HIGH COURT OF AUSTRALIA

BRENNAN CJ, GAUDRON, McHUGH, GUMMOW AND KIRBY JJ

QANTAS AIRWAYS LIMITED APPELLANT

AND

JOHN BAILLIE CHRISTIE RESPONDENT

Qantas Airways Limited v Christie [1998] HCA 18
19 March 1998
S194/1996

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Full Court of the Industrial Relations Court of Australia and in lieu thereof order that the appeal to that Court be dismissed with costs.*

On appeal from Industrial Relations Court of Australia

Representation:

D M J Bennett QC with I M Neil for the appellant (instructed by Blake Dawson Waldron)

D F Jackson QC with F L Wright QC for the respondent (instructed by Paul Murphy)

Intervener:

P M Kite SC intervening on behalf of the Human Rights and Equal Opportunity Commission (instructed by M Nicholls, Solicitor, Human Rights and Equal Opportunity Commission)

CATCHWORDS

Qantas Airways Limited v Christie

Industrial Law – Termination of Employment – Whether termination of employment at initiative of employer – Whether contract of employment ended with effluxion of time.

Industrial Law – Termination of Employment – Discrimination on the basis of age – "Rule of 60" – Inherent requirement of the particular position – International airline pilot – Distinction between "position" and "job".

Discrimination Law – Termination of Employment – Discrimination on the basis of age – "Rule of 60" – Inherent requirement of the particular position – International airline pilot – Distinction between "position" and "job".

Industrial Relations Act 1988 (Cth), ss170DE, 170DF, 170EA, 170EDA, 170EE.

Mr Christie appealed against this finding but the majority of the Full Court did not find it necessary to deal with this ground of appeal. Gray J held the bidding and roster system to be irrelevant[2] and Marshall J found that the finding by Wilcox CJ did not "bear upon the question as to whether it was an inherent requirement of the position of a Qantas B747-400 captain that the occupant of that position be aged less than 60 and/or be able to fly B747-400 aircraft anywhere Qantas flies"[3]. But the bidding system was an integral part of the Qantas administrative machinery by which it organised its services. That system was not discriminatory in its design or operation. In my opinion, the ability to participate effectively in the system equally with other pilots of similar seniority was an inherent requirement of Mr Christie's position.

4 The ground of appeal to the Full Court challenging the finding of Wilcox CJ that Mr Christie would need to use a large proportion of Qantas' short flights in order to make up his hours was repeated in an amended notice of contention in this Court. That issue was not dealt with by the majority judgments in the Full Court. If the correctness of the finding by Wilcox CJ raised by that ground in the notice of contention were critical to the result of this litigation, it would be necessary to remit the issue to the Full Court of the Industrial Relations Court[4] to hear and determine the issue. But the system of bidding is merely the machinery by which Qantas selected pilots for duty on its scheduled flights. It was the ability of each pilot to participate effectively in the system equally with other pilots of similar seniority that made the bidding system an equitable, efficient and non-discriminatory method of selecting pilots for duty.

5 The question is not whether Mr Christie would need to use a large proportion of short flights to make up his hours but whether he would necessarily make up his hours by excluding from his bids flights to or over those countries which apply the *Rule of 60*. As Mr Christie would be constrained to exclude flights to or over some countries from his bids, he could not participate equally with other pilots of similar seniority in the bidding system. His exclusion from flights to and from some destinations would require other pilots to be selected for duty on those flights more frequently than if Mr Christie had been available for that duty. Even if, the *Rule of 60* apart, Mr Christie's seniority would have allowed him to exclude those flights from his bids which filled the required number of flying hours, that hypothetical exclusion would have been made in exercise of his rights as an equal participant in the bidding system. There would

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2 *Christie v Qantas Airways Ltd* (1996) 138 ALR 19 at 32.

3 (1996) 138 ALR 19 at 38.

4 See the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth), Sched 16, Items 63(1)(a) and (b) and Item 68.

1 BRENNAN CJ. I am in respectful agreement with what Gaudron J has written except in relation to the final, and critical, question of fact, namely, whether it was an inherent requirement of the position which Mr Christie occupied as a pilot of Qantas B747-400 aircraft that such a pilot should not be excluded from flying those aircraft to or over those countries which enforce the *Rule of 60*. In particular, I agree that a stipulation in a contract of employment is not necessarily conclusive to show whether a requirement is inherent in an employee's position. The question whether a requirement is inherent in a position must be answered by reference not only to the terms of the employment contract but also by reference to the function which the employee performs as part of the employer's undertaking and, except where the employer's undertaking is organised on a basis which impermissibly discriminates against the employee, by reference to that organisation. In so saying, I should wish to guard against too final a definition of the means by which the inherent nature of a requirement is determined. The experience of the courts of this country in applying anti-discrimination legislation must be built case by case. A firm jurisprudence will be developed over time; its development should not be confined by too early a definition of its principles.

2 Evidence is not needed to show that the commercial operation of an international airline requires the efficient deployment of B747-400 aircraft to meet customer demand. The employment of pilots to take those aircraft on the routes selected is a necessary aspect of the undertaking. So too is the allocation of pilots to the scheduled flights. The evidence showed that the method of allocating pilots to particular flights had been established by practice between Qantas and the Pilots Association in 1987. It was a preferential bidding system which discriminated among pilots only on the basis of seniority of service. One element of that practice was that pilots could not bid for more than two one-day flights in any eight-week period. The essential requirements of the position were, apart from the necessary aeronautical skills and licences, a capacity to fly on Qantas' international routes and a consequential ability to participate effectively in the bidding process equally with other Qantas international pilots.

3 Once Mr Christie attained the age of 60, the *Rule of 60* effectively precluded him from flying on the majority of Qantas' international routes. Wilcox CJ found that, in consequence of that limitation[1] -

> "[Mr Christie] could not bid in the normal way; he would have to pick and choose amongst the available slip patterns. [The trips open to bidding.] In order to make up his hours, he would need to use a large proportion of Qantas' short flights, flights that would otherwise be used to make up the hours of other B747-400 Captains."

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1 *Christie v Qantas Airways Ltd* (1995) 60 IR 17 at 56.

have been a continuing possibility of bidding successfully for the flights from which he is now compulsorily excluded. But his inability to bid and to be selected for some flights skews the equitable operation of the system.

6 As this consideration makes the "large proportion of ... short flights" issue unnecessary to pursue, there is no need to remit the matter to the Full Court of the Industrial Relations Court. I would allow the appeal.

7 GAUDRON J. The respondent, John Baillie Christie, was employed by the appellant, Qantas Airways Limited ("Qantas"), from 1964 until his 60th birthday on 21 September 1994. His employment came to an end in consequence of a Qantas policy that its pilots should not continue in employment beyond the age of 60. Prior to his retirement, Mr Christie was employed as a captain of B747-400 aircraft on Qantas international flights.

The proceedings

8 On 4 October 1994, Mr Christie commenced proceedings in the Industrial Relations Court of Australia[5] claiming that his employment was terminated by Qantas in breach of s 170DF(1)(f) of the *Industrial Relations Act* 1988 (Cth) ("the Act"), now the *Workplace Relations Act* 1996 (Cth)[6]. He sought orders for reinstatement and compensation pursuant to s 170EE of the Act.

9 At first instance, the trial judge, Wilcox CJ, found for Qantas[7]. His decision was reversed on appeal by the Full Court of the Industrial Relations Court, it being held by majority (Gray and Marshall JJ, Spender J dissenting) that Mr Christie was entitled to succeed in his action and that the matter should be remitted to the trial judge to consider the relief to be granted[8]. Qantas now appeals to this Court.

Relevant legislative provisions

10 When these proceedings were commenced, ss 170DE and 170DF of the Act[9] limited the rights of an employer to terminate an employee's employment. Section 170DE(1) provided:

> " An employer must not terminate an employee's employment unless there is a valid reason, or valid reasons, connected with the employee's

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5 Schedule 16 to the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth) transferred the jurisdiction of the Industrial Relations Court to the Federal Court of Australia with effect from 26 May 1997.

6 See Sched 19 to the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth), which took effect on 25 November 1996.

7 *Christie v Qantas Airways Limited* (1995) 60 IR 17.

8 *Christie v Qantas Airways Limited* (1996) 138 ALR 19.

9 The provisions of sub-ss (1)(f) and (2) of s 170DF were retained in almost identical terms as sub-ss (2)(f) and (3) of s 170CK of the *Workplace Relations Act*. There is no equivalent provision to s 170DE(1).

capacity or conduct or based on the operational requirements of the undertaking, establishment or service."[10]

Section 170DF relevantly provided:

"(1) An employer must not terminate an employee's employment for any one or more of the following reasons, or for reasons including any one or more of the following reasons:

...

(f) ... age ...

...

(2) Subsection (1) does not prevent a matter referred to in paragraph (1)(f) from being a reason for terminating employment if the reason is based on the inherent requirements of the particular position."

It was provided in s 170CB that an expression had the same meaning in Div 3 of Pt VIA of the Act, which contained s 170DF, as in the Termination of Employment Convention 1982[11]. Article 3 of that Convention defines "termination" and "termination of employment" to mean "termination of employment at the initiative of the employer."

Issues in the proceedings

11 The proceedings have at all stages been conducted on the basis that Mr Christie's age was the reason, or at least one of the reasons, why his employment came to an end. On that basis, the issues in the Industrial Relations Court were whether Qantas terminated Mr Christie's employment and, if so, whether the termination was outside the prohibition in s 170DF(1) because the reason was "based on the inherent requirements of [his] particular position."[12] The same two issues arise in the appeal to this Court. Additionally, an amended notice of contention filed on behalf of Mr Christie raises issues under s 170HA of

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10 Section 170DE(2), which provided that a reason was not valid if the termination was "harsh, unjust or unreasonable", was held to be invalid but severable in *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 517-518.

11 The English text of that convention was set out in Sched 10 to the Act.

12 Section 170DF(2).

the Act[13] and Pt 4E of the *Anti-Discrimination Act* 1977 (NSW). However, those issues only arise if it is held that Mr Christie's employment came to an end by some means other than by termination at the initiative of Qantas.

Reason for termination

12 Before considering the issues in the appeal, it is convenient to note that it seems to have been assumed that, because Qantas required Mr Christie's employment to come to an end on his 60th birthday, that was the reason for its so doing. Certainly, it has not at any stage of the proceedings been argued otherwise. However, it may be noted that the mere fact that an employer requires or stipulates for employment to come to an end when an employee reaches a certain age does not necessarily direct the conclusion that, if employment is terminated when he or she reaches that age, age is the reason for its termination.

13 If, as here, employment comes to an end at an age stipulated by an employer, it will ordinarily be inferred that age was the reason for its so doing. But there may be exceptional cases where, an employee having reached the stipulated age, that is the occasion and not the reason for the termination of his or her employment. It is important to refer to this question because, in my view, the facts of this matter permit of an argument that, although Mr Christie's employment came to an end on his 60th birthday, it did not come to an end for that reason but, in terms of s 170DE(1), for "a valid reason ... based on the operational requirements of the [Qantas] undertaking".

Matters pertaining to the employment relationship

14 The questions in this appeal require consideration of the terms of certain documents which, together, governed Mr Christie's employment with Qantas. That consideration begins with a letter of 30 April 1964 from Qantas setting out the terms and conditions of his appointment "to the Flight Staff of [that] Company" ("the letter of appointment"). The terms and conditions were accepted by Mr Christie by a signed notation to that effect at the bottom of the letter. By par 2 of the letter, he was "appointed as a Pilot for duty as required by the Company in any part of the world".

15 Termination of employment was specifically dealt with by par 4 of the letter of appointment. By par 4(a), either party could terminate "by the giving of notice or payment or forfeiture of salary in lieu thereof in accordance with the agreement covering Airline Pilots employed by Qantas". The letter also made

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13 This issue was not pressed at the hearing.

reference to the ability of Qantas to terminate without notice for misconduct[14]. The letter made no reference to retirement although it was apparently then the practice for all pilots to retire no later than their 55th birthday.

16 By par 19 of the letter of appointment, "the ... conditions of employment [were] to be read in conjunction with and [were] supplementary to the terms of any enactment industrial agreement or award specifically covering [Mr Christie's] employment with [Qantas]." Although par 4(a) of the letter referred to an "agreement covering Airline Pilots employed by Qantas", that agreement is not in evidence. The only agreement tendered in evidence is the International Airline Pilots' Agreement 1986 ("the 1986 agreement"), an agreement certified by the Australian Industrial Relations Commission on 19 June 1989 pursuant to s 115 of the Act as it then stood.

17 The 1986 agreement is expressed to replace an earlier agreement known as the International Airline Pilots' Agreement 1984. The 1986 agreement was, in turn, replaced by the International Airline Pilots' Agreement 1988 ("the 1988 agreement"). As already indicated, that agreement was not put in evidence. However, a copy was made available to the Court. As it happens, nothing turns on whether regard is had to the 1986 agreement or the 1988 agreement, there being no difference between them as to any matter bearing on the outcome of this appeal.

18 Each of the 1986 and 1988 agreements is expressed to be binding on the Australian International Pilots Industrial Organisation and its members and on pilots employed by Qantas for whom the organisation is deemed to act as agent[15]. Each provides that Qantas may employ its pilots and that its pilots should serve Qantas "in any part of the world where [it] may from time to time be operating."[16] Each provides for termination without notice for misconduct and for termination on notice or by payment or forfeiture of pay in lieu of notice: the period of notice for a pilot with service of 12 months or more is 28 days[17]. The agreements, as such, contain no provision as to retirement. That subject is dealt with in letters of agreement between Qantas and the Australian Federation

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14 In terms used in par 4(b), "misconduct, neglect of duty, gross inefficiency [and] breach of Company instructions".

15 Section 2 of each agreement.

16 Section 5(e) of the 1986 agreement and s 5E of the 1988 agreement.

17 Section 5(a) of the 1986 agreement and s 5A of the 1988 agreement.

of Air Pilots ("AFAP") and, later, the Australian International Pilots' Association ("AIPA")[18].

19 In 1974, in a letter of agreement between Qantas and AFAP ("the 1974 letter"), it was specified that the normal date of retirement was 1 July following a pilot's 55th birthday, but it was agreed that the retirement age for pilots could be extended until age 58. That agreement was renewed in 1977 and, later, confirmed by AIPA. Subsequently, in 1991, in a letter of agreement ("the 1991 letter"), Qantas and AIPA recorded their further agreement that "[a] pilot [might] elect to extend his employment beyond the normal retirement date on a year by year basis up to but not beyond the date of his sixtieth birthday."

20 The 1974 and 1991 letters provide that pilots wishing to extend their employment beyond the normal retirement date should give notice of their election so to do. In accordance with those procedures, Mr Christie made a number of elections to continue in employment, the last, in September 1992, being an election to continue in employment until he reached the age of 60 on 21 September 1994. Then, on 6 July 1994, he wrote to Qantas expressing his belief that amendments to the Act which took effect earlier that year "[overrode] any requirement for a retirement ... based on age."[19] He also said that he wished to continue in employment beyond his 60th birthday. He received two letters in response, neither of which indicated a final position with respect to his continued employment. His solicitors also confirmed his wish to remain in employment in a letter to Qantas of 22 August. Mr Christie subsequently received a letter from Qantas dated 8 September informing him that "it [was] necessary that [his] retirement take effect as planned on 21 September, 1994." A similar letter was sent to his solicitors.

Termination of employment at the initiative of Qantas

21 Qantas contends, as it has at all stages of these proceedings, that it did not terminate Mr Christie's employment. Rather, it is said that his employment came to an end by the effluxion of time, it being a term of his employment contract or, perhaps, a condition of the employment relationship that his employment should terminate not later than his 60th birthday. Alternatively, it is put that, having elected to extend his employment until his 60th birthday in accordance with the

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18 Mr Christie was at all relevant times a member of AFAP and AIPA, the latter of which was formerly known as the Australian International Pilots Industrial Organisation.

19 Apparently, the amendments effected by the *Industrial Relations Reform Act* 1993 (Cth) which, inter alia, inserted the provisions of Div 3 of Pt VIA of the Act containing ss 170DE and 170DF.

terms of the 1974 and 1991 letters, Mr Christie is estopped from denying that his employment came to an end on his 60th birthday in accordance with the agreements recorded in those letters.

22 The argument that Mr Christie's employment expired by the effluxion of time or, alternatively, that he was estopped from arguing otherwise led Wilcox CJ, at first instance, and Spender and Marshall JJ, in the Full Court, to consider whether the 1974 and 1991 letters were binding on Mr Christie[20]. In the view of Wilcox CJ, it was also necessary to consider whether the doctrine of estoppel required that the agreement recorded in the 1991 letter be treated as binding because Mr Christie elected to take the benefit of it. In the view that I take, it is unnecessary to consider either question.

23 Even if the agreements recorded in the 1974 and 1991 letters were binding on Mr Christie, they do not purport to alter or vary the terms and conditions of his employment as set out in the letter of appointment or as contained in the 1986 and 1988 agreements[21]. In particular, the letters do not purport to vary the terms specifying the circumstances in which the employment relationship could be brought to an end without notice and providing that it could otherwise be brought to an end by notice or by payment or forfeiture of pay in lieu of notice. Construed in that light, the 1974 and 1991 letters simply record the agreement of Qantas that, if a pilot should elect to continue in employment in accordance with the procedures set out in them, it would not terminate that pilot's employment before his or her 60th birthday to give effect to its retirement policy.

24 Given the terms of the letter of appointment and of the 1986 and 1988 agreements and given, also, the limited nature of the agreement recorded in the 1974 and 1991 letters, it follows that Mr Christie's employment with Qantas continued until terminated by one or other of them in accordance with the industrial agreement which, together with the letter of appointment, governed the employment relationship. Certainly, Mr Christie did nothing to terminate that relationship. That being so, the letter from Qantas of 8 September 1994 is to be seen, in the context of the correspondence between them as to his continued employment, as notice of termination.

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20 The 1974 letter was bound with the 1986 agreement and the 1991 letter with the 1988 agreement. A question which arose at first instance and in the Full Court was whether the 1974 letter was part of the 1986 agreement. That question did not arise with respect to the 1991 letter because the 1988 agreement was not in evidence and, apparently, not before the Full Court.

21 Note that each letter of agreement provides that subsequent letters of appointment should include provision for a normal date of retirement and an entitlement to extend. No reference is made to existing appointments.

25 It may be that Qantas should have given Mr Christie longer notice than it did. Whether or not that is so, his employment was terminated by Qantas by its letter informing him that his retirement was to take effect as planned, namely, on his 60th birthday. That being so, no issue arises under the amended notice of contention with respect to s 170HA of the Act and Pt 4E of the *Anti Discrimination Act* 1977 (NSW).

A reason based on the inherent requirements of the particular position

26 The only reason now advanced by Qantas for its retirement policy is the *Rule of 60*, a convenient shorthand description of Standard 2.1.10.1 in Annex 1 to the Convention on International Civil Aviation and Arts 39(b) and 40 of that Convention[22]. The effect of Standard 2.1.10.1 is that State parties to that Convention may not permit a pilot who has attained the age of 60 to act as pilot in command of an international air service. And Arts 39(b) and 40 of the Convention, read with Standard 2.1.10.1, allow a State to exclude from its airspace any aircraft flown by a pilot who has attained the age of 60. Those rules do not apply in Australia[23] but are enforced by many of the countries to and over which Qantas flies.

27 At first instance, Wilcox CJ held that the position which had to be considered for the purposes of s 170DF(2) was that actually held by Mr Christie immediately prior to the termination of his employment. His Honour proceeded on the basis that that was captain of B747-400 aircraft flying on Qantas' international routes. However, he did not expressly identify the inherent requirements of that position. Rather, he considered the work which would be available to Mr Christie by reason of the enforcement of the *Rule of 60* by countries to and over which Qantas flies, including the United States of America, Singapore and Thailand.

28 It was found by Wilcox CJ that, given the routes flown by Qantas and given the countries which enforce the *Rule of 60*, Mr Christie would only be able to fly to and from New Zealand, Denpasar (in Indonesia) and Fiji. And on his findings, there would be problems in his flying to Fiji because Qantas often requires its crews to proceed from Fiji to the United States. His Honour went on to consider whether the Qantas roster system would permit Mr Christie to be rostered exclusively on flights to and from New Zealand, Denpasar and Fiji or, perhaps,

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22 At first instance Qantas raised other considerations, including the health, general fitness and acuity of pilots who had reached the age of 60. This issue was concluded against it by Wilcox CJ and was not in issue in the Full Court.

23 Note that the Convention contemplates departure by contracting States from international standards: see Art 38.

exclusively on those flights together with internal flights flown as part of Qantas' international services. He held that it would not, or, at least, that it would involve serious practical difficulties. He concluded that s 170DF(2) was to "be applied in a practical, commonsense way" and that, given the serious practical difficulties involved in Mr Christie's continued employment, "being under 60 years of age was an inherent requirement of a position as a B747-400 Captain."[24]

29 It is convenient at this stage to say something of the Qantas roster system. When routes and flights have been determined and aircraft have been allocated to those flights, Qantas prepares its flight schedule and notifies its pilots and other crew members of the resulting "slip patterns". Each "slip pattern" represents a single trip. A trip may be for a few hours or for several days, sometimes as many as 12 days. Pilots and other crew members submit bids for the various "slip patterns", the bids being made for "slip patterns" extending over an eight week period. The bids are accepted or rejected on the basis of seniority and a roster is then prepared. One aspect of the bidding system is that no pilot can bid for more than two one-day trips in any eight week period, a rule apparently devised by Qantas to ensure that there are enough of those trips for each pilot to construct a bid involving the requisite minimum number of hours.

30 At first instance, Wilcox CJ found that if Mr Christie's employment were continued, he "could not bid [for flights] in the normal way" and "to make up his hours, he would need to use a large proportion of Qantas' short flights, flights that would otherwise be used to make up the hours of other B747-400 Captains."[25] His Honour seems to have equated short flights with one-day trips. The finding that he would need to use "a large proportion of ... short flights" and, thus, the conclusion that there were serious practical difficulties involved in his continued employment was put in issue by ground 3 of the notice of appeal filed on behalf of Mr Christie in the Full Court. The same issues are raised by the amended notice of contention filed in this Court. The parties accept that, if it is necessary for those questions to be decided, the matter should be remitted to the Full Court.

31 On the approach taken by the majority in the Full Court, it was unnecessary to consider whether, if he continued in employment, Mr Christie could comply with the Qantas roster system. In the view of Gray J, an inherent requirement, for the purposes of s 170DF(2) of the Act, was something essential to the position, rather than something imposed on it. Moreover, an employer could not, "by stipulating for contractual terms, or by creating or adhering to rostering

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24 (1995) 60 IR 17 at 56.

25 (1995) 60 IR 17 at 56.

systems ... create inherent requirements of a particular position."[26] It followed, in his Honour's view, that it was not an inherent requirement of Mr Christie's position that, in terms of his letter of appointment, he be able to undertake "duty as required by [Qantas] in any part of the world". Nor was it an inherent requirement that he be able to fly to such destinations as were necessary to comply with its roster system.

32 The view taken by Marshall J was that the expression "inherent requirements" in s 170DF(2) of the Act was to be construed in accordance with the approach adopted by the Human Rights and Equal Opportunity Commission in *X v Department of Defence*[27]. In that case, the Commission held in relation to s 15(4) of the *Disability Discrimination Act* 1992 (Cth)[28] that:

> "for [it] to apply, there must be a clear and definite relationship between the inherent or intrinsic characteristics of the employment and the disability in question, the very nature of which disqualifies the person from being able to perform the characteristic tasks or skills required in [the] specific employment."[29]

Applying that test, Marshall J held that "Mr Christie [was] not disqualified from being able to perform the characteristic tasks or skills required in being a pilot, he [was] only inhibited geographically as to where he [might] perform such tasks."[30] His Honour added that "[i]t was not necessary for Mr Christie to be able to fly to any part of the world ... to be a Qantas B747-400 captain" because "[h]e was capable of being rostered so that his services were utilised in flying to locations where he was not prohibited from so doing by the laws of other countries."[31] And in his Honour's view, difficulties which might result from his being rostered in that way were relevant to the question whether Mr Christie should be reinstated but not to the operation of s 170DF(2) of the Act[32].

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26 (1996) 138 ALR 19 at 32.

27 [1995] EOC 92-715.

28 Section 15(4)(a) provides that certain types of disability discrimination in employment are not unlawful if the person "would be unable to carry out the inherent requirements of the particular employment".

29 [1995] EOC 92-715 at 78,378.

30 (1996) 138 ALR 19 at 40.

31 (1996) 138 ALR 19 at 40.

32 This was also the view of Gray J: see (1996) 138 ALR 19 at 33.

33 There may be many situations in which the inherent requirements of a particular position are properly identified as the characteristic tasks or skills required for the work done in that position. But that is not always so. In the present case, the position in question is that of captain of B747-400 aircraft flying on Qantas' international routes[33], a matter as to which there is no real dispute between the parties. To identify the inherent requirements of that position as "the characteristic tasks or skills required in being a pilot", as did Marshall J in the Full Court[34], is to overlook its international character.

34 Moreover, the international character of the position occupied by Mr Christie cannot be treated as irrelevant simply because it derives from his contract of employment or from the terms and conditions of the industrial agreements which have, from time to time, governed his employment with Qantas. It is correct to say, as did Gray J in the Full Court, that an inherent requirement is something that is essential to the position. And certainly, an employer cannot create an inherent requirement for the purposes of s 170DF(2) by stipulating for something that is not essential or, even, by stipulating for qualifications or skills which are disproportionately high when related to the work to be done. But if a requirement is, in truth, essential, it is irrelevant that it derives from the terms of the employment contract or from the conditions governing the employment relationship.

35 Much of the argument in this Court was directed to the question whether the expression "inherent requirements" in s 170DF(2) should be construed broadly or narrowly. It was put on behalf of Mr Christie that it should be construed narrowly because it is an exception to or exemption from the prohibition on termination on discriminatory grounds and a broad construction would be contrary to the evident purpose of s 170DF, namely, to prevent discriminatory conduct. I doubt whether s 170DF(2) is an exception or exemption of the kind which the argument assumes. Rather, I think the better view is that sub-s (2) is, in truth, part of the explication of what is and what is not discrimination for the purposes of s 170DF of the Act. However, that issue need not be explored for there is nothing to suggest that the expression "inherent requirements" in s 170DF(2) is used other than in its natural and ordinary meaning. And that meaning directs attention to the essential features or defining characteristics of the position in question.

36 A practical method of determining whether or not a requirement is an inherent requirement, in the ordinary sense of that expression, is to ask whether the position would be essentially the same if that requirement were dispensed

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33 Note that Qantas' international routes sometimes involve domestic sectors.

34 (1996) 138 ALR 19 at 40.

with. Clearly, Mr Christie's position would not be essentially the same if it did not involve flying B747-400 aircraft or if it did not involve flying on Qantas' international routes. However, that does not answer the question raised by this case. The question is whether the position would be essentially the same if it involved flying B747-400 aircraft but only on those routes which remain available by reason of the enforcement of the *Rule of 60*.

37 As already indicated, the fact that a requirement is stipulated in an employment contract does not, of itself, direct an answer one way or another as to the question whether it is an inherent requirement of the particular position in question. Although the letter of appointment and the 1986 and 1988 agreements stipulate respectively for service "as required by [Qantas] in any part of the world" and for service "in any part of the world where [Qantas] may from time to time be operating", neither, in my view, is an inherent requirement of the particular position which Mr Christie occupied. That is because the practical effect of the Qantas roster system was to require only that he fly to those destinations necessary to comply with that system. That being so, the stipulations in the letter of appointment and in the industrial agreements governing his employment with Qantas are no different from contractual stipulations for qualifications and skills which are excessive when related to the work to be done.

38 If, notwithstanding the limited destinations to which he can now fly, Mr Christie can comply with the Qantas roster system, his position will be essentially the same as that previously occupied by him. However, it will not be the same if Qantas excepts him from the general roster requirements, for that would transform a position no different from that of any other B747-400 captain into a special position for him. The same would be true of an exception in favour of all pilots over the age of 60. Even so, it would not be correct, in my view, to identify compliance with the roster system as an inherent requirement of the particular position occupied by Mr Christie. A roster system is simply an administrative arrangement designed to ensure the systematic performance of the work to which it relates. However, it does not follow that a roster system is wholly irrelevant for it may be that the inherent requirements of a particular position or, at least, some of them, can be discerned from it.

39 The Qantas roster system has not at any stage of these proceedings been examined with a view to discerning the inherent requirements of the position of a captain of B747-400 aircraft flying on international routes. Even so, it seems tolerably clear from the examination that has taken place that those requirements include the working of a minimum number of hours in an eight week period flying B747-400 aircraft on trips structured and scheduled by Qantas but chosen, in the first instance, by the pilot, without preference over any other B747-400 captain save to the extent that preference may be given to his or her choice of trips by reason of seniority. There may be other discernible inherent requirements. And it may be that another system could be devised to

accommodate Mr Christie without altering the essential nature of the position of captain of B747-400 aircraft. If so, it would follow that his termination was not for a reason based on the inherent requirements of his position.

40 As it happens, the question whether a roster system can be devised to accommodate Mr Christie without altering the essential nature of the position of captain of B747-400 aircraft need not be explored. The case for Mr Christie has been conducted on the basis that the Qantas roster system is wholly irrelevant, or, in the alternative, that he can comply with it or that it can be adjusted to accommodate him. For the reasons given, the only one of those questions which is relevant is the question whether Mr Christie can comply with the roster system. That raises the question whether Wilcox CJ erred in holding that he would need to use a large proportion of short flights that would otherwise be used to make up the hours of other captains of B747-400 aircraft, a question raised by ground 3 of Mr Christie's notice of appeal to the Full Court but not answered by it.

Orders

41 The appeal should be allowed with costs and the orders of the Full Court of the Industrial Relations Court set aside. The matter should be remitted to the Full Court for determination of ground 3 of the notice of appeal to that Court.

McHUGH J.

42 The questions in this appeal are:

(1) whether an employer has terminated employment "for reason" of age where it was a term of the employment that the employee would retire at a specified age and the employer has refused to continue the employment past that age;

(2) whether the age of an employee can constitute one of the "inherent requirements of the particular position" within the meaning of s 170DF(2) of the *Industrial Relations Act* 1988 (Cth) ("the Act")[35] and therefore constitute a non-discriminatory basis for dismissal.

43 In my opinion, the first question should be answered, No and the second question should be answered, Yes.

The statutory background

44 Section 170DF of the Act[36] relevantly provides:

"(1) An employer must not terminate an employee's employment for any one or more of the following reasons, or for reasons including any one or more of the following reasons:

...

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35 The Act has been renamed the *Workplace Relations Act* 1996 (Cth) and has undergone substantial modifications since the current proceedings were initiated. My discussion is limited to the Act as it applied at the relevant time.

36 Although it was not in issue at any stage of these proceedings, it would seem that s 170DE could also be of relevance. Section 170DE(1) provides:

> "An employer must not terminate an employee's employment unless there is a valid reason, or valid reasons, connected with the employee's capacity or conduct or based on the operational requirements of the undertaking, establishment or service."

Section 170DE(2), which stated that a reason was not valid if the termination was "harsh, unjust or unreasonable", was found to be invalid but severable in *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 517.

(f) race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;

...

(2) Subsection (1) does not prevent a matter referred to in paragraph (1)(f) from being a reason for terminating employment if the reason is based on the inherent requirements of the particular position."

The employment of Mr Christie

45 The respondent ("Mr Christie") was employed by the appellant ("Qantas") pursuant to a letter of appointment dated 30 April 1964. The letter of appointment gained contractual force when it was signed by Mr Christie to indicate that he had "read the conditions of employment set out above and accept[ed] appointment in accordance therewith". A number of conditions of employment were specified in the letter of appointment. Paragraph 2 of the letter stated that Mr Christie was employed by Qantas "as a Pilot for duty as required by the Company in any part of the world". Two further conditions are relevant. Paragraph 4 dealt with termination of Mr Christie's employment. It provided:

"(a) During your employment, your services may be terminated by the Company or yourself by the giving of notice or payment or forfeiture of salary in lieu thereof in accordance with the agreement covering Airline Pilots employed by Qantas Empire Airways Limited.

(b) You are reminded that should you at any time, in the opinion of the Company be guilty of misconduct, neglect of duty, gross inefficiency or breach of Company instructions, the Company may terminate your employment without notice."

No provision was made for termination of Mr Christie's employment by reason of the reaching of any specified age.

46 However, par 19 of the conditions of employment provided:

"The abovementioned conditions of employment are to be read in conjunction with and are supplementary to the terms of any enactment industrial agreement or award specifically covering your employment with this Company."

47 A letter of agreement addressed by Qantas' Director of Flight Operations to an officer of the Australian Federation of Air Pilots ("the AFAP"), an industrial organisation of which Mr Christie was a member, provided for retirement by reason of age. The letter of agreement was dated 20 November 1974 ("the 1974

letter") and provided for the extension of a pilot's employment beyond the "normal date of his retirement". The 1974 letter designated the "normal date of retirement" as 1 July following the pilot's 55th birthday. In evidence, after referring to Qantas' superannuation plan, Qantas' General Manager of Flight Operations indicated that 55 had been the accepted date of retirement for Qantas pilots prior to the 1974 letter.

48 The 1974 letter described a process which allowed pilots to elect to extend their employment beyond their 55th birthday on a yearly basis until their 58th birthday. The letter was physically bound to the International Airline Pilots' Agreement 1986 ("the 1986 agreement"), which was certified by the Australian Industrial Relations Commission ("the Commission") pursuant to s 115 of the Act on 19 June 1989. Thereafter the 1974 letter had the status of an industrial award[37].

49 The agreement contained in the 1974 letter was renewed on 26 August 1977. The Australian International Pilots Association ("the AIPA"), which had acquired the right from the AFAP to represent pilots flying on international routes, adopted the agreement in a letter dated 17 December 1981 ("the 1981 letter"). The 1981 letter was also bound to the 1986 agreement at the time of certification.

50 The 1986 agreement was expressed to bind Qantas, the Australian International Pilots Industrial Organisation ("the AIPIO")[38], its members and pilots employed by Qantas "for whom the association is deemed to act as agent"[39]. Section 5(e) of the agreement stated:

> "[Qantas] may employ its pilots and the pilots shall serve [Qantas] in any part of the world where [Qantas] may from time to time be operating."

51 Although provision was made in the 1986 agreement for the termination of employment for misconduct or other sufficient cause and by notice[40], no reference was made to a specified age at which Qantas' pilots' employment would come to an end. These terms were replicated in the International Airline Pilots' Agreement 1988, which replaced the 1986 agreement.

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37 s 116 of the Act.

38 The former name of the AIPA.

39 s 2.

40 s 5(a).

52 A further letter of agreement between Qantas and the AIPA was dated 14 January 1991 ("the 1991 letter"). The 1991 letter extended the date up to which a pilot could annually extend his or her employment to the date of the pilot's 60th birthday. At no stage was the 1991 letter produced to the Commission for certification.

53 Mr Christie wrote to his employer on 28 April 1987 to inform of his "intention to extend my period of service with Qantas beyond my 55th birthday". On 14 September 1989, 3 September 1990, 1 July 1991 and 21 September 1992, Mr Christie notified Qantas of his election to extend his employment, each time for one year.

54 On 6 July 1994, Mr Christie wrote to Qantas' Director of Flight Operations in the following terms:

> "My current retirement date is 21.9.94 my sixtieth birthday. I believe recent legislation may now override any requirement for a retirement to be based on age. It is my wish to continue flying for Qantas beyond 21.9.94.
>
> I am aware that there may be some restrictions to my flying due to certain overseas regulations, but I am prepared to bid around any such restrictions."

55 Qantas' Director of Flight Operations also received a letter from Mr Christie's solicitors which made reference to s 170DF(1)(f) of the Act. A response was sent to both Mr Christie and his solicitors which reiterated Qantas' policy of requiring pilots to retire at 60 due to "safety and operational considerations" and stated that it was therefore necessary for Mr Christie's retirement to take effect on 21 September 1994.

56 Mr Christie ceased employment on that date. He applied to the Industrial Relations Court[41] for a declaration that Qantas had contravened s 170DF(1)(f) of the Act by terminating his employment by reason of his age. Mr Christie also sought consequential orders under s 170EE of the Act requiring his reinstatement and the payment of compensation.

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41 Note that the jurisdiction of the Industrial Relations Court of Australia has been transferred to the Federal Court of Australia since the time of these proceedings: see Sched 16 of the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth).

The findings of Wilcox CJ

57 At first instance, Wilcox CJ found against Mr Christie[42]. His Honour made findings on three issues - (1) whether Qantas had terminated Mr Christie's contract ("the contractual issue"); (2) whether there was a medical justification for termination ("the medical issue")[43]; and (3) whether the termination was justified due to problems arising from laws of other countries which prohibited pilots who had attained the age of 60 from entering their airspace ("the operational issue"). Although Mr Christie succeeded on the contractual and medical issues, he failed on the operational issue.

58 Wilcox CJ found that Qantas had failed to demonstrate that Mr Christie's employment came to an end through effluxion of time. His Honour held that Qantas had terminated Mr Christie's employment on account of his age[44].

59 Although Wilcox CJ found that termination of pilots' employment on the ground of age was "not defensible on medical or safety grounds"[45], his Honour found that s 170DF(2) of the Act prevented Mr Christie's dismissal from being classified as discriminatory. The rostering and bidding system employed by Qantas, together with the effect of the laws which had been enacted in most countries on Qantas' routes to prevent pilots over the age of 60 from entering that country's airspace, meant that it was an "inherent requirement" of Mr Christie's position that he be under the age of 60.

The findings of the Full Court of the Industrial Relations Court

60 On appeal, the Full Court of the Industrial Relations Court set aside the order made by Wilcox CJ and made a declaration that Qantas had contravened s 170DF(1)(f) of the Act by terminating the employment of Mr Christie by reason of his age[46]. The Full Court remitted the matter to Wilcox CJ to consider the relief to be granted[47]. A majority of the Full Court (Gray and Marshall JJ, Spender J dissenting) held that age was not an inherent requirement of

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42 *Christie v Qantas Airways Ltd* (1995) 60 IR 17 at 57.

43 The medical issue was not pursued in the Full Court or in this Court.

44 (1995) 60 IR 17 at 22.

45 (1995) 60 IR 17 at 56.

46 *Christie v Qantas Airways Ltd* (1996) 138 ALR 19 at 46.

47 (1996) 138 ALR 19 at 46.

Mr Christie's position[48]. The majority of the Court (Gray and Marshall JJ, Spender J dissenting) also upheld Wilcox CJ's finding that Mr Christie's contract of employment had been terminated rather than brought to an end simply by the expiration of time[49].

Qantas did not terminate Mr Christie's contract of employment

61 The first question in the appeal is whether Qantas terminated Mr Christie's employment.

62 A person's employment is not terminated when it ends by virtue of the effluxion of time. In *Victoria v The Commonwealth (Industrial Relations Act Case)*[50], Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ said:

> "There is nothing in the Act to suggest that the words '[a]n employer must not terminate an employee's employment' are to be construed other than in accordance with their ordinary meaning. So construed, they do not apply to the situation where employment comes to an end because its term has expired ... The prohibitions effected by [ss 170DC, 170DE(1) and 170DF] are directed, respectively, to termination for a specified reason and termination for one or more specified reasons, none of which includes the expiry of the employee's term of appointment."

63 In the Act "termination" of employment has the same meaning as in the Termination of Employment Convention[51]. The International Labour Organisation's Termination of Employment Convention 1982 ("the Termination Convention") is reproduced in Sched 10 of the Act. Article 3 provides:

> "For the purpose of this Convention the terms 'termination' and 'termination of employment' mean termination of employment at the initiative of the employer."

64 In *Mohazab v Dick Smith Electronics Pty Ltd (No 2)*[52], the Full Court of the Industrial Relations Court interpreted the phrase "termination of employment at the initiative of the employer" in accordance with the general rules of treaty

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48 (1996) 138 ALR 19 at 33, 40.

49 (1996) 138 ALR 19 at 30, 45.

50 (1996) 187 CLR 416 at 520.

51 s 170CB.

52 (1995) 62 IR 200.

interpretation found in Arts 31 and 32 of the Vienna Convention on the Law of Treaties 1969. The Full Court held[53] that "termination of employment at the initiative of the employer" meant a termination that was brought about by an employer and to which the employee had not agreed. The Court held[54] that a termination occurs when "the act of the employer results directly or consequentially in the termination of the employment". It said[55]:

> "That is, had the employer not taken the action it did, the employee would have remained in the employment relationship."

65 Accordingly, Qantas did not terminate Mr Christie's employment. After the age of 60, Mr Christie was unable to remain in the employment relationship because the terms of the 1974, 1981 and 1991 letters were incorporated into his contract by virtue of par 19 of the original conditions of employment. Paragraph 19 provided that the conditions of employment were "to be read in conjunction with and are supplementary to the terms of any enactment industrial agreement or award specifically covering [Mr Christie's] employment". As I have said, the 1974 and 1981 letters had the status of awards subsequent to their certification with the 1986 agreement by the Commission on 19 June 1989. From this point, s 116 of the Act rendered their terms binding not only on the parties to the agreement[56] (Qantas and the AIPIO) but also on Mr Christie as a member of these industrial organisations[57]. Although the 1991 letter was never certified by the Commission, it was clearly an "industrial agreement ... specifically covering [Mr Christie's] employment". It was also incorporated by par 19.

66 It may be that, even prior to the letters of agreement, Mr Christie's contract of employment contained a term that his employment would end at 55. Evidence concerning the Qantas superannuation plan, which was given in the Industrial Relations Court, indicated that Qantas pilots had customarily retired at the age of 55. If a term requiring retirement at the age of 55 could be said to be reasonable and was "so well known as to be properly read into the contract"[58], that term would be incorporated into the contract by implication. When Mr Christie notified his intention to extend his employment beyond the age of 55 on

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53 (1995) 62 IR 200 at 205.

54 (1995) 62 IR 200 at 205.

55 (1995) 62 IR 200 at 205-206.

56 s 116(4)(a).

57 s 116(4)(b).

58 *Devonald v Rosser & Sons* [1906] 2 KB 728 at 733.

28 April 1987, he was acting in accordance with the system for the extension of his employment from the age of 55 to the age of 58 which had been established by the 1974 letter. Subsequent notifications were in accordance with the modifications of this system effected by the later letters.

67 Upon reaching 60, Mr Christie had no legal right to continue in the employment of Qantas. His employment ended when he attained the age of 60 because he and Qantas had agreed that it would end when he reached that age. All the benefits of his employment ended at that age because he had agreed that they would end at that age. Qantas' refusal to employ him past that age was not a termination of employment but a refusal to re-employ him after his employment ended. Nothing in the Act requires an employer of labour to employ a person who is over age 60. To the extent that such a refusal constitutes discrimination on the ground of age, the remedy of the person affected lies in the general anti-discrimination statutes that are in force in various jurisdictions or not at all.

68 A finding that Qantas did not terminate Mr Christie's employment does not make the prohibition on age discrimination in s 170DF(1) of the Act meaningless. The argument that "there would be no work for s 170DF(1) to do" unless a finding of discrimination is made in this appeal is unpersuasive. Many examples can be given of cases of termination that would offend against the age discrimination clause of the Act. Probably, the commonest case of such discrimination is one where the employee is terminated because he or she is "too old".

69 Accordingly, the prohibition on discrimination in s 170DF(1) is inapplicable because Qantas did not terminate Mr Christie's employment[59]. In my opinion, that prohibition is also inapplicable because Mr Christie's age was an "inherent requirement of the position" within the meaning of s 170DF(2) of the Act. As a result, Qantas was entitled to terminate Mr Christie's employment when he reached the age of 60 even if the contract of employment did not end by effluxion of time.

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59 If a majority of this Court had found that Qantas had not terminated Mr Christie's employment, it would have been necessary to consider the applicability of Pt 4E of the *Anti-Discrimination Act* 1977 (NSW). However, in view of the majority position and the need for further argument before this issue could be determined, it is unnecessary to deal with the position under the State legislation.

The construction of s 170DF(2) of the Act

70 Although s 170DF(1)(f) prohibits termination of employment for reason of age, s 170DF(2) makes this prohibition inapplicable where the reason for termination is based on "the inherent requirements of the particular position", a phrase whose meaning is to be ascertained by reference to its meaning in the Convention provisions which are the basis of the termination of employment provisions of the Act[60]. The relevant Convention provision[61] is Art 1(2) of the International Labour Organisation's Discrimination (Employment and Occupation) Convention 1958[62] ("the Discrimination Convention"). It provides[63]:

> "Any distinction, exclusion or preference *in respect of a particular job based on the inherent requirements thereof* shall not be deemed to be discrimination." (my emphasis)

71 The words of s 170DF(2) differ from those of Art 1(2) of the Discrimination Convention in that s 170DF(2) refers to a "particular position" rather than to a "particular job". Qantas asserts that this is a material distinction and that the interpretations of Art 1(2) which require a narrow reading of that article[64] are not applicable to s 170DF(2). In the Full Court of the Industrial Relations Court, Marshall J rejected this submission. His Honour held that

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60 *Gerhardy v Brown* (1985) 159 CLR 70 at 124; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 71 ALJR 381 at 383, 388, 419; 142 ALR 331 at 332, 339, 383.

61 See s 170CA(2) of the Act.

62 Reproduced in Sched 1 of the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth).

63 Paragraph 1(2) of the Discrimination (Employment and Occupation) Recommendation, which is reproduced in Sched 9 of the Act, is in similar terms. It states that "[a]ny distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof *is not* deemed to be discrimination". (my emphasis)

64 See the Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organisation to examine the observance of the Discrimination (Employment and Occupation) Convention, 1958 (No 111), by the Federal Republic of Germany, ILO Official Bull, Supp 1, (Series B) (1987), vol 70 at par 530.

Art 1(2) of the Discrimination Convention and s 170DF(2) of the Act are "materially indistinguishable"[65].

72 In my opinion, however, there is a distinction between a person's job and a person's position and that distinction may sometimes prevent the Convention jurisprudence on Art 1(2) from being applicable. The term "a particular job" in Art 1(2) of the Discrimination Convention has been construed by reference to the preparatory work and the text of the Convention to mean "a specific and definable job, function or task" and its "inherent requirements" those "required by the characteristics of the particular job"[66]. A person's job is therefore primarily concerned with the tasks that he or she is required to perform. No doubt the term "job" is often used to signify a paid position of employment. But in the context of determining the requirements of a job, it seems more natural to regard the term as referring to particular work or tasks that the person must perform. A person's position, on the other hand, is primarily concerned with the level or rank from which he or she performs those tasks. Position concerns rank and status. What is required of a person's position, however, will usually require an examination of the tasks performed from that position. That is because the capacity to perform those tasks is an inherent requirement of the particular position.

73 In most cases, the distinction between the requirements of a position and the requirements of a job will be of little significance. But it is a mistake to think that there is no distinction between "a particular position" and "a particular job". In some cases the distinction between the inherent requirements of a particular position and those of a particular job, although subtle, may be material. This is often likely to be the case where qualifications are concerned, particularly those qualifications that are not concerned with the physical or mental capacity to perform the tasks involved in the position. Thus to be an American born citizen is an inherent requirement of the position of President of the United States, but it is not an inherent requirement of the "job" of President if that term refers to the work done by the President.

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65 (1996) 138 ALR 19 at 36.

66 International Labour Office, *General Survey: Equality in Employment and Occupation*, (1988) at par 126.

The "inherent requirements" of Mr Christie's "particular position"

74 Mr Christie's "job" was to captain international flights[67]. His "position" was Captain of Qantas B747-400 aircraft flying internationally. What is an inherent requirement of the position of Captain of such an aircraft is not necessarily an inherent requirement of the tasks that the Captain performs, and an inherent requirement of the tasks of that Captain is not necessarily an inherent requirement of the position. In the report of the International Labour Organisation's Commission of Inquiry into the observance of the Discrimination Convention by the Federal Republic of Germany[68], "inherent" was interpreted to mean "existing in something as a permanent attribute or quality; forming an element, especially an essential element, of something; intrinsic, essential". The term "inherent" in s 170DF(2) should be given the same meaning. Importantly, for the purposes of this case, that which is essential to the performance of a particular position must be regarded as an inherent requirement of that position. Thus, in *Cramer v Smith Kline Beecham*[69], Ryan JR held that the termination of employees at a chemical plant who were penicillin sensitive was not in contravention of s 170DF(1)(f), which prohibits termination by reason of physical disability. The Judicial Registrar found[70] penicillin tolerance to be an inherent requirement of working in a chemical manufacturing plant. Tolerating penicillin was an essential attribute of being employed in "the particular position".

75 Qantas submitted that it was an inherent requirement of the position of a Captain of a Qantas B747-400 aircraft flying internationally that the holder of that position be under 60 years of age. Qantas contended that age was an inherent requirement of the position because the Captain of a Qantas B747-400 - indeed any pilot - over the age of 60 years is prohibited from entering the airspace of the countries on Qantas' overseas routes by the laws of those

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67 See par 2 of the letter of appointment and s 5(e) of the 1986 agreement as set out in the judgment of Gummow J.

68 Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organisation to examine the observance of the Discrimination (Employment and Occupation) Convention, 1958 (No 111), by the Federal Republic of Germany, ILO Official Bull, Supp 1, (Series B) (1987), vol 70 at par 531.

69 Unreported, Federal Court of Australia, 2 July 1997.

70 Unreported, Federal Court of Australia, 2 July 1997 at 5.

countries. Indonesia[71], Fiji[72] and New Zealand are the only exceptions to the prohibition. Except for those three countries, the countries to or through which Qantas flies are parties to the Convention on International Civil Aviation. That Convention prohibits State parties from allowing a pilot who has attained the age of 60 to act as a pilot in command of an international air service[73]. Articles 39(b) and 40 of the Convention give State parties the power to refuse entry to aircraft piloted by a person 60 years of age or older. Qantas contended, therefore, that the position of a Captain of a Qantas B747-400 aircraft flying internationally could only be held by a person under 60 because the holder of that position had to fly to foreign countries which were parties to the Convention on International Civil Aviation. Whatever might be the case with other pilots and other airlines, Qantas argued, the Captain of a Qantas B747-400 flying internationally had to be under 60 to hold that "particular position". Being under 60 years of age was therefore an indispensable incident of that "particular position". To employ somebody in that position who was over 60 would result in a change in the essential nature of the position.

76 The argument for Qantas placed much weight on the practical difficulty that would confront it if it had to employ persons over the age of 60 in the position of a Captain of a B747-400 flying internationally. Qantas allocates international flights to its pilots by means of a preferential bidding system. Flight schedules are devised by allocating specific aircraft to specific flights. The flight schedules are then put through a computer program which produces slip patterns. One slip pattern is produced for each trip; the slip patterns are then combined to form an eight week bid package. The bid package shows all the trips available in an eight week period for each aircraft and rank of pilot. Pilots then use the bid package to submit their bids for the slip patterns they wish to work on in each period. Certain restrictions operate on a pilot's choice of slip patterns - pilots cannot bid for any more than two one-day trips in an eight week bid period and each pilot is required to fly approximately 170 hours per bid period. The rationale behind the limited number of short trips per pilot is that the short trips are used to make up shortfalls in each pilot's bidding total and therefore have to be shared. Bids are determined in accordance with seniority. At the completion of bidding, a further computer program allocates slip patterns to each pilot.

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71 Denpasar in Bali.

72 Note that Wilcox CJ recognised that even Fiji might present a problem, because flight crews are often required to proceed from Fiji to the United States, which is a strong adherent of the "Age 60 Rule": see (1995) 60 IR 17 at 54.

73 Standard 2.1.10.1 in Annex 1 to the Convention.

77 Qantas claimed that Mr Christie's inability to fly on any flights except those to Indonesia, New Zealand and Fiji, all of which were short flights, could not be accommodated by its bidding system. Because the short flights were used by all pilots to round their flying hours up to the required number, if all such flights were allocated to Mr Christie, the remaining pilots would be under-utilised. Qantas claimed that to employ Mr Christie to operate short flights only would result in Qantas paying him to do work which the remaining pilots would otherwise have undertaken. The position would worsen if other pilots over the age of 60 also had to be employed on the Indonesian, New Zealand and Fiji routes. Indeed, the Full Court recognised that Mr Christie "was no longer able to do a large part of what his job previously required him to do"[74].

78 Qantas claimed that the problems occasioned by the retention of Mr Christie beyond the age of 60 therefore extended beyond matters of mere administrative inconvenience and expense to strike at the core of the system by which Qantas utilised its pilots. This system was described by Wilcox CJ as "the only way of ensuring fairness between employees"[75]. Mr Christie, on the other hand, contended that the international restrictions to which he was subject could or should be accommodated by modifications to Qantas' bidding system, so that being under the age of 60 was not "an essential element" of his employment.

79 Anti-discrimination legislation serves a vital purpose within the community, reflecting standards and values demanded by a society striving for fairness and egalitarianism. But the Act is not a general anti-discrimination statute although its objects include "ensuring that labour standards meet Australia's international obligations"[76] and "helping to prevent and eliminate discrimination on the basis of ... age"[77]. The objects of a federal Act must always be considered when interpreting any of its provisions and, so far as possible, its provisions should be given a meaning consistent with its objects[78]. That being so, in interpreting s 170DF of the Act, courts must endeavour to give full effect to the legislature's prohibition on discrimination in situations where a person's employment is terminated. However, the effect of s 170DF(2) is that a termination of employment "based on the inherent requirements of the particular position" is non-discriminatory. No doubt, having regard to the objects of the Act, a court should not give the exception in s 170DF(2) an expansive interpretation.

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74 (1996) 138 ALR 19 at 27 per Spender J.

75 (1995) 60 IR 17 at 56.

76 s 3(b)(ii) of the Act.

77 s 3(g).

78 *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 359.

Nevertheless, if a requirement falls within the natural and ordinary meaning of the exception, it must be regarded as non-discriminatory for the purposes of the Act.

80 Furthermore, although the prohibition in s 170DF(1) must be given a liberal interpretation, that liberal interpretation operates in the context of a free enterprise system of industrial relations where employers and employees have considerable scope for defining their contractual rights and duties. Nothing in s 170DF(1), for example, prevents the employer from defining the tasks of or the qualifications for a particular position or requires that they be delineated in a particular way. If by reason of a particular delineation of the requirements of a particular position, age is an inherent requirement of that particular position, the employer commits no breach of s 170DF(1) if he terminates the employment for reasons of age. There is nothing in the Act equivalent to Pt IVA of the *Income Tax Assessment Act* 1936 (Cth), nothing that invalidates a contract or arrangement whose purpose or effect is to avoid the operation of s 170DF(1). The contract of employment, expressly or by implication, defines the position of each employee and the requirements of that position.

81 In *Commonwealth of Australia v Human Rights and Equal Opportunity Commission*[79], Cooper J considered the operation of s 15(4)(a) of the *Disability Discrimination Act* 1992 (Cth)[80]. That section relevantly provides:

> "Neither paragraph (1)(b) nor (2)(c) renders unlawful discrimination by an employer against a person on the ground of the person's disability, if taking into account the person's past training ... and all other relevant factors that it is reasonable to take into account, the person because of his or her disability;
>
> (a) would be unable to carry out the inherent requirements of the particular employment."

Cooper J said[81]:

> "The inherent requirement[s] of a particular employment are the necessary tasks required to be performed and the personal characteristics or qualifications, if any, required by the employer, divorced of any

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79 (1996) 70 FCR 76.

80 Like s 170DF(2) of the Act, s 15(4) of the *Disability Discrimination Act* 1992 (Cth) is based on the Discrimination Convention.

81 (1996) 70 FCR 76 at 87.

requirement or condition the enforcement of which would constitute discrimination against a person".

82 It is unnecessary to determine whether this statement correctly construes s 15(4)(a). But given the structure of s 170DF, it is not correct to say that the "inherent requirements of a particular [position] are the necessary tasks ... divorced of any requirement or condition the enforcement of which would constitute discrimination against a person". This is because s 170DF(2) operates on the assumption that what is in fact discrimination on the ground of age is not discrimination for the purposes of the section. Other statements by his Honour in that case, however, are applicable to s 170DF. Thus, his Honour said[82] that whether a requirement was an inherent requirement of a particular employment was a matter which should be determined according to the dictates of common sense and as a matter of objective fact rather than as a matter of mere speculation or impression.

83 Courts in the United States have also considered a counterpart of s 170DF(2) found in legislation which provides that termination for otherwise discriminatory reasons will be non-discriminatory where the termination relates to a "bona fide occupational qualification" and/or requirement[83]. However, the variance in expression between this phrase and the phrase employed in the Act, as well as the structure of s 170DF, means that judicial interpretations of the phrase are of limited assistance in construing s 170DF, particularly as the United States legislation goes so far as to require the bona fide occupational qualification or requirement to be "reasonably necessary to the normal operation" of the particular business.

84 Decisions of US courts emphasise that, when interpreting provisions which render otherwise discriminatory behaviour non-discriminatory, regard should be had not only to the situation of the employer and employee but also to the needs of third parties. For example, the Supreme Court of the United States has used the "bona fide occupational qualification" defence to uphold an employer's decision to hire male guards only in contact areas of maximum-security prisons[84] and an airline's decision to dismiss flight attendants at different points during the first five months of their pregnancy[85]. These cases involved a consideration of

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82 (1996) 70 FCR 76 at 88.

83 See, for example, the Age Discrimination in Employment Act of 1967, 29 USC § 623(f)(1) and the Civil Rights Act of 1964, 42 USC § 2000e-2(h).

84 *Dothard v Rawlinson* 433 US 321 at 336-337 (1977).

85 *Condit v United Air Lines, Inc* 558 F 2d 1176 (1977), 435 US 934 (1978); *In re National Airlines, Inc* 434 F Supp 249 (1977); *Harriss v Pan American World*

(Footnote continues on next page)

the needs of prison inmates and airline passengers respectively. However, the different language of s 170DF provides no ground for considering the needs of third parties - in this case Qantas' other employees, who presently operate under a bidding system which allocates flights in a fair and just manner.

85 It is no doubt true that, if Qantas was ordered to accommodate not only Mr Christie, but all other pilots who reach the age of 60 and wish to remain in employment, the order would detrimentally affect both the way Qantas manages its operations and the employment conditions of pilots under age 60. At first instance Wilcox CJ said that there were "serious practical difficulties"[86] associated with requiring Qantas to modify its operations in the way contended for by Mr Christie. In order to avoid under-utilisation of its staff, Qantas would need to change "the very nature" of its operations, an outcome which has been eschewed by the United States Supreme Court in its interpretations of the bona fide occupational qualification defence[87]. But such problems are irrelevant to the issue of what is inherent in the "particular position" of the Captain of a Qantas B747-400 flying internationally. If age is not an inherent requirement of the position, termination on the ground of age is a breach of s 170DF. That being so, inconvenience to Qantas or third parties from any order of the Industrial Relations Court is an inevitable by-product of the effect of the ordinary and natural meaning of s 170DF.

86 Nevertheless, the conclusion that it was an inherent requirement of Mr Christie's position as a Qantas Captain of international B747-400 flights that he be able to fly to a reasonable number of Qantas' numerous overseas destinations is inescapable. It was plainly an "inherent requirement" of the position of such a Captain that he or she should have the capacity (physically, mentally and legally) to fly B747-400 flights to any part of the world. That was an indispensable requirement of the position. Having regard to the fact that pilots over 60 are unable to fly over the greater portion of Qantas routes, it is an essential incident of that requirement and therefore an inherent requirement of the position of Captain that the holder be under 60. If Qantas had to employ persons over the age of 60 in the position of a Captain of a B747-400 flying internationally, the inherent requirements of the position of Captain of such an aircraft would be very different. It is true that a contractual requirement does not necessarily equate to an "inherent" requirement. However, it was essential that,

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Airways, Inc 649 F 2d 670 (1980); *Burwell v Eastern Air Lines, Inc* 633 F 2d 361 (1980), 450 US 965 (1981).

86 (1995) 60 IR 17 at 56.

87 *Price Waterhouse v Hopkins* 490 US 228 at 242 (1989); *Automobile Workers v Johnson Controls, Inc* 499 US 187 at 218 (1991).

at the very least, a pilot in Mr Christie's position should be able to operate a sufficient number of flights to meet the requirements of his employment with Qantas as an international pilot. It is probably the case, having regard to the terms of the employment contract, that the Captain of a Qantas B747-400 flying internationally should be able to fly to every Qantas destination. It is unnecessary, however, to decide that point in this case.

87 When Mr Christie turned 60, he was unable to perform a large and essential part of his duties. Whether an inherent requirement of his position is identified by reference to his age or merely by reference to an ability to fly to a reasonable number of Qantas' overseas destinations is immaterial, as the former necessarily incorporates the latter. It is unnecessary to determine what conclusion might be reached if only a small number of countries imposed the 60 year age ban. The ability to fly to most of Qantas' overseas destinations is a requirement which was, to use the words of Cooper J in *Commonwealth of Australia v Human Rights and Equal Opportunity Commission*[88], "truly necessary to ensure the adequate performance of the employment".

Order

88 The appeal should be allowed with costs. The orders of the Full Court of the Industrial Relations Court should be set aside. In lieu thereof, the appeal to that Court should be dismissed with costs.

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88 (1996) 70 FCR 76 at 88.

89 GUMMOW J. The facts giving rise to the controversy between the parties and the course of the litigation in the Industrial Relations Court of Australia[89] ("the Industrial Relations Court") are described in the judgments of McHugh J and of Kirby J and need not be repeated in any detail.

90 On 4 October 1994, the respondent ("Captain Christie") filed an application in the Industrial Relations Court under s 170EA of what was then the *Industrial Relations Act* 1988 (Cth) ("the Act")[90]. Section 170EA(1) provided that:

> "A person ('**the employee**') may apply to the Court for a remedy in respect of termination of his or her employment."

Section 412(1)(a) of the Act conferred jurisdiction upon the Industrial Relations Court "with respect to matters arising under [the Act] in relation to which ... applications may be made to it under [the Act]".

91 The relief sought by Captain Christie included an order declaring that the termination of his employment by the appellant ("Qantas") contravened Div 3 of Pt VIA of the Act. Division 3 comprised ss 170CA-170HB. Provision for the Court to grant declaratory relief was made by s 417 of the Act. The Full Court made a declaration that Qantas "has contravened section 170DF(1)(f) of the [Act] by terminating the employment of [Captain Christie] by reason of his age" and ordered that the matter be remitted for consideration of the making of orders pursuant to s 170EE.

92 Sections 170EE and 170EDA are provisions of central importance for this case. Section 170EE applied in respect of a contravention of a provision of Div 3 (other than s 170DB and s 170DD) which was "constituted by the termination of employment of an employee" (s 170EE(1)). The Industrial Relations Court was empowered to make various orders, including an order requiring the employer to reinstate the employee and an order for payment of compensation. Sections 170DB and 170DD have no relevance for the present case.

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89 *Christie v Qantas Airways Ltd* (1995) 60 IR 17 at first instance and *Christie v Qantas Airways Ltd* (1996) 138 ALR 19 on appeal to the Full Court.

90 The short title to that Act was changed to the *Workplace Relations Act* 1996 (Cth) by Sched 19 to the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth). Schedule 16 thereof provides for the transfer of jurisdiction to the Federal Court of Australia. This appeal concerns the Act as it stood after the commencement on 18 August 1994 of certain provisions of the *Industrial Relations Legislation Amendment Act* 1994 (Cth).

93 Section 170EDA(2) dealt with the onus of proof on an application alleging contravention of s 170DF(1) in respect of termination of employment, among other things, by reason of age. The termination was to be taken to have contravened s 170DF(1) unless the employer proved the employment was not terminated for that reason or that the reason was one to which sub-s (2) or (3) of s 170DF applied. Section 170DF(2) is relevant to this case and is set out below.

94 The case was not presented in the Industrial Relations Court either at first instance or on appeal on the footing that there was an alternative or additional contravention, namely of s 170DE(1)[91]. This stated:

> "An employer must not terminate an employee's employment unless there is a valid reason, or valid reasons, connected with the employee's capacity or conduct or based on the operational requirements of the undertaking, establishment or service."

There was no issue before the Court that the termination of Captain Christie's employment did not contravene s 170DE(1) because there was a valid reason or valid reasons "based on the operational requirements" of Qantas. The onus in respect of such an issue would have been borne by Qantas (s 170EDA(1)(a)). The only relevant issue was raised under s 170DF.

95 So far as presently material, s 170DF provided:

> "(1) An employer must not terminate an employee's employment for any one or more of the following reasons, or for reasons including any one or more of the following reasons:
>
> ...
>
> (f) race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
>
> ...
>
> (2) Subsection (1) does not prevent a matter referred to in paragraph (1)(f) from being a reason for terminating employment if the reason is based on the inherent requirements of the particular position."

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91 Section 170DE(2) was held to be invalid, in *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 573-577.

The effect of s 170DF(2) was that, although a reason for terminating employment may be one of the matters referred to in par (f) of s 170DF(1), if a further condition be met there would be no contravention of the requirement in s 170DF(1) that the employer not terminate an employee's employment for any one or more, or for reasons including any one or more, of those set out in par (f). The further condition was that what otherwise would be the proscribed reason be "based on" the inherent requirements of the particular position occupied by the employee. The expression "based on" suggests that the proscribed reason is incidental to the inherent requirements or is derived from them.

96 Section 170CB provides that an expression has the same meaning in Div 3 as in the Termination of Employment Convention 1982, which is set out as Sched 10 to the Act. Article 3 thereof states:

> "For the purpose of this Convention the terms 'termination' and 'termination of employment' mean termination of employment at the initiative of the employer."

97 Section 170CA states that the object of Div 3 of Pt VIA is to give effect to the Termination of Employment Convention and to the Termination of Employment Recommendation 1982, which is set out in Sched 11 to the Act. Further, the references in par (f) of s 170DF(1) to sexual preference, age, physical or mental disability had been included in order to give effect or further effect to the Discrimination (Employment and Occupation) Convention 1958[92] and to the Discrimination (Employment and Occupation) Recommendation 1958, which is set out in Sched 9 to the Act (s 170CA(2)). Whilst Div 3 has these diverse origins, the municipal legal regime which it establishes should be read as a whole. Thus the contravention provided for by s 170DE(1) is to be considered in conjunction with that in s 170DF.

98 The prohibitions in s 170DE(1) and s 170DF are concerned with termination of employment for reasons unconnected with the previously fixed term or duration of the employment. There is no prohibition upon the entry into contracts providing for employment over a specified period.

99 The effect of the prohibitions in Div 3, such as that in s 170DF(1), which are expressed as "[a]n employer must not terminate an employee's employment", was discussed in the joint judgment of five members of this Court in *Victoria v The Commonwealth* (*Industrial Relations Act Case*)[93]. Their Honours said:

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92 The text is set out as Sched 1 to the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth).

93 (1996) 187 CLR 416 at 520.

"As a matter of ordinary language, an employer does not terminate an employee's employment when his or her term of employment expires. Rather, employment comes to an end by agreement, or, where the term is fixed by award or statute, by operation of law.

There is nothing in the Act to suggest that the words '[a]n employer must not terminate an employee's employment' are to be construed other than in accordance with their ordinary meaning. So construed, they do not apply to the situation where employment comes to an end because its term has expired. To put the matter another way, the prohibitions are concerned with termination for reasons unconnected with the term of employment. And that is manifestly clear when regard is had to ss 170DC, 170DE(1) and 170DF. The prohibitions effected by those sections are directed, respectively, to termination for a specified reason and termination for one or more specified reasons, none of which includes the expiry of the employee's term of appointment."

100 The present litigation was conducted on the footing that if, in accordance with its terms, Captain Christie's contract of employment had been for a period ending on his sixtieth birthday, there could have been no further subsisting employment which was terminated on the initiative of Qantas, thereby engaging Div 3 of Pt VIA of the Act. There was a factual issue, found in favour of Qantas only by Spender J in his dissenting judgment in the Full Court. This was whether Captain Christie's employment with Qantas came to an end on the date of his sixtieth birthday, 21 September 1994. In this Court, Qantas renews its submissions on this issue. However, as will become apparent, the appeal is to be determined favourably to Qantas on the basis that, even if it is assumed that in the ordinary course Captain Christie's employment otherwise would not have come to an end on his sixtieth birthday and would have continued, there was no termination thereof at the initiative of Qantas which constituted a contravention of s 170DF. The appeal should be allowed upon the issues going to the construction of the Act.

101 Upon the footing I have indicated, it was common ground that the employment of Captain Christie was terminated at the initiative of Qantas for the reason of his having attained the age of 60 or, at least, for reasons including that reason. That fact brought Captain Christie's termination within the terms of s 170DF(1)(f) of the Act. The issue is whether in the circumstances s 170DF(2) operated in favour of Qantas so as to deny what otherwise would have been a contravention of s 170DF, because the termination for the reason of Captain Christie's having attained the age of 60 itself was based on or derived from the inherent requirements of Captain Christie's particular position. The phrase in s 170DF(2) "the particular position" emphasises that the sub-section is directed to the precise case in question, not to a general class of persons of which the employee comprises one member.

102 Before Wilcox CJ, there was a body of evidence led to establish, as his Honour found[94], that (i) the international flights available to Captain Christie after he turned 60 years of age were limited to those to and from New Zealand, Denpasar and Fiji; (ii) if a "substantial proportion" of those short flights were allocated to Captain Christie, Qantas would be unable to use fully all its other B747-400 Captains; (iii) to make up sufficient hours, Captain Christie would need to use a "large proportion" of the Qantas flights to those destinations; (iv) the problem of scheduling flights was not within the control of Qantas; and (v) the continuation of Captain Christie in his employment by Qantas would have occasioned Qantas "serious practical difficulties".

103 By his notice of contention, Captain Christie submits that findings (ii)-(v) should not have been made. However, in my opinion, the appeal is to be resolved adversely to Captain Christie without entering upon that question. These matters would have been of considerable importance if the case had been fought upon the applicability of s 170DE(1) and, in particular, upon an issue whether the termination had been supported by a valid reason based on the operational requirements of the Qantas undertaking. They do not assist where the issue arises under s 170DF(2) and concerns the inherent requirements of the particular position.

104 In a case such as the present, the position of Captain Christie was constituted by the tasks and responsibilities which made up his duties and by the rights conferred upon him under his contract of employment with Qantas. However, in the Full Court, Gray J said[95] that Captain Christie's contractual obligation to fly anywhere in the world as required by Qantas was irrelevant to the application of s 170DF(2). His Honour continued[96]:

> "That subsection refers to an 'inherent' requirement, namely something that is essential to the position, rather than being imposed on it. I do not think that an employer, by stipulating for contractual terms, or by creating or adhering to rostering systems, can create inherent requirements of a particular position."

The assumption appeared to be that the "position" has a distinct existence which differs in quality and kind from the bundle of contractual rights and duties, the further continuation of which is brought to an end by the termination on the

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94 (1995) 60 IR 17 at 54-56.

95 (1996) 138 ALR 19 at 32.

96 (1996) 138 ALR 19 at 32.

initiative of the employer. Marshall J[97] appears to have treated the phrase "inherent requirements" as requiring attention to "the position of a Qantas B747-400 captain" rather than the particular position of Captain Christie.

105 These constructions of s 170DF(2) should not be accepted. In a particular context the term "position" may be used to identify a position of authority conferred by the exercise of governmental power for a public purpose. Under the common law, at least some of such offices were classified as incorporeal hereditaments[98], being permanent substantive positions which exist independently of a person's filling them from time to time[99]. In such a context, the phrase "inherent requirements" could be apt to identify permanent attributes or qualities of an office and thus of a "particular position".

106 Paragraph 1(2) of the Discrimination (Employment and Occupation) Recommendation 1958 states that any distinction, exclusion or preference "in respect of a particular job based on the inherent requirements thereof is not deemed to be discrimination". The phrase "a particular job" has been said to refer to "a specific and definable job, function or task", such that the limitation must be required "by the characteristics of the particular job"[100]. The phrase "job, function or task" would be broad enough to encompass steps taken in the discharge of an office. However, whilst an office in the strict sense may not lay outside the scope of the phrase "particular position" in s 170DF(2), its primary and general application must be to identify those tasks and responsibilities which make up the contractual duties of the employee, together with the contractual rights of the employee, the termination of whose employment is in question.

107 Those tasks and responsibilities will be required of the employee under the express or implied terms of the contract of employment. Those terms may be supplemented by requirements of statute, for example by a certified agreement which has been made binding under s 149(2) of the Act.

108 Captain Christie joined Qantas as a Second Officer in April 1964. He was promoted to First Officer and then to Captain on the Boeing 707 aircraft in 1977. In 1978, he transferred as Captain to the 747 aircraft and in 1991 to the 747-400

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97 (1996) 138 ALR 19 at 38-39.

98 Blackstone, *Commentaries on the Laws of England*, 1st ed (1766), vol 2 at 76-77; Cruise, *A Digest of The Laws of England Respecting Real Property*, 2nd ed (1818), vol 3, Title XXV, §§1, 2 at 117; *Kendle v Melsom* [1998] HCA 13 at 33.

99 *Sykes v Cleary* (1992) 176 CLR 77 at 96.

100 International Labour Office, *General Survey: Equality in Employment and Occupation*, (1988) at par 126.

series aircraft. Throughout this period the contractual basis of his employment remained in the letter of appointment dated 30 April 1964. This contained 20 numbered paragraphs. Paragraph 14 read:

> "You will be required during the period of your appointment to comply with Licences and other Certificates of Competency as may be required by the Director General of Civil Aviation and to keep valid such Certificates or Licences and to pay all fees in connection therewith.
>
> In the event of any such Certificates of Competency becoming invalid you will be suspended without remuneration until the Company receives written advice from the Department of Civil Aviation that renewal or revalidation has been effected."

109 Paragraph 19 required the terms of employment to be read in conjunction with, and stated that they were supplementary to, the terms of any enactment, industrial agreement or award which specifically covered Captain Christie's employment with Qantas. This requirement later was supplemented by the provisions of the International Airline Pilots' Agreement 1986 ("the Certified Agreement"). On 19 June 1989, this was certified by the Australian Industrial Relations Commission under s 115 of the Act as it then stood[101]. The consequence of the certification was that the Certified Agreement bound Captain Christie, the industrial association of which he was a member, other members, and Qantas.

110 Section 5 of the Certified Agreement was headed "CONTRACT OF EMPLOYMENT" and comprised pars (a)-(o). Paragraph (e) stated:

> "The company may employ its pilots and the pilots shall serve the company in any part of the world where the company may from time to time be operating."

111 More significant for present purposes was par 2 of the letter of appointment. This stated:

> "You are appointed as a Pilot for duty as required by the Company in any part of the world, including Flight Engineering and Navigational duties as directed."

112 The result of the adoption by the municipal laws of various countries of the so-called "Rule of 60" was to deny to Captain Christie the ability further to

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101 Section 115 was repealed by the *Industrial Relations Legislation Amendment Act* 1992 (Cth).

comply with par 2 of his letter of appointment and s 5(e) of the Certified Agreement. The situation was described as follows by Spender J in the Full Court[102]:

> "The effect of the application [of the 'Rule of 60'] by countries to which or over which Qantas flies on those routes serviced by B747-400 aircraft means that Mr Christie would not be able to fly to any of the Qantas European destinations or to Singapore, Bangkok or Hong Kong, or to the United States, or over United States territories. The effect of these restrictions is that the only international flights on which Qantas could use Mr Christie, if he were to be employed by them, are flights to and from New Zealand, Denpasar in Bali and Fiji."

The imposition of the "Rule of 60" in this way may have been to render further performance by Captain Christie of his contract with Qantas radically different from performance in the circumstances which were contemplated at the time of his engagement. This may have enlivened the principles considered in *Codelfa Construction Pty Ltd v State Rail Authority of NSW*[103].

113 However, that is not an issue which arises in the present litigation. The question here is whether the termination by Qantas of Captain Christie's employment for the reason of his having attained the age of 60 was based on the inherent requirements of the tasks and responsibilities which made up the duties he owed to Qantas. In particular, the issue is whether it was an inherent requirement that Captain Christie be available for duty as required by Qantas in any part of the world.

114 A right or privilege which is permanently attached to an office may be described as inherent in that office, as it is filled by successive holders of the position. Other permanent attributes or qualities thereof may answer the same description. However, the present case is not found in that universe of discourse. The "position" here is the particular bundle of contractual rights and obligations, supplemented, as I have indicated, by the operation of statute. In such a setting, the term "inherent" suggests an essential element of that spoken of rather than something inessential or accidental.

115 This is a distinction found in various areas of the law. It is illustrated by a passage in the joint judgment of Dixon and Evatt JJ, addressed to very different subject-matter, in *Attorney-General (NSW) v Perpetual Trustee Co (Ltd)*[104].

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102 (1996) 138 ALR 19 at 25.

103 (1982) 149 CLR 337.

104 (1940) 63 CLR 209.

There, the question was whether the intention of the testatrix that a particular farming property be used for charitable purpose formed an essential or indispensable condition of her gift or whether the will manifested a more general charitable intention. Observations by Dixon and Evatt JJ are of general significance. Their Honours said[105]:

> "The truth is that the time-honoured distinction between essential and accidental characteristics is at the root of the test provided by the modern law for ascertaining whether a trust for charitable purposes, found incapable of literal execution according to its tenor, is nevertheless to be administered *cy-près*. In other departments of the law, however, similar distinctions are in use. Analogies may be seen in the question whether a contractual provision is of the essence; whether a term is a condition or a warranty; in the question whether invalid provisions of a statutory enactment or other instrument are severable or form part of an indivisible whole; in the question whether a law is mandatory or directory, and perhaps in the question whether the substantial purpose of creating a special power of appointment was to ensure a benefit to the objects so that they take in default of its exercise by the donee."

116 In the case of Captain Christie, the primary requirement of Qantas was that found in the very terms in which his appointment was expressed, namely that he was "appointed as a Pilot for duty as required by [Qantas] in any part of the world" (par 2). As I have outlined above, this was later supplemented by the Certified Agreement.

117 This requirement of availability for service in any part of the world where Qantas from time to time operates was a property or attribute which gave to any tasks and responsibilities which made up the duties of Captain Christie their particular character. The reason for the termination of his employment, namely the attainment of the age of 60, was proscribed by s 170DF(1)(f), but was incidental to the requirement of availability for worldwide service. In that regard, Wilcox CJ concluded[106]:

> "Whatever the future may bring, the evidence shows that Mr Christie's continuation in employment after 21 September 1994 would have occasioned Qantas serious practical difficulties. If, as I believe, s 170DF(2) is to be applied in a practical, commonsense way, it must be concluded that, at that time, being under 60 years of age was an inherent requirement of a position as a B747-400 Captain.

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105 (1940) 63 CLR 209 at 226-227.

106 (1995) 60 IR 17 at 56-57.

> In relation to this conclusion, it should be remembered that availability to fly anywhere in the world was not only a term of the [Certified Agreement], under which Mr Christie worked at the time of his termination, but was a term of his contract of employment, negotiated when he joined the company in 1964.
>
> I do not think it is any answer for Mr Christie to volunteer to fly as a First Officer, or on domestic routes in a different type of aircraft or on a part-time basis. These are practical suggestions in relation to a pilot approaching his or her 60th birthday that might attract an employer in the position of Qantas, if that employer was minded to find a way of keeping the pilot's services. But the adoption of any of these suggestions would involve Mr Christie being employed in a different position than that which he occupied immediately prior to 21 September 1994."

118 It was said by Marshall J in the Full Court[107] that a logical consequence of the submissions made by Qantas was that Qantas would be entitled to terminate the employment of all its female pilots "with impunity" if one or more foreign countries would not permit them to fly into their airports. The implication is that this would be a result at odds with the remedial nature of the legislation and the correct approach to its construction[108]. However, the point made by his Honour, with respect, misconceives the issues raised by Captain Christie's application. In the example given, Qantas could not act "with impunity" in terminating the employment of all its female pilots unless, within the meaning of s 170DE(1), it could establish a valid reason or valid reasons based on the operational requirements of the undertaking, establishment or service of Qantas. That would involve a broader and different inquiry to that which arises from reliance solely upon s 170DF(2) where the termination has been for a reason specified in par (f) of s 170DF(1).

119 The same may be said in respect of the reliance placed upon the decision of the United States Supreme Court in *Western Air Lines, Inc v Criswell*[109]. The statute there in question[110] generally prohibited mandatory retirement before the age of 70 but it was not unlawful for an employer to take any action otherwise prohibited "where age [was] a bona fide occupational qualification reasonably

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107 (1996) 138 ALR 19 at 39.

108 See *I W v City of Perth* (1997) 71 ALJR 943 at 947, 954, 956, 963, 974; 146 ALR 696 at 702, 710, 714, 724, 738-739.

109 472 US 400 (1985).

110 The *Age Discrimination in Employment Act* 1967, 29 USC §§621-634.

necessary to the normal operation of the particular business"[111]. The employer imposed a requirement of retirement at 60 upon members of cockpit crews of its aircraft. They did not operate the flight controls unless both the pilot and co-pilot became incapacitated. Federal statutory law prohibited a person from serving as a pilot or co-pilot after reaching the age of 60. The issues which arose concerned the construction of the statutory exception in favour of bona fide occupational qualifications which were reasonably necessary to the normal operation of a particular business. Any assistance the case provides is of use in construing s 170DE(1), rather than s 170DF. The same is true of the later decision of the United States Supreme Court in *Automobile Workers v Johnson Controls, Inc*[112].

120 The application was properly dismissed by Wilcox CJ. Spender J was correct in his minority decision in the Full Court that the appeal to that Court should have been dismissed.

121 The appeal to this Court should be allowed with costs, and the orders of the Full Court of the Industrial Relations Court should be set aside. In place thereof it should be ordered that the appeal to that Court be dismissed with costs.

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111 29 USC §623(f)(1).

112 499 US 187 (1991).

122 KIRBY J. This appeal concerns the operation of federal legislation which renders it unlawful to terminate employment for reasons of age[113].

123 The legislation provided an exemption if the reason for the termination was based on "the inherent requirements of the particular position"[114]. Two points have been argued in the appeal which comes from the Full Court of the Industrial Relations Court of Australia[115]. The first is whether the employer in question "terminated" the employee's employment or whether (as the employer asserts) such employment expired by effluxion of time. (The termination point). The second is whether, if there was a termination, it was for a reason based on the "inherent requirements of the particular position". (The discrimination point).

124 The primary judge (Wilcox CJ) found for the employee on the termination point but for the employer on the discrimination point. Relief was therefore denied[116]. On appeal, the judges constituting the Full Court divided. One[117] found against the employee on both points. However, a majority[118] confirmed the primary judge's decision on the termination point but reversed him on the complaint of discrimination. In the result, a declaration was made that the employer had contravened the legislation[119]. The proceedings were remitted to the primary judge for consideration of the appropriate relief[120]. Now, by special leave, the employer appeals to this Court.

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113 *Industrial Relations Act* 1988 (Cth) ("the Act"), s 170DF(1)(f). The legislation has since been repealed and replaced by the *Workplace Relations Act* 1996 (Cth). Section 170DF(1)(f) has been re-enacted as s 170CK(2)(f). The provisions of s 170DF(2) have been re-enacted as s 170CK(3) of the *Workplace Relations Act* 1996. There is no section equivalent to s 170DE(1).

114 s 170DF(2).

115 *Christie v Qantas Airways Ltd* (1996) 138 ALR 19.

116 *Christie v Qantas Airways Ltd* (1995) 60 IR 17 per Wilcox CJ.

117 Spender J.

118 Gray J and Marshall J.

119 (1996) 138 ALR 19 at 46.

120 Pursuant to the Act, s 170EE.

Airline pilots and the *Rule of 60*

125 Captain John Christie joined Qantas Empire Airways Ltd (now Qantas Airways Ltd) in 1964. His letter of appointment stated that he was engaged "as a Pilot for duty as required by the Company in any part of the world, including Flight Engineering and Navigational duties as directed". The letter made no mention of a compulsory retirement age. But it did provide for termination:

> "During your employment, your services may be terminated by the Company or yourself by the giving of notice or payment or forfeiture of salary in lieu thereof in accordance with the agreement covering Airline Pilots employed by [Qantas] ... The abovementioned conditions of employment are to be read in conjunction with and are supplementary to the terms of any enactment industrial agreement or award specifically covering your employment with this Company".

126 Before Captain Christie's engagement, the retirement age for Qantas' pilots had been progressively extended[121]. In the year in which he joined Qantas it was increased to fifty-five years. Thereafter, by steps which it will be necessary to mention, Qantas extended the "normal retirement age" of its pilots, ultimately to the pilot's sixtieth birthday. In Captain Christie's case that fell on 21 September 1994. In accordance with the established procedure, he signed forms presented to him by Qantas, the last of which stated:

> "By advice of this letter, I elect to extend my employment to 21.9.94 being my 60th birthday".

That letter was acknowledged by Qantas. Captain Christie continued to perform his duties. However, on 6 July 1994, he wrote to Qantas:

> "My current retirement date is 21.9.94 my sixtieth birthday. I believe recent legislation may now over-ride any requirement for a retirement to be based on age. It is my wish to continue flying for Qantas beyond 21.9.94.
>
> I am aware that there may be some restrictions to my flying due to certain overseas regulations, but I am prepared to bid around such restrictions.
>
> Due to the relatively short time available before 21.9.94 I trust that you can give me an early reply".

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121 It was age forty-five in 1946; age fifty in 1955: see Human Rights and Equal Opportunity Commission, *Report of Inquiry into Complaints of Discrimination in Employment and Occupation: Compulsory Age Requirement* (HRC Report No 1) (1996) at 34.

The legislation to which Captain Christie referred was the *Industrial Relations Reform Act* 1993 (Cth). This amended the *Industrial Relations Act* 1988 (Cth) ("the Act") by inserting in it the provisions which are in question in this appeal. Relevantly, the principal provision made unlawful the termination by an employer of the employment of an employee for reasons of age[122]. Qantas was an employer bound by the Act. Captain Christie was an employee. The amendments came into force on 30 March 1994.

127 Qantas clearly realised the significance of Captain Christie's request. It had previously been involved in protracted litigation concerning alleged discrimination in the retirement of flight attendants[123]. Contemporaneous with Captain Christie's enquiry was a request, similar to his, by a pilot (Captain Dallas Allman) then employed by "Qantas Domestic"[124]. Qantas replied to Captain Christie on 8 September 1994:

> "As you know, the International Airline Pilots' Agreement and the Company's policy requires that pilots retire no later than upon reaching the age of 60 years.
>
> Insofar as this is a matter of policy, it is based on safety and operational considerations. It reflects the particular requirements of and qualifications for the position of pilot[s] within the employ of Qantas.
>
> The Agreement and the policy are still appropriate and remain operative. Accordingly, it is necessary that your retirement take effect as planned on 21st September, 1994".

128 Pursuant to this letter, Captain Christie's employment with Qantas ceased (to use a neutral word) on his sixtieth birthday. He was one of Qantas' most senior pilots licensed to fly its B747-400 aircraft. There were 113 pilots so licensed. He enjoyed a wealth of flying experience. His health was good. He continued to hold a Class 1 licence. He objected to having his employment "terminated", as he saw it, for a reason so arbitrary as the sixtieth anniversary of his birthday. So keen was he to continue flying that he offered to work as a First Officer, as a Captain on Qantas Domestic services, or even to work

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122 s 170DF(1)(f).

123 *Squires v Qantas Airways Ltd (No 1)* (1985) 12 IR 21 and *Squires v Qantas Airways Ltd (No 2)* (1985) 12 IR 30; *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26.

124 Formerly Trans-Australia Airways and Australian Airlines Ltd. See *Christie v Qantas Airways Ltd* (1995) 60 IR 17.

part-time[125]. His offers were rejected. Along with Captain Allman, Captain Christie's employment with Qantas ceased on his sixtieth birthday. However, he and Captain Allman challenged Qantas in the Industrial Relations Court.

The trial - medical and safety issue

129 The challenges were heard together. The two fundamental issues (the termination point and the discrimination point) were common to each case.

130 So far as the discrimination point was concerned, Qantas asserted that it did not fall within the statutory prohibition because its policy was based on "the inherent requirements of the particular position". To support its adherence to the *Rule of 60*, Qantas called medical and other expert evidence. By this it sought to establish that the prohibition on pilots flying beyond the age of sixty years was justified. This was the issue which occupied most of the time at trial. Qantas laid emphasis upon the company's enviable safety record, "fail-safe philosophy", elimination of risks and conviction that the retirement of pilots at age sixty was necessary and prudent. It sought, by evidence, to prove that mental acuity, physical dexterity and capacity for judgment, necessary for the position of a pilot, deteriorated with age. Its expert supported Qantas' adherence to the *Rule of 60* on health and safety grounds. He did so by reference to papers which were described and analysed in the reasons of the primary judge[126].

131 Captains Christie and Allman relied on a more recent report[127] undertaken for the United States Federal Aviation Authority. This was highly critical of the methodology and data of Qantas' expert. The employees called their own experts with medical and aviation experience. They expressed the opinion that, with advances in motor and psychological testing techniques, it was feasible to design a reliable means of identifying inability to meet the high standards required for Class I medical certification necessary to be a pilot. One of these experts stated, in evidence which the primary judge accepted[128]:

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125 *Christie v Qantas Airways Ltd* (1995) 60 IR 17 at 56.

126 The Kulak Report 1971; the Booze Report 1977; the NIA Report 1981 and the OTA Report 1990, all described in the judgment of Wilcox CJ at 30-44. He also relied upon a Report by Dr Castello-Branko and a Report of 1985 by Dr Geoffrey Holt; see *Christie v Qantas Airways Ltd* (1995) 60 IR 17 at 38-43.

127 The Hilton Report 1993-1994.

128 *Christie v Qantas Airways Ltd* (1995) 60 IR 17 at 48-49.

> "There is no logic or scientific data which allows the medical profession to make the assumption that when an individual turns 60 years of age the individual immediately fails to meet either the operational standard or medical standard required for Class 1 medical certification. The very fact that the medical surveillance system operating through routine pilot aircrew medicals and self referral identifies individuals who fail to meet the medical standard before the 60th birthday resulting in denial of medical certification testifies to the fact that age alone is an unreliable indicator as to an individual's ability to meet the required standard ... There is ... no evidence to suggest that at upon obtaining the age of 60 years that all individuals who have met the required standard up to that point will suddenly cease to meet the medical requirements for certification".

132 The primary judge gave numerous and convincing reasons as to why he rejected the attempt by Qantas to justify on medical and safety grounds its *Rule of 60*[129]. He concluded[130]:

> "[I]ndependently of general practice and the policy of the particular employer, but looking at the question in a practical, commonsense way, is it a necessary qualification for the particular position that an incumbent be less than 60 years old? So far as the medical issue is concerned, this question must be answered in the negative".

What follows for the effective operation of anti-discrimination law must proceed from that finding which is not challenged.

The trial - "operational requirements"

133 The primary judge ordered Qantas to reinstate Captain Allman as a pilot of Qantas' domestic passenger aircraft for which he was licensed. But there was a point of distinction in Captain Christie's case which, it was held, resulted in the failure of his claim. It was the matter adverted to in Captain Christie's letter to Qantas in which he referred to "overseas regulations" and his preparedness to "bid around" the restrictions created by them.

134 The primary judge examined the international rules and practices concerning the entitlement of pilots to fly B747-400 aircraft in, or through, the airspace of certain overseas countries served by the Qantas international network. He considered whether the difficulties undoubtedly presented to Qantas by the restrictions imposed by such international rules and practices could be

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129 *Christie v Qantas Airways Ltd* (1995) 60 IR 17 at 52.

130 (1995) 60 IR 17 at 53.

satisfactorily circumvented, as Captain Christie proposed, by an adjustment of the rostering system whereby pilots bid for the allocation of flights.

135 The Convention on International Civil Aviation, to which Australia is a party, provides for the adoption of uniform international standards for civil aviation to "facilitate and improve air navigation"[131]. One object of these standards is to deal with matters concerned with safety[132]. Provision is made for the endorsement of pilot licences in the case of any person holding a licence who does not satisfy in full "the conditions laid down in the international standard relating to the class of licence of certificate which he holds"[133]. The Convention also provides that no personnel, having certificates so endorsed, should participate in international navigation, except with the permission of the State whose territory is entered[134]. The Convention establishes the International Civil Aviation Organization ("ICAO")[135]. The council of that body[136] is obliged to adopt international standards and recommended practices[137]. These become annexes to the Convention[138]. Annex 1 titled "Personnel Licensing" contains provisions for "Curtailment of privileges of pilots who have attained their 60th birthday"[139]. The relevant sub-paragraph reads[140]:

> "A Contracting State, having issued pilot licences, shall not permit the holders thereof to act as pilot-in-command of an aircraft engaged in scheduled international air services or non-scheduled international air transport operations for remuneration or hire if the licence holders have attained their 60th birthday."

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131 Art 37.

132 Art 37.

133 Art 39(b).

134 Art 40.

135 Art 43.

136 Art 50.

137 Art 54(l).

138 Art 54(l).

139 Par 2.1.10 of Annex 1.

140 Par 2.1.10.1 of Annex 1.

There follows a recommendation that Contracting States should not permit such persons to act as co-pilots[141].

136 Notwithstanding these provisions, several countries have removed, or modified, the age restriction there stated. According to the evidence, some have substituted another age for the *Rule of 60*[142]. Others leave it to the pilot's own licensing country[143]. Still others have removed the arbitrary age requirement altogether. Thus, the Civil Aviation Authority of New Zealand wrote to Captain Christie[144]:

> "From a pilot licensing point of view there is no requirement for permission to be granted to persons who are over the age of 60 years and who wish to fly into or over New Zealand. Should you wish to fly an Australian registered aircraft in NZ you may do so, age is of no consequence. ... [S]o long as a person is medically fit and meets the other licence currency requirements, he or she may fly here regardless of age".

137 Despite this enlightenment, several countries continue to adhere strictly to the *Rule of 60*. These include some[145] which control the airspace of or near primary destinations of the Qantas international network. Thus, although Captain Christie could pilot a B747-400 aircraft into and through much of European airspace, the prohibitions imposed by Singapore, Thailand and the United States (including Guam) would effectively prevent Captain Christie from piloting or co-piloting such aircraft on the long haul routes which constitute the bulk of Qantas' international business. The position of South Africa and Zimbabwe was not disclosed by the evidence, presumably because Captain Christie's sixtieth birthday fell in 1994 when flights there were limited. The case was therefore conducted upon the basis that, effectively, there were only three international destinations to which he could fly the B747-400 aircraft for Qantas, namely Denpasar (Bali) in Indonesia, Fiji and New Zealand[146]. Even Fiji presented some difficulties because of the schedules by which flights to that country frequently proceed across the Pacific into United States airspace. There

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141 Par 2.1.10.2 of Annex 1.

142 Iran (61); Finland (63); Germany, Switzerland and the United Kingdom (65); Sweden (66) (depending on size of aircraft).

143 Austria, Cyprus, Hungary, India and the Netherlands.

144 Annex C3 to the affidavit of J B Christie.

145 For example Singapore, Thailand and the United States of America.

146 *Christie v Qantas Airways Ltd* (1995) 60 IR 17 at 54.

was no difficulty in Captain Christie's piloting aircraft within Australia. A proportion of flights assigned to international pilots comprise domestic sectors[147]. Qantas submitted that Captain Christie could not be accommodated without his being required, impermissibly, to fly as a pilot to or over a country which would not accept a Qantas aircraft flown by anyone over sixty years of age.

138 Much evidence at the trial was devoted to Qantas' rostering system. It is referred to in an agreement between Qantas and the Australian International Pilots' Association ("the pilots' association"), certified by the Australian Industrial Relations Commission[148]. According to the findings of the primary judge, Qantas determined the routes which it wished to fly and the planes to operate those routes. It then allocated aircraft to such flights on a principle aimed to ensure the most efficient use of its aircraft. A computer programme adjusted to these considerations statutory and award requirements affecting air crew. The product was called a "slip pattern". Each of these slip patterns represented one trip which might be as short as four hours (Sydney/Melbourne/Sydney) or as long as 12 days (Sydney/Bangkok/London/Bangkok/Sydney). Slip patterns were then combined into eight week periods, for which crew, including pilots, were entitled to submit their bids. The bids were then determined according to seniority. They were allocated to pilots and other crew. A roster was prepared on the basis of the successful bids. It could be altered. But normally it would govern the allocation of employment duties. Qantas imposed a rule upon the bidding system by which a pilot could not bid for more than two one day trips in an eight week period. There was some dispute concerning the interpretation of the evidence about the application of this rule. But its existence was not doubted. Flights within Australia and to New Zealand were used to reach the allocated flying hours in a bid period.

139 Captain Christie's case was that, by a rearrangement of this roster, Qantas could allow him to fly domestically and on the sectors to New Zealand, Indonesia and Fiji or elsewhere where his age was no barrier. Qantas' case was that, especially if more B747-400 pilots insisted on flying after their sixtieth birthday, there were insufficient sectors available to constitute the minimum flying hours. The disruption to the rostering system would be serious. The situation would get worse as more international pilots followed Captain Christie's lead.

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147 According to the respondent this was 19% of hours of international flying. According to Qantas it was 4.48% of hours.

148 The certified agreement had the force of law; see the Act, s 149(2); but cf the Act s 170HA ("inconsistent awards and orders").

140 The primary judge rejected the submission that these difficulties were merely administrative problems within the control of Qantas itself[149]. This opinion led the primary judge to conclude that the termination of Captain Christie's employment was based on "the inherent requirements of the particular position". His claim was therefore dismissed.

The decision of the Full Court

141 The differences between the judges in the Full Court were marked. Spender J supported the conclusion last stated. Moreover, unlike the primary judge, he was of the opinion that there had been no termination of Captain Christie's employment[150]. It simply expired according to its terms.

142 Gray J held that Qantas had terminated Captain Christie's employment. He rejected the argument that the successive collective agreements as to retirement had been incorporated into the contract between Qantas and Captain Christie[151]. Even on the footing that the retirement age of sixty had become incorporated in the contract, Gray J considered that the amendments to the Act[152] operated[153]:

> "to make any term of the appellant's contract requiring his retirement at a particular age a term on which the respondent could not insist, unless it had the protection of subs (2)".

Upon this basis, Gray J concluded that the difficulties presented by countries which adhere to the *Rule of 60* and the readjustment of Qantas' roster system were irrelevant to the "inherent requirements" of Captain Christie's particular position[154].

143 Marshall J substantially followed the approach of the primary judge on the question of "termination". He concluded that Captain Christie's contract of employment did not end by lapse of time but was terminated on the initiative of Qantas[155]. On the discrimination point, he rejected the conclusion that it was an

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149 (1995) 60 IR 17 at 56.

150 (1996) 138 ALR 19 at 25.

151 (1996) 138 ALR 19 at 30.

152 Notably s 170DF(1)(f).

153 (1996) 138 ALR 19 at 30.

154 (1996) 138 ALR 19 at 32.

155 (1996) 138 ALR 19 at 45.

"inherent requirement" of a position as a B747-400 Qantas Captain that Captain Christie be under sixty years of age[156]:

> "It was possible and remains possible for Mr Christie to be rostered so that he is able to perform his duties as a B747-400 captain. The very characterisation of the issue by Wilcox CJ as 'an operational issue' illustrates, with respect, an incorrect approach to the resolution of the issue. A matter that goes to operational requirements is not necessarily a matter that bears upon the inherent requirements of the particular position."

It was in this way that Captain Christie gathered the majority in the Full Court to make the orders which Qantas now challenges.

Provisions of the Act

144 Following the amendments to the Act in 1993 there was included amongst the Act's objects[157]:

> "(g) helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin".

145 Division 3 "Termination of employment" was inserted into Pt VIA. Subdivision (A) contained certain objects and provisions on interpretation. By s 170CA(1) it was stated that the object of the Division was to give effect to the Termination of Employment Convention and the Termination of Employment Recommendation 1982[158]. Section 170CA(2) provided:

> "Without limiting subsection (1), the references in paragraph 170DF(1)(f) to sexual preference, age and physical or mental disability, have been included in order to give effect, or further effect, to:

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156 (1996) 138 ALR 19 at 40.

157 s 3(g).

158 Rec No 166 adopted by the General Conference of the International Labour Organisation on 22 June 1982. The English text of this is reproduced in Sched 11 of the Act. See also Section 170BA which provides: "The object of this Division is to give effect, or further effect, to: (a) the Anti-Discrimination Conventions; and (b) the Equal Remuneration Recommendation, 1951 ... and (c) the Discrimination (Employment and Occupation) Recommendation, 1958".

(a) the Convention concerning Discrimination in respect of Employment and Occupation, a copy of the English text of which is set out in Schedule 1 to the *Human Rights and Equal Opportunity Commission Act 1986*; and

(b) the Recommendation referred to in paragraph 170BA(c)."

Section 170CB provided that an expression in the Division had the same meaning as in the Termination of Employment Convention. Specific provision was made for the regulations in certain cases to exclude specified employees. There were no regulations relevant to international pilots. Section 170DE forbade termination of an employee's employment unless there was a valid reason connected with the employee's capacity or based on the operational requirements of the employer's undertaking. The critical provisions of the Act are now reached. They appeared in s 170DF. That section specified certain grounds for which an employer was not to terminate the employment of an employee. These included temporary absence from work for illness or injury, union membership or non-membership, acting as a representative of an employee or filing complaints against an employer. There then appeared the important provisions[159]:

"170DF(1) An employer must not terminate an employee's employment for any one or more of the following reasons, or for reasons including any one or more of the following reasons:

...

(f) race, colour, sex, sexual preference, *age*, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;

...

(2) Subsection (1) does not prevent a matter referred to in paragraph (1)(f) from being a reason for terminating employment if the reason is based on the inherent requirements of the particular position."

146 Specific provision was made for the onus of proof in proceedings between an employer and employee. By s 170EDA(2), where the employee alleged termination on a ground in s 170DF(1), such termination was taken to have contravened that sub-section unless the employer proved that the employment was not terminated for the particular reason so specified or that the reason or

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159 Emphasis added.

reasons were those to which, relevantly, s 170DF(2) applied. There was a definition of "termination of employment" in s 170EDA(3). However, apart from making it plain that the termination had to be by the employer, this provision did not elaborate the elements required for the purposes of the Act.

147 Section 170EE provided for the remedies which the Court might grant where termination of employment of an employee contrary to the Act was established. The Court could order the employer to reinstate the employee[160], as was done in the case of Captain Allman. But if the Court considered that reinstatement was impracticable, it could "make an order requiring the employer to pay to the employee compensation of such amount as the Court thinks appropriate"[161]. It was made clear by s 170EG that a contravention of Subdivision B (containing ss 170DE and 170DF) was not a criminal offence.

International Conventions

148 Because of the express references in the Act to a number of "anti-discrimination conventions", and the stated objects relevant to the provisions in question[162], it is appropriate to examine those provisions in the context of the international measures to which reference may be made in elucidating their meaning and purpose[163].

149 General provisions against discrimination were contained in the Universal Declaration of Human Rights 1948[164], the International Covenant on Economic, Social and Cultural Rights 1966[165] and the International Covenant on Civil and Political Rights 1966[166]. Specific instruments dealing with discrimination on

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160 s 170EE(1).

161 s 170EE(2); see also sub-ss (3), (4) and (5).

162 ss 170CA(1) and (2).

163 *Gerhardy v Brown* (1985) 159 CLR 70 at 124; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 71 ALJR 381 at 382-383, 388, 419; 142 ALR 331 at 332, 339-340, 383.

164 Art 7.

165 Art 2.2; see also Art 6.1.

166 Art 2.1.

grounds of race[167] and sex[168] have been adopted. The International Labor Organisation (ILO) has had a longstanding involvement in the removal of discrimination in matters relevant to its field of competence[169]. The International Labour Conference had adopted several relevant Conventions and Recommendations addressed to equality of opportunity in the context of employment. The most important of these is the Discrimination (Employment and Occupation) Convention and Recommendation (No 111) 1958 ("Convention 111"[170] and "Recommendation 111"[171]). According to a commentator, the number of ratifications of Convention 111 place it "among the most widely ratified conventions by countries from all regions of the world"[172]. It has been ratified by Australia. It is the Convention referred to in s 170CA(2)(a) of the Act[173]. Section 170DF is substantially based upon Art 5 of the Convention. However, age was not referred to in that Article as a prohibited ground of termination of employment. That ground was introduced by Art 5(a) of Recommendation No 166[174] which provides:

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167 Convention on the Elimination of All Forms of Racial Discrimination (CERD), 1965.

168 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979.

169 Nielsen, "The Concept of Discrimination in ILO Convention No 111" (1994) 43 *International and Comparative Law Quarterly* 827 at 827-828: "Equality of opportunity and treatment has been one of the objectives of the International Labour Organisation (ILO) since its foundation by the Peace Treaty of Versailles in 1919. The principle was recognised in Article 41(2) of the original Constitution of the ILO and was re-stated by the International Labour Conference (ILC) in its 1944 Declaration of Philadelphia concerning the future aims and objectives of the ILO" (footnotes omitted).

170 Found in *Human Rights and Equal Opportunity Commission Act* 1986 (Cth), Sched 1.

171 Found in the Act, Sched 9 (now repealed, and not reproduced in the *Workplace Relations Act* 1996 (Cth)).

172 Nielsen, "The Concept of Discrimination in ILO Convention No 111" (1994) 43 *International and Comparative Law Quarterly* 827 at 828.

173 See also the definition of "discrimination" in s 3 of the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth).

174 Found in Sched 11 to the Act (now repealed, and not reproduced in the *Workplace Relations Act* 1996 (Cth)).

"In addition to the grounds referred to in Article 5 of the Termination of Employment Convention, 1982, the following should not constitute valid reasons for termination:

(a) age, subject to national law and practice regarding retirement. ..."

150 Although age is likewise not specifically included in Convention 111, that Convention refers to a number of the grounds included in s 170DF(1)(f)[175]. It also prohibits other distinctions which have the "effect of nullifying or impairing equality of opportunity"[176]. It states the exemption which is obviously the source of the provision in s 170DF(2) of the Act. Convention 111 provides[177]:

"Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination".

151 Qantas emphasised the differentiation between the language of Convention 111 and the language of the Act. It was suggested that the use of the indefinite article ("a") and the more general word ("job") in Convention 111 was to be contrasted with the use of the definite article ("the") and the more specific word ("position") in the Act. Qantas submitted that this differentiation meant that part only of the international obligation was implemented by the Act, qualifying the use which might be made of international material in elaborating its meaning and purpose[178]. Clearly, there is a differentiation of language. But it is not, ultimately, a crucial one. The critical words in both Convention 111 and the Act are "termination" and "inherent requirements". They are common to both texts. They determine the outcome of this appeal.

General approach

152 The following rules govern the approach to ascertaining the meaning of the provisions of the Act applicable in this case:

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175 Such as "race, colour, sex, ... religion, political opinion, national extraction or social origin".

176 Art 1.1.

177 Art 1.2.

178 cf *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 233-234, 268; *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 487-488.

1. *Purposive construction of legislation* A court must give meaning to legislation according to its terms. This is as true of anti-discrimination legislation as of any other. At the end of its analysis, the court holds that the Act "means what it says"[179]. However, different eyes can see the same words and derive different meanings from them. In the attempt to reduce such disparities, courts have accepted rules of construction. However, even these do not eliminate the differences entirely. In recent times, courts, including this Court, have placed increasing emphasis upon adopting a purposive and not an unduly literal approach to the task of statutory construction[180]. Once the object or purpose of the legislation is defined, the duty of a court is to give effect to it, so far as the language permits[181].

2. *Beneficial construction of anti-discrimination legislation* Remedial legislation, designed to achieve the high public purpose of upholding equal opportunity, should be construed beneficially and not narrowly. Any other approach risks frustrating the will of Parliament[182]. So long as that will is expressed in valid legislation, it is the function of courts to give effect as far as they can to its purpose, particularly where that purpose is designed to protect and advance basic rights[183]. This approach should be adopted, and there should be no faltering, where the object relates to less familiar grounds of discrimination (such as age, sexual orientation ("sexual preference") and handicap) as for the more familiar grounds (such as "race, colour and sex"). Each ground is accorded equal status in the Act. Each is derived from successive elaborations of international standards.

3. *Use of international instruments* Where, as here, the Act contains words derived from international sources, it is legitimate for a court to have regard to those sources in assigning meaning to the words of the Act. Not only is this a proper approach mandated by the authority of this Court[184]. In the

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179 *Automobile Workers v Johnson Controls, Inc* 499 US 187 at 211 (1991).

180 *Bropho v Western Australia* (1990) 171 CLR 1 at 20 applying *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 423 per McHugh JA.

181 *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 424; cf *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 272-275.

182 *IW v City of Perth* (1997) 71 ALJR 943 at 974; 146 ALR 696 at 738-739.

183 *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 at 196-197; *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 359, 406-407.

184 *The Tasmanian Dam Case* (1983) 158 CLR 1 at 93-94, 222-223; *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338 at 349, 356; *Applicant A v*

(Footnote continues on next page)

instant case, it derives specific endorsement, so far as the Termination of Employment Convention is concerned, from the provision of the Act whereby an expression in the one is to have "the same meaning" as in the other[185].

4. *Derogations to be construed narrowly* A question arises as to whether the provision of s 170DF(2) of the Act dealing with "inherent requirements of the particular position" is to be viewed as an *exception* to the impermissible reasons for termination of an employee's employment or as an *elaboration* of the definition of discrimination, marking out the forbidden territory. Qantas argued for the latter approach based upon the language of the sub-section. However, whether it is properly described as an exception or an exemption matters not. Clearly, the primary rule is that contained in s 170DF(1)(f). The provision of s 170DF(2) constitutes a derogation from that primary rule. In the United States of America, the Supreme Court has held that the analogous derogation for "bona fide occupational qualification"[186] is to be treated as "an extremely narrow exception to the general prohibition"[187] against age discrimination contained in the equivalent United States legislation. The international experts have emphasised that "exceptions" to the main rule must be consistent with, and proportional to, adherence to the primary requirement which is designed to diminish discrimination on arbitrary grounds and to secure the object of equal opportunity[188].

Minister for Immigration and Ethnic Affairs (1997) 71 ALJR 381 at 383, 388, 419; 142 ALR 331 at 332, 339-340, 383.

185 s 170CB.

186 Contained in Age Discrimination in Employment Act of 1967: 29 USC §623(f)(1).

187 *Western Air Lines Inc v Criswell* 472 US 400 at 412 (1985); cf *Dothard v Rawlinson* 433 US 321 at 334 (1977); *Automobile Workers v Johnson Controls Inc* 499 US 187 at 201 (1991); Nielsen, "The Concept of Discrimination in ILO Convention No 111" (1994) 43 *International and Comparative Law Quarterly* 827 at 850. See also *Director-General Department of Community Services v Bowie* (1990) 1 WAR 480 at 487.

188 International Labour Office, *Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organisation to examine the observance of the Discrimination (Employment and Occupation) Convention, 1958 (No 111), by the Federal Republic of Germany*, Official Bulletin, Supp 1 (Series B) (1987), vol 70 at pars 527-532 (esp par 531); cf *Christie v Qantas Airways Ltd* (1996) 138 ALR 19 at 39.

5. *Contracts which provide for compulsory retirement* Meaning must be given to the concept "termination" of employment in the context, and for the purposes, of the forbidden reasons for termination, including age. It must be assumed that the Parliament, by enacting the provisions of s 170DF(1)(f) in relation to age, intended to address the position of persons already in employment whose employment was brought to an end unilaterally on the arbitrary ground of age. The link between the various forbidden reasons in par (f) is, and is only, the existence of a stereotype with no inherent relevance to the capacity of the employee to perform the duties of the employment in question. It must also be assumed that, by the inclusion of the reference to age, the Parliament intended to afford effective protection. It should not be assumed that it was intended that par (f) could so easily be circumvented by the simple expedient of presenting an "agreement" whereby the employment would "expire" by reference to age without a need for "termination". This is the kind of "misfiring" of legislation, once quite common, which courts are now enjoined, wherever possible, to avoid[189].

6. *The employer's intention is irrelevant* The absence of a subjective intention to discriminate does not convert discriminatory conduct into neutral policy[190]. The Act operates in the highly practical circumstances of an employment relationship. This warrants the adoption of a commonsense approach to the statutory requirements[191]. The Act is fundamentally designed to achieve social change by the removal of artificial stereotypes. Unless otherwise excused, it requires, in effect, the assessment of an employee's capacities upon that employee's individual merits. Requiring this approach has a price. In part, that price is economic, involving various adjustments to accommodate the needs of particular employees[192]. In part, the cost may involve a challenge to the political, moral or other biases of

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189 *Inland Revenue Commissioners v Ayrshire Employers Mutual Insurance Association Ltd* [1946] 1 All ER 637 at 641 per Lord Macmillan; Lord Diplock, "The Courts As Legislators" in *The Lawyer and Justice* (1978) at 274 cited in *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 424 per McHugh JA.

190 *IW v City of Perth* (1997) 71 ALJR 943 at 975; 146 ALR 696 at 739; *Alexander v Choate* 469 US 287 at 295-296 (1985); *Jamal v Secretary, Department of Health* (1988) 14 NSWLR 252 at 259.

191 *Automobile Workers v Johnson Controls Inc* 499 US 187 at 205-206, 212-213 (1991); *Christie v Qantas Airways Ltd* (1995) 60 IR 17 at 56.

192 For example particular adjustments for reasons of physical or mental disability, marital status, family responsibility or pregnancy or particular adjustments for prayers required for religious observance.

the employer. The Parliament must be taken to have accepted that, to conform to Australia's international obligations and to achieve the objectives which they set, such costs must be borne unless the employer is exempted[193] or excused[194].

7. *Events after termination not to be considered* The relevant date for a decision whether the termination which is impugned was based upon an unlawful reason, or excused as based on the "inherent requirements of the particular position", is the date of the alleged termination[195]. Thus, the prospect of future modifications of the *Rule of 60* by ICAO or by Qantas is irrelevant. So is the willingness of the employee to accept duties different from those performed before termination[196]. In his decisions on these questions the primary judge was clearly right.

8. *Consideration of employer's operational requirements* If discrimination involving a breach of s 170DF is established, it is not, as such, relevant that compliance would occasion inconvenience to the "operational requirements" of the employer. Such "operational requirements" may provide an answer to a complaint that an employer has terminated an employee's employment without "valid reason"[197]. However, they do not afford an answer to the provisions of s 170DF(1) forbidding termination of employment on discriminatory grounds. Such termination is prohibited whatever the "operational requirements" of the employer. This is plain from the juxtaposition of the two sections which immediately follow each other. Anti-discrimination legislation often contains an exemption for an employer where, to maintain the particular employee would impose "an unjustifiable hardship on the employer"[198] or where "services or facilities" required for the particular employee cannot reasonably be provided or accommodated[199]. For whatever reason, such an exemption finds no place

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193 For example by s 170DF(2) relating to inherent requirements of the particular position.

194 For example by s 170DF(3) relating to staff of religious institutions.

195 (1995) 60 IR 17 at 56.

196 (1995) 60 IR 17 at 56-57.

197 s 170DE(1).

198 *Disability Discrimination Act* 1992 (Cth), s 15(4)(b).

199 *Southeastern Community College v Davis* 442 US 397 (1979); *Alexander v Choate* 469 US 287 at 300 (1985); *Jamal v Secretary Dept of Health* (1988) 14 NSWLR

(Footnote continues on next page)

in the Act under consideration here. A more stringent standard has been adopted, apparently deliberately. For most grounds of discrimination, there is no exemption at all once the unlawful reason is established. This structure of the section suggests the approach to be taken to the two derogations which are expressly provided[200]. Unless such derogations apply, the only place for the consideration of questions of "reasonable accommodation" and "unjustifiable hardship" arises in the provision of the remedies envisaged by s 170EE. There the court has a wide discretion to order reinstatement or, if that is "impracticable", to order the payment of compensation[201] and damages[202] as provided by the section.

9. *The duty of courts* If such provisions are then considered an unreasonable burden on employers, it is appropriate to repeat the remark of Scalia J in the United States Supreme Court in *Automobile Workers v Johnson Controls Inc*[203]:

> "A legislative forum is available to those who believe that such decisions should be made elsewhere".

Although the Act was repealed and its provisions substantially revised after this litigation began, the replacement Act makes no modifications of relevance to the provisions applicable in this appeal. As a matter of legal principle it is preferable to incorporate exemptions for "reasonable accommodation" or "unjustifiable hardship on the employer" rather than artificially to narrow the grounds of unlawful discrimination or to expand unduly the operation of the "inherent requirements of the particular position"[204].

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252 at 262, 269 considering s 49I(1)(b) of the *Anti-Discrimination Act* 1977 (NSW).

200 In s 170DF(2) and (3).

201 s 170EE(3) and (4).

202 s 170EE(5).

203 499 US 187 at 223 (1991) citing Easterbrook J (diss) in *International Union UAW v Johnson Controls Inc* 886 F 2d 871 at 915 (1989).

204 See McCallum, "Labour Law and the Inherent Requirements of the Job: *Qantas Airlines Ltd v Christie* - Destination: The High Court of Australia - Boarding at Gate Seven" (1997) 19 *Sydney Law Review* 211.

Compulsory retirement was "termination"

153 The termination point may be readily disposed of. The findings made sustain the conclusion that Qantas terminated Captain Christie's employment for the reason of age. This is hardly a surprising conclusion given Qantas' unyielding insistence upon the criterion of age and its determined, but ultimately unsuccessful, attempt to justify its stand by reference to medical and safety considerations.

154 The original contract between Qantas and Captain Christie contained no term as to its duration. It was therefore to continue indefinitely, subject to the right of both parties to terminate it. If this contractual position remained unchanged, there is no doubt that the event which brought it to a close in 1994 was the unilateral act of Qantas. By his letter of 6 July 1994, Captain Christie made it plain that he wished to continue flying beyond his sixtieth birthday. He invited Qantas to agree. It did not. It enforced the *Rule of 60*. It ascribed that course to "the International Airline Pilots' Agreement and the Company's policy". Upon this basis, the end of the employment came about by the decision of the employer. It was contrary to the wishes of the employee.

155 It is a precondition of the application of the Act, as of the Termination of Employment Convention, that the termination must be by the employer[205]. In the field of termination of employment litigation, there are many cases where the dispute has concerned whether the action of the employer was the "principal contributing factor which leads to the termination of the employment relationship"[206]. In such cases courts seek to discover where the initiative for ending the employment relationship arose and specifically whether the employee voluntarily left[207]. In the instant case, unless the legal position was altered by supervening industrial agreements or by the "elections" signed by Captain Christie, the situation at the end of the employment relationship was the same as that established by the letter of appointment. Either party could terminate. Qantas exercised that right. Such an analysis would scarcely be surprising given that, at the time the initial agreement was reached, there was no

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205 See s 170CB referring to the ILO Termination of Employment Convention and 170DF(1).

206 *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* (1995) 62 IR 200 at 205.

207 *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* (1995) 62 IR 200 at 204-208; see also *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 at 374; McCarry, "Constructive Dismissal of Employees in Australia" (1994) 68 *Australian Law Journal* 494 at 495.

legal or other inhibition upon Qantas' right to terminate the employment of a pilot by reference to his age and that alone.

156 Qantas argued that legal analysis of the employment contract between itself and Captain Christie indicated that, between the original contract and the ultimate "retirement", a condition was incorporated whereby both parties agreed that Captain Christie would retire at the age of sixty. This argument was advanced on several bases. It was suggested that the reference in the original contract to "the terms of any enactment, industrial agreement or award specifically covering your employment" incorporated the successive agreements made with the pilots' association of which Captain Christie was a member. The terms of the letters of agreement of 1974 and 1991 are contained in the reasons of Marshall J in the Full Court[208]. The earlier document, providing for extensions up to the pilot's fifty-eighth birthday, did not become a term of Captain Christie's contract of employment. It was not shown that the agreement had been certified under the Act, or the *Conciliation and Arbitration Act* 1904 (Cth), so as to give it binding force by statute. It was never expressly agreed to by Captain Christie. When it was made (and varied) there was nothing to suggest that the original agreement was not workable and effective. Nor was it shown that the agreement required an additional condition to be imported to avoid depriving the contract of its substance and value[209]. If this is true of the terms of a collective bargain which favoured the interests of an employee at the expense of those of the employer[210], the converse must equally be true of a provision having the reverse effect. There was no basis for treating the provision of the agreement between Qantas and the pilots' association as a "crystallised custom" implied, for that reason, as a term of the contract of employment[211].

157 The express extension of Captain Christie's service after his fifty-fifth birthday, although in apparent conformity with the 1974 agreement, was, in law, unnecessary. The attempt to introduce a retirement age into the initial agreement with Qantas was never effective. It is true that in 1989 the Australian Industrial Relations Commission certified an agreement between the pilots' association and Qantas[212]. By force of the Act[213], such an agreement would, so far as relevant,

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208 (1996) 138 ALR 19 at 41-43 (1974 letter); 44-45 (1991 letter).

209 *Byrne v Australian Airlines Ltd* (1995) 69 ALJR 797 at 819; 131 ALR 422 at 452.

210 *Byrne v Australian Airlines Ltd* (1995) 69 ALJR 797 at 802; 131 ALR 422 at 429.

211 *Byrne v Australian Airlines Ltd* (1995) 69 ALJR 797 at 801-802; 131 ALR 422 at 428-429.

212 International Airline Pilots' Agreement 1986.

213 s 149(2).

have been binding on Captain Christie as a member of the pilots' association. However, that certified agreement merely reproduced the 1974 agreements as later renewed (most recently in 1981). As at the date of the certification, that agreement, so far as it purported to introduce a retirement date into Captain Christie's agreement with Qantas, had not become part of his contract of employment. It did not do so by virtue of certification.

158 The later (1991) agreement between Qantas and the industrial organisation was not certified. Captain Christie obviously knew of its existence. His "elections" to extend his retirement, eventually up to his sixtieth birthday, appear on a form provided by Qantas. That form was obviously prepared in reliance upon the agreement. But this conduct is also insufficient to signify an agreement by Captain Christie to include the retirement date in his contract with Qantas. Once again, the so-called "elections" were legally unnecessary because Captain Christie's initial agreement was for employment until terminated. The "elections" might have been administratively convenient to Qantas. But they could not alter, without Captain Christie's consent, the terms of his initial engagement. The "elections" fall short of indicating such consent. They were based on Qantas' misunderstanding of the position between it and Captain Christie. Nor was that position affected by any estoppel preventing Captain Christie from relying on his original contract. By filling in the form provided by Qantas in the successive years after his fifty-fifth birthday, he was merely conforming to Qantas' internal procedures. He was not promising to retire at age sixty. Had a further form been submitted to him, in or before 1994, there can be no doubt that he would have filled this in to extend to his sixty-first and later birthdays. But it would not have changed the basis of the contract.

159 Even supposing that Captain Christie's contract did contain a term to the effect that it would end when he attained the age of sixty, further questions would have to be answered. Does the fact that a contract is expressed to expire when the employee reaches a given age take the contract outside the termination provisions in the Act? Is such a contract more akin to one that is to expire upon a certain date, or to one that is to end only upon the happening of a certain event?

160 In support of the former proposition, McHugh J has referred in his reasons to a passage in *Victoria v The Commonwealth (Industrial Relations Act Case)*[214]. In my view, the majority in that case should not be taken to be referring to contracts expressed to expire upon the employee's reaching a certain age. The employee's age, as such, should correctly be characterised as a matter "unconnected with the term of employment"[215]. A term specifying that the

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214 (1996) 187 CLR 416 at 520.

215 (1996) 187 CLR 416 at 520.

contract is to end when the employee attains a specified age is, in my view, analogous to one which requires that the contract will end upon the employee's becoming pregnant. It falls within the protective provisions of the Act. Whether that result can be circumvented by calculating the duration of the contract in terms of the employee's birth date is a question well beyond the scope of this appeal. However, the interpretation of the Act contended for by Qantas would undermine the achievement of the object of the Act. That object is not only to redress age discrimination where it occurs[216]. It is also to "prevent and eliminate discrimination on the basis of ... age"[217]. Compulsory retirement by reference to age is the principal mischief at which the inclusion of "age" in the list of prohibited grounds of discrimination was targeted[218].

161 It follows that, even had a term requiring retirement at the age of sixty been successfully incorporated into Captain Christie's contract, there would still have been a "termination" by Qantas. The termination point, establishing the jurisdiction of the Industrial Relations Court, was properly found in Captain Christie's favour.

Inherent requirements of the particular position

162 I reach the difficult point in this appeal. The arguments which support the construction urged for Qantas found favour with two of the judges below[219]. There is no merit in Qantas' suggestion that the Full Court erred in disturbing a conclusion resting on the advantages which the trial judge enjoyed in evaluating Qantas' rostering system[220]. The question was not one which required evaluation of rostering but rather an identification of the "particular position" in question and then, for the purposes of s 170DF(2) an identification of the "inherent requirements" of that position. It is essential to give full meaning to the word "inherent". This must be done in the context of statutory provisions designed to

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216 By the operation of ss 170DF and 170EE.

217 s 3(g).

218 cf McMorrow "Retirement Incentives In The Twenty First Century: The Move Toward Employer Control Of The ADEA" 31 *University of Richmond Law Review* 795 at 813 (1997); see also Eglit, "Age Discrimination in Employment Act" 31 *University of Richmond Law Review* 579 at 629 (1997) which notes that involuntary age-based retirement is now "virtually outlawed" by the Age Discrimination in Employment Act of 1967 (US).

219 *Christie v Qantas Airways Ltd* (1995) 60 IR 17 at 56 per Wilcox CJ; (1996) 138 ALR 19 at 27 per Spender J (diss).

220 Relying on *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 178.

forbid the termination of the employment of employees for specified reasons, including age.

163 In comparison with Convention 111, the Act laid greater emphasis upon the specific tasks in question. However, this distinction is less important than Qantas argued. A report to the International Labour Conference of the Committee of Experts surveying the operation of Convention 111 and Recommendation 111 makes it plain that the language of the latter already required that attention be given to the essential tasks of the job in question[221]. According to one report, apparently approved by the experts, the enterprise "may base job requirements only on the job's essential tasks". Therefore, the Convention and Recommendation, as interpreted, appear to involve the same particularity as Qantas urged to be necessary to the meaning of s 170DF(2) of the Act.

164 Qantas submitted that the majority in the Full Court had wrongly identified the "particular position" as no more than that of a "pilot" or "B747-400 pilot". If that had been done, it would indeed have been a mistake. Clearly, the "position" which Captain Christie enjoyed at the time of his termination was that of a B747-400 pilot employed by Qantas to fly international routes as required by it. But that leaves the identification of "the inherent requirements" of such position. It is here, I believe, that Qantas' arguments fall down. My reasons are as follows:

1. The adjective "inherent" qualifies the noun "requirements". The meaning to be given to the word "inherent" may be assisted by resort to dictionaries of the English language. The *Oxford Shorter English Dictionary* defines "inherent" as "sticking in; fixed, situated, or contained in something ... existing in something as a permanent attribute or quality; forming an element, esp an essential element, of something; intrinsic, essential". The *Macquarie Encyclopaedic Dictionary of Australian English* confirms the notion of the permanency of the inherent characteristic. "Inherent" is defined as "existing in something as a permanent and inseparable element, quality, or attribute". These dictionary meanings reinforce my own understanding of the word. They are appropriate to the context of s 170DF(2) of the Act. Thus the "inherent requirements" of the particular position must be those which can be regarded as permanent and integral. This fits comfortably with the case law to which Gummow J has referred. The requirements are not those which are transient, subject to change, geographically limited or otherwise temporary. The word "inherent"

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221 International Labour Office, *Equality in Employment and Occupation: General Survey of the Reports on the Discrimination (Employment and Occupation) Convention (No 111) and Recommendation (No 111), 1958*, Report III (Part 4B) (1988) at par 132; cf at 133.

imports those features of the requirements for the particular position as are essential to its very nature.

2. This differentiation between "inherent" and "non-inherent" requirements is particularly appropriate to the context of s 170DF(2) for two reasons. The first is a verbal reason. If it had been intended to permit transient or changing requirements to be taken into account, it would have been possible for the drafter to drop the word "inherent", in the present context. There is no doubt that the "requirements of the particular position" which Captain Christie held included the requirements that he be able to fly a B747-400 aircraft anywhere in the Qantas network. But it is necessary for the word "inherent" to be given work to do. This enlivens the second argument. It is one derived from the context. The purpose of identifying the prohibited reason of discriminatory termination is obviously to prevent such decisions being made on arbitrary or stereotyped grounds, including by reference to age[222]. The provisions of s 170DF(2) must be read in such a way that the sub-section does not undermine the achievement of that purpose. That is why the adjective "inherent" has been added. It is not *any* "requirement of the particular position" which will prevent a matter from constituting an unlawful reason for termination of employment. To be within the sub-section, it is necessary to show that the requirements of the particular position relied upon are *inherent*, ie that they involve permanent features of the position and thus not such features as vary in time and place.

3. When the phrase, so understood, is applied to the evidence as found in this case, even when the definition of the "particular position" is extended to that of an international pilot flying B747-400 aircraft for Qantas, it cannot be said that the "*inherent* requirements" of that position exclude reaching a given age. Numerous elements of the evidence demonstrate that this is so. The age of sixty can scarcely be described as "permanent". The evidence shows that the retirement age for Qantas pilots has varied over time, including by the increase from fifty-five to sixty years during Captain Christie's service[223]. The same aircraft may be flown domestically by a pilot as a sector of an international trip. Accordingly, the "requirements" are not "inherent" at that time. The evidence also

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222 International Labour Conference, *Equality in Employment and Occupation: General Survey of the Reports on the Discrimination (Employment and Occupation) Convention (No 111) and Recommendation (No 111), 1958*, Report III (Part 4B) (1988) at par 132.

223 Human Rights and Equal Opportunity Commission, *Report of Inquiry into Complaints of Discrimination in Employment and Occupation: Compulsory Age Requirement* (HRC Report No 1) (1996) at 34.

demonstrated that for some international routes there was no impediment by reference to the *Rule of 60*. The disqualification upon the pilot is thus shown to be connected with geography and rostering. It is not an "inherent", ie a permanent, requirement of the particular position.

4. This approach to s 170DF(2) of the Act is confirmed if the requirements of the sub-section are contrasted with the language used in the legislation of other jurisdictions providing for exceptions from the primary prohibition on termination of employment for discriminatory reasons. Thus the *Sex Discrimination Act* 1975 (UK) introduced an exception for the case where "[b]eing a man is a genuine occupational qualification" because "the essential nature of the job calls for a man for reasons of physiology", authenticity or because the job needs to be done by a man to preserve decency or privacy[224]. In the United States of America, the exception is commonly expressed in terms where the prohibited ground "is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business"[225]. The introduction of notions of reasonable accommodation in such legislation permits courts to evaluate the burdens which it would be appropriate to impose upon employers for the achievement of the objectives of the legislation[226]. Such notions introduce less stringent standards than appear in s 170DF of the Act. There, the Australian Parliament has prohibited an employer from terminating an employee for specified reasons, including age. It has given relief from that prohibition but only if the reason for termination is based "on the inherent requirements of the particular position". There is no mention of bona fides. There is no reference to reasonableness. There is no consideration of business necessity. Operational requirements (referred to in the immediately preceding section) are not an excuse. Instead, attention is focused upon the inherent, ie permanent, requirements of the particular position. In the face of the evidence accepted in the present case, it would be a bold person who asserted that being under the age of sixty was a permanent requirement of the particular position which Captain Christie enjoyed at termination. It is a present requirement. But, even then, only in some parts of the world. It is

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224 s 7(2). Discussed in *Director-General Department of Community Services v Bowie* (1990) 1 WAR 480 at 485-486; cf *United States v Virginia* 135 L Ed 2d 735 (1997).

225 Age Discrimination in Employment Act of 1967: 29 USC §623(f)(1) (age discrimination); cf Civil Rights Act of 1964: 42 USC §2000(e)-2(e).

226 *Western Air Lines Inc v Criswell* 472 US 400 at 407-408 (1985); *Automobile Workers v Johnson Controls Inc* 499 US 187 at 215 (1991).

not a requirement for domestic sectors or for certain international flights. It cannot therefore be described as an "inherent" requirement of the position.

5. It seems clear from the heading which the primary judge used, in that part of his reasons where he came to his ultimate conclusion on this point ("The operational issue"[227]) that he took a different view of the meaning of "inherent". He regarded operational considerations as being involved in the "inherent requirements" of the particular position in question. In this, with respect, he erred. I agree with the majority of the Full Court. Any doubts about this conclusion are dispelled by contrasting ss 170DE and 170DF. Whilst it is true, as Qantas argued, that care must be exercised in the use of the *expressio unius* rule of construction[228], the particular mention of "operational requirements" in the immediately preceding section suggests (as the context of s 170DF confirms) that the anti-discrimination provisions were not to be watered down by reference to "operational requirements". If such factors could be cited in the case of age, they could equally be invoked for the other grounds in s 170DF(1). This would significantly erode the protections enacted. Operational requirements would be invoked to justify discriminatory terminations of employment on the grounds of sex, family responsibilities, pregnancy and so on. The law would return to the excuses of lack of toilets or other facilities which formerly met claims of discrimination. I agree with Marshall J in the Full Court[229]:

> "The very characterisation of the issue by Wilcox CJ as 'an operational issue' illustrates, with respect, an incorrect approach to the resolution of the issue. A matter that goes to operational requirements is not necessarily a matter that bears upon the inherent requirements of the particular position".

I also agree with Marshall J's remark[230] that the logical consequence of Qantas' position was that Qantas would be entitled to terminate the employment of all of its female pilots if one or more foreign countries on its routing would not permit them to fly into their airports. Similarly if particular nations decided that pilots of a sexual orientation ("sexual preference") to which they objected would not be permitted to land aircraft at their airports or fly through their airspace. To allow such

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227 *Christie v Qantas Airways Ltd* (1995) 60 IR 17 at 53.

228 *Houssein v Under Secretary of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 at 94.

229 (1996) 138 ALR 19 at 40.

230 (1996) 138 ALR 19 at 39.

discrimination to operate would be to defy the purposes of the Act and of the international law to which it gives effect. This point was never satisfactorily answered by Qantas.

6. So far as the suggestion that Captain Christie is in a different class because of the large number of routes which he cannot now fly and that somehow this converts "requirements of the particular position" to "inherent" requirements, I consider that the answer given for the employee was entirely persuasive. Such considerations under the Act arise not at the point of determining whether the Act has been breached but when the court turns to consider the relief which it should order as "appropriate in all the circumstances of the case"[231]. That point has not been reached in this case because of the conclusion of the primary judge, that considerations of the practicability or impracticability[232] of reinstatement did not arise. It is possible that the court of trial could be convinced that reinstatement of Captain Christie is not practicable having regard to the amount of flying which he could perform, even if modifications of the rostering system were introduced to respond to his needs and those of other pilots in the same position after their sixtieth birthdays. But if reinstatement were not ordered, questions of compensation and damages[233] would remain. By such means a court could still vindicate the provisions of the Act although in circumstances which took into account the mitigating factors, including some of those upon which Qantas relied.

165 Unless the foregoing approach to the construction of the Act is adopted, there is a real risk that "operational issues" or "operational requirements" will be elevated to "inherent requirements" of particular positions to the destruction of the high purpose to which s 170DF of the Act is directed. Only by upholding the application of the Act is it likely that the employer would be persuaded to lend its support to the international review of the arbitrary and discriminatory standards of ICAO which help to sustain the attitudes of aviation authorities in some overseas countries in the Qantas network. The primary judge found that ICAO's standard was not justified by the medical or safety evidence which Qantas called. International law has advanced since the ICAO standard was first drawn up. So have the available physiological and psychological tests for determining pilot capability. So has the law of this country. Arbitrary standards should be replaced by rational criteria freed from stereotyping. That is the purpose of the Act. Until it is given effect by the courts, it is clear enough that there will be no

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231 s 170EE(1).

232 s 170EE(2).

233 s 170EE(3) and (5).

real stimulus to Qantas either to promote change internationally or so to alter its international and domestic system as to conform to the anti-discrimination principles which the Australian Parliament adopted in 1993[234] and re-enacted in 1996[235]. It is the duty of this Court, the provisions of the Act being constitutionally valid, to give effect to the will of the Parliament.

Conclusions and orders

166 A notice of contention was filed for Captain Christie. It principally sought to rely upon the *Anti-Discrimination Act* 1977 (NSW)[236] to render unlawful the application to any term of his employment of a policy of Qantas which required him to retire at age sixty. As I would hold the operation of that policy unlawful under federal law, this question does not need to be considered by me.

167 The appeal should be dismissed with costs.

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234 In the *Industrial Relations Reform Act* 1993 (Cth).

235 *Workplace Relations Act* 1996 (Cth).

236 Pt 4E.