly*** *required...."*)

51 A second reason for rejecting the Commonwealth's submission is suggested by the last sentence in the passage from the reasons for judgment of Mason J in *Yager* which I have quoted above. The use of other Commonwealth statutes to construe the definition of "*discrimination*" in subs 3(1) of the Act would be inconsistent with the approach to the

construction of such provisions which was laid down by Brennan J in *Koowarta*, which approach requires one to focus on the construction in international law of the international obligation which is the source of the domestic provision under consideration.

52 Thirdly, all of the express provisions relating to indirect discrimination in the Commonwealth racial, sex and disability discrimination legislation were enacted after the enactment of the Act itself, so that they appear to me to be able to provide little assistance as to the Parliament's intention at the earlier time.

53 In the result, I have not been persuaded by the Commonwealth that the Commission erred in construing the definition of "*discrimination*" in subs 3(1) of the Act as encompassing indirect, as well as direct, discrimination.

54 Against the prospect that I might not be so persuaded, the Commonwealth adopted a fall-back position, which was that, in so far as the definition of "*discrimination*" in subs 3(1) of the Act encompassed indirect discrimination, that definition should be read as impliedly excluding therefrom any distinction, exclusion or preference which has a rational and proportionate connection to a legitimate non-discriminatory objective. Reliance was placed in making that submission on discussions in the cases of the prohibitions against discrimination contained in ss 92 and 117 of the Commonwealth Constitution: see respectively *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 478 (Gaudron and McHugh JJ) and *Street v Queensland Bar Association* (1989) 168 CLR 461 at 510-11 (Brennan J). Further, reliance was placed on the discussion in the reasons for judgment of Mason CJ and Gaudron J in *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 363-64 of the meaning of the word "*reasonable*" in s 17(5)(c) of the *Equal Opportunity Act 1984* (Vic). (I note that, on that issue, Mason CJ and Gaudron J took a different view in *Waters* than did the other five members of the Court.)

55 It will be necessary for the Commonwealth to find other souls less timorous than I if it wishes to succeed with the argument which I have just summarised.

56 There might be much to be said in policy for a generally available exclusion from the definition of "*discrimination*" in the Convention and the Act of distinctions, exclusions or preferences which have a rational and proportionate connection to a legitimate non-

discriminatory objective.

57 (Whether such a generally available exclusion should even be necessary in respect of the armed forces or whether they should instead be altogether exempt from anti-discrimination provisions, either generally or at least in respect of anti-discrimination provisions relating to age, could raise yet a further policy question. For instance, it has been held in the United States, which is not a party to the Convention (see http://webfusion.ilo.org/public/db/standards/normes/appl/appl-ratif8conv.cfm?Lang=EN (accessed 3 December 2000)), that the federal Age Discrimination in Employment Act does not apply at all to the armed forces: see, for example, *Kawitt v US* 842 F2d 951 (7th Cir, 1988). In that case, Posner, Circuit Judge, said (at 953-54),

> *"[T]he interpretation [of the Act] that excludes uniformed military personnel [is not] inevitable as a matter of semantics, but it makes compellingly good sense.... Military efficiency demands that the services have a free hand in establishing age ceilings designed to ensure that the nation's soldiers, sailors, and airmen are young and fit enough to meet the challenges of military service. Of course in modern war only a small fraction of military personnel serve in combat units.... But judges should be reluctant to assume the micromanagement of military age-grading policies, and without a clearer directive from Congress we decline to do so."*)

58 However, whatever might be the best approach in policy to the various matters which I have mentioned above, the fact is that the General Conference of the ILO plainly applied its mind to the question of which distinctions, exclusions and preferences should be excluded from the definition of "*discrimination*" in the Convention which it was "enacting" and relevantly decided expressly to exclude only those "*in respect of ... particular job[s] based on the inherent requirements thereof*", an approach which the Parliament later adopted in substance in par (c) of the definition of "*discrimination*" in subs 3(1) of the Act. (The other exclusions from the definition of "*discrimination*" in the Convention, which exclusions have no present relevance, are those for certain security and affirmative action measures (see Arts 4 and 5 respectively).) I consider that it is not for me to expand the exclusions from the definition of "*discrimination*", in a way in which I might have preferred to do if I had been the drafter of either the Convention or the Act, by reading into that definition some further exclusion.

59 It will therefore be necessary for the Commonwealth, in order to succeed before me in

the present proceeding, to persuade me (as it has sought to do) that the Commission erred in some judicially reviewable way by concluding that the distinction, exclusion or preference which the Commonwealth had made regarding Mr Hamilton had not been one "*in respect of a particular job based on the inherent requirements of the job*".

60 (Before, however, moving to the matter just mentioned, it is convenient to mention by way of conclusion to my discussion of the preceding matter the report of an ILO Commission of Inquiry on a complaint that the Federal Republic of Germany was not securing the effective observance of the Convention by reason of its laws prohibiting entry to the public service by persons supporting particular political parties: (1987) 70 ILO Official Bulletin, Ser B, Supp 1. That Commission of Inquiry consisted of a former Justice of the Supreme Court of Finland as chairman, sitting together with two professors of international law, one Swiss and one Venezuelan, the second of whom had formerly been a Venezuelan judge. In that matter, the West German government had unsuccessfully argued that there existed certain implied exclusions from the definition in the Convention of "*discrimination*". One such implied exclusion was said to be derived from Art 5, par 1 of the International Covenant on Civil and Political Rights, which provides:

> *"Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the present Covenant."*

In denying the existence of that implied exclusion, the Commission of Inquiry stated (at par 507) that the Convention,

> *" ... defines what is to be considered as discrimination for the purpose of the Convention, and expressly identifies certain circumstances which shall not be so considered. It would appear difficult to read into the Convention, in addition to the express exception clauses, an implied exception drawn from other, very differently conceived instruments."*

A second implied exclusion argued for by the West German government was for differential treatment which was not arbitrary. As to that implied exclusion, the Commission of Inquiry stated,

> *"520. ... It has to be noted that the express definition contained in [the Convention] does not embody a reference to the element of arbitrariness, but refers to 'any distinction, exclusion or preference' made on specified grounds*

> *which has the effect of nullifying or impairing equality of opportunity or treatment. The question of justification for particular distinctions, exclusions or preferences is addressed by the exception clauses to which reference has already been made. It is within the framework of those provisions, rather than under a general criterion which would leave a wide measure of discretion to each ratifying State, that the possible justification for the measures adopted in the Federal Republic of Germany needs to be examined."*

The approach of the Commission of Inquiry to the two implied exclusions from the definition of "*discrimination*" in the Convention suggested by the West German government supports my rejection of the Commonwealth's particular candidate before me for implied exclusion from that definition.)

61 So far as concerns the Commission's treatment of the question whether the distinction, exclusion or preference which the Commonwealth had made regarding Mr Hamilton had been one "*in respect of a particular job based on the inherent requirements of the job*", in its written notification to the Commonwealth of its finding and recommendation, the Commission pointed out that, since the Commonwealth had alleged the existence of a particular inherent requirement of the job of Commander on the basis of which it had made a distinction, exclusion or preference regarding Mr Hamilton, it bore the burden of persuasion on that issue. Before me, the Commonwealth did not dispute the correctness of that burden allocation, whose correctness seems plain.

62 The particular inherent requirement of the job of Commander alleged before the Commission by the Commonwealth was that a Commander have the potential (in the sense of having time remaining to serve before compulsory retirement) to be promoted to the rank of Captain or beyond. The Commission, however, rejected the Commonwealth's submission that the possession of such potential had been an inherent requirement of the job of Commander in June 1995, when Mr Hamilton had been placed in promotion band D. It therefore followed that the distinction, exclusion or preference which the Commonwealth had made regarding Mr Hamilton had not been one based on the inherent requirements of the job.

63 In rejecting the Commonwealth's submission, the Commission proceeded on the basis that a job requirement was not "*inherent*" in the relevant sense unless it "*directly, as opposed to remotely, further[ed] or aid[ed] the furthering of the employer's operations*" (a test of the inherency of a job requirement which the Commonwealth submitted before me was the

appropriate one for the Commission to have applied). In the Commission's view, the requirement of the job of Commander that a Commander have the potential to be promoted to the rank of Captain or beyond no more than remotely either furthered or aided the furthering of the Commonwealth's operations. In substance, the Commission took that view because the Commonwealth had not persuaded it that such potential of Commanders was required to be actualised sufficiently frequently.

64 Before me, the Commonwealth attacked the Commission's conclusion that that which the Commonwealth itself had nominated before the Commission as being, not only a requirement of the job of Commander, but also an inherent one, was not such an inherent requirement. In oral submissions, the Commonwealth began that attack by acknowledging that it was "*rather difficult conceptually*". I agree that the Commonwealth's attack was rather difficult, and not only conceptually, since, so far as I can tell from the evidence which the Commonwealth chose to put before me, the Commonwealth's attack amounted to a criticism of the Commission for having failed to take an approach which the Commonwealth had failed to urge before it.

65 That attack was expressed as being that, in testing for inherency of the requirement, the Commission had "*lost sight of the fact*" that the absence of such potential in a Lieutenant-Commander seeking promotion to the rank of Commander did not automatically disqualify that Lieutenant-Commander from such promotion. Implicit in the attack was the further proposition that if the Commission had kept that fact in view when testing the requirement for inherency, it must have concluded that the requirement was an inherent one.

66 I reject that attack.

67 First, I am not satisfied from the evidence before me that the absence of such potential in a Lieutenant-Commander seeking promotion to the rank of Commander did not automatically disqualify that Lieutenant-Commander from such promotion in June 1995. I have no evidence before me that any Lieutenant-Commander, having less than four years to serve before compulsory retirement, had at any time, whether before, at or after June 1995, been promoted to Commander.

68 Secondly and in any event, if it was the fact that the absence of such potential in a

Lieutenant-Commander seeking promotion to the rank of Commander did not automatically disqualify that Lieutenant-Commander from such promotion, that would mean that the having of such potential was not a "*requirement*" of the job within the meaning of the relevant exclusion from "*discrimination*", let alone an inherent one. That being the case, the Commonwealth's attempt to bring itself within the exclusion would necessarily fail.

69 In reliance on particular passages from two cases, the Commonwealth submitted before me that something could be a "*requirement*" of a job within the meaning of the relevant exclusion from the definition of "*discrimination*" in subs 3(1) of the Act, nonetheless though a person's not possessing that thing did not disqualify the person from holding that job. The relevant cases and passages were: *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251 at 257-58; and *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 at 185, 195-97.

70 In *Styles*, a Full Court of the Federal Court was concerned with subs 5(2) of the Sex Discrimination Act, which defines indirect sex discrimination as involving the requiring of a person "*to comply with a requirement or condition*": first, with which a substantially higher proportion of persons of the opposite sex to the person being required to comply either do, or are able to, comply; secondly, which is not reasonable having regard to the circumstances of the case; and thirdly, with which the person being required to comply either does not, or is not able to, comply. In their joint reasons for judgment, Bowen CJ and Gummow J pointed out (at 257-58) that the term "*requirement*" took its colour from the particular statutory context in which it appeared and, in the particular statutory context with which they were there concerned, their Honours concluded (rejecting the Commonwealth's argument to the contrary) that "*something falling short of an absolute bar to selection*" for appointment to a certain position if not possessed could nevertheless be a "*requirement*" within the meaning of subs 5(2) of the Sex Discrimination Act.

71 In *Banovic*, the High Court of Australia was concerned with s 24(3) of the *Anti-Discrimination Act 1977* (NSW) which, like the provision under consideration in *Styles*, was a provision defining indirect discrimination in terms involving requiring a person "*to comply with a requirement or condition*". Dawson J (at 185) stated that the words "*requirement or condition*" in s 24(3) "*should be construed broadly*", "*[u]pon principle and having regard to the objects of the Act*". McHugh J (who was in dissent in the case) (at 195-97) adopted a

similar approach, relying on, among other cases, *Styles*.

72 However, in relying before me on the passages from *Styles* and *Banovic* which it did, the Commonwealth committed the same forensic error as that which it had committed in *Bradley*, that is, pointing to the construction given in other cases to a word or phrase in the inclusionary part of a definition of "*discrimination*" and then seeking to apply that same construction to the same word or phrase when appearing in the exclusionary part of a (different) definition of "*discrimination*": see *Bradley* at 235, [34] (Black CJ).

73 In my view, given the context, that of an exclusion from the definition of "*discrimination*", no good reason appears to give to the notion of a job "*requirement*' for present purposes any meaning more broad than that which it would ordinarily bear, that of something which must be complied with. Such a construction, appears, incidentally, to be supported by a statement in the report of the ILO Commission of Inquiry regarding Germany to which I have already referred above. That Commission of Inquiry stated (at par 530), "*It needs to be borne in mind that Article 1, paragraph 2, [of the Convention] is an exception clause. It should therefore be interpreted strictly, so as not to result in undue limitation of the protection which the Convention is intended to provide*".

74 (I add that if one were to give to the notion of a "*requirement*' of a job the meaning sought to be given to it by the Commonwealth in the present case, then, far from making more probable than it would otherwise have been the inherency of the "*requirement*" nominated by the Commonwealth, the fact that non-satisfaction of the "*requirement*" did not automatically disqualify a Lieutenant-Commander from promotion to Commander might be thought to have made its inherency less probable than it would otherwise have been, because of the peripheral character of such a "*requirement*". I note that, in construing the notion of the inherency of a requirement of a particular employment for the purpose of par 15(2)(c) of the Disability Discrimination Act, Gummow and Hayne JJ contrasted the "*characteristic or essential*" requirements of the employment with those which could be described as "*peripheral*": see *X v Commonwealth of Australia* (1999) 167 ALR 529 at 552-53, [102].)

75 For the reasons given above, I will dismiss the Commonwealth's application for re-

view of the Commission's decision.

I certify that the preceding seventy-five (75) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Katz.

Associate:

Dated: 15 December 2000

Counsel for the Applicant:	Mr S J Gageler
Solicitor for the Applicant:	Australian Government Solicitor
Date of Hearing:	4 September 2000
Date of Judgment:	15 December 2000