

**Report of an Inquiry into a Complaint of Discrimination in
Employment and Occupation**

Discrimination on the Ground of Age

The Hon Daryl Williams AM QC MP
Attorney-General
House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Attorney,

Pursuant to my responsibilities under s.31(b) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) I attach a report of my inquiry into a complaint of discrimination in employment and occupation concerning discrimination on the ground of age.

Yours sincerely,

Chris Sidoti
Human Rights Commissioner
August 2000

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1. Introduction

1.1 The Commission's jurisdiction

This is a report to the Attorney-General on inquiries made by the Human Rights and Equal Opportunity Commission into a complaint made under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (the Act) of discrimination in employment on the ground of age. The complaint was made by Ms Akiko Ishikuni against the Japan Travel Bureau (Australia) (JTB).

The jurisdiction of the Human Rights and Equal Opportunity Commission (the Commission) in relation to complaints of discrimination in employment and occupation was described in my first report to Parliament on complaints in this area.¹ That description is set out in Appendix A to this report. In 1989 the Human Rights and Equal Opportunity Commission Regulations declared a number of additional grounds of discrimination for the purposes of the Act with effect from 1 January 1990.² The subject of this Report, age discrimination, is one of those grounds.

I have reported to the Attorney General on issues concerning age discrimination in employment on a number of previous occasions, most recently in HRC 9, a report concerning age discrimination in the Australian Defence Force. I have also reported generally on age discrimination in *Age Matters: A report on age discrimination*, a report tabled in Parliament in June 2000. In that report, I made a number of recommendations for change including recommendations concerning community awareness, the review of age based distinctions in Commonwealth laws and policies and the enactment of a more rigorous and effective legal regime to prevent and remedy acts of discrimination based on age. I draw those recommendations to the attention of the Attorney-General and the parliament.

1.2 Outline of the complaint

In 1995 Ms Akiko Ishikuni made a complaint alleging discrimination on the basis of her age in respect of her employment. She alleged that she had been employed on a casual basis with JTB since 1987 as a travel guide and interpreter for Japanese tourists visiting Melbourne. She alleged that a reduction in 1994 in the work allocated to her and subsequent decline in income amounted to discrimination on the basis of her age.

1.3 Findings and recommendations

On 22 June 2000 I issued a notice of my findings and recommendations in relation to the complaint under s.35(2) of the Act. I found that the complainant had been subjected to discrimination in employment within the terms of the Act and I recommended that the respondent pay the complainant the sum of \$43,385 being damages for loss of income. I further recommended that all future decisions with

¹ Human Rights and Equal Opportunity Commission *Report into complaints of discrimination in employment and occupation: compulsory age retirement*, HRC Report No.1, 30 August 1996.

² Notified in the Commonwealth of Australia Gazette on 21 December 1989.

respect to the allocation of work to the complainant be made without discrimination on the ground of her age

1.4 Actions taken by the respondent as a result of my findings and recommendations

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

I am very pleased that on 3 August the respondent's solicitors advised that the respondent accepted my recommendations in full. Accordingly the respondent will pay the sum of \$43,385, less tax, to Ms Ishikuni by 31 August 2000. The respondent's solicitors also advised that the respondent was "committed to conducting business in a manner so as not to discriminate against any employee on the basis of age or on any other improper ground".

JTB is to be congratulated on this. It is a model for other respondents, including the Commonwealth, that are often far less willing to accept the Commission's recommendations. I regret only that the complainant and the respondent were unable to settle this matter through conciliation.

2. The inquiry process

2.1 The complaint

On 25 November 1995 Ms Ishikuni lodged a complaint alleging discrimination on the basis of her age. At the time of lodging the complaint, Ms Ishikuni was aged 64.

The complainant has been employed on a casual basis with Japan Travel Bureau (JTB) since 2 December 1987 as a travel guide and interpreter for Japanese tourists visiting Melbourne. The complainant continues to be employed by JTB.

The complainant alleges that a reduction in 1994 in the work allocated to her and subsequent decline in income amounts to discrimination on the basis of her age.

In particular the complainant alleges that from mid-1994 instead of being allocated three 'large jobs' a week, which is what she had been allocated previously, she was allocated only 'optional tours'. It appears that 'large jobs' were 'full tours' which involved greeting tourists at the airport, showing them the city sights and joining them for meals. The remuneration for one of these tours was \$381.

The complainant alleged that in approximately 1990 or 1991, four to five years before lodging the complaint, the in-bound Manager for JTB, Mr Ue, had told her that she should not be doing large jobs because she was too old. Mr Ue also allegedly told her that JTB was looking for young people and that she should go to JTB's subsidiary, Travelbox, which ran the optional tours. The optional tours were 'City Sights' tours and the remuneration for one of these tours was \$173. Mr Ue allegedly later apologised for making these comments.

The complainant further alleges that, after she returned from Japan from a three week holiday in 1994, she received only small jobs for the following five months. Later that year, just before Christmas, she was allegedly told by the assistant to the General Manager, Mr Jojima, that her employment would be terminated in June 1995 on the basis that everything had changed and she was too old to work. Mr Jojima allegedly apologised for saying this a couple of days later.

However, according to the complainant, when she approached the General Manager, Mr Hanamo, in July or August 1995, about the lack of jobs being allocated to her, he allegedly told her that she was not allocated jobs because she was no longer young.

The complainant states that her income decreased significantly and provided the following figures:

- 1992: \$40,731
- 1993: \$40,484
- 1994: \$39,250
- 1995: \$16,925.

The complainant provided income tax returns for the financial years ending 30 June 1992 and 1993 and a group certificate for the financial year ending 30 June 1995.

2.2 The response

In a letter to the Commission dated 6 September 1996, the respondent denies discriminating against Ms Ishikuni on the basis of her age. It states that it had had concerns over the previous few years about her work performance. It says that management was aware of times where the complainant had failed to carry out her duties properly, including meeting clients, checking out from hotels and conducting tours.

The respondent further states that these concerns were made clear to the complainant. In doing so there may have been a reference to age but this was simply a method to indicate the complainant's failure to carry out her job function effectively and to express concerns about her health and physical ability to meet the requirements of tours.

The respondent specifically denies the allegations regarding Mr Ue's comments and his alleged apology.

The respondent also denies the allegation regarding Mr Hanamo's comments to the effect that work was not distributed to the complainant because of her age. However, Mr Hanamo admits to expressing concerns about the complainant's health and ability to carry out the work. Mr Hanamo further states that when the complainant approached him regarding her lack of work he did not regard it as a complaint but as "a matter raised in passing which was dealt with appropriately".

The respondent raises doubts as to the complainant's ability to undertake early starts and late finishes or to handle large groups which move quickly and which may have large volumes of luggage with which a guide would be expected to assist.

The respondent states that the difficulty it had was not with age as much as with the complainant's ability to carry out the inherent requirements of the position. The respondent further notes that the complainant's age considerably exceeded the average age of the guides employed with JTB. It states that age was only important in the context of physical ability, health, competence and overall fitness to carry out the job and meet its physical and mental demands.

The respondent submits that there has been no discrimination but rather an appropriate matching of the inherent requirements of the position with the abilities of a casual employee. The complaint should therefore be declined as lacking in substance and/or misconceived.

The respondent provided the following material in its response:

- Anti Discrimination Policy for JTN Oceania Pty Ltd issued 1st January 1995
- lists of tourist guides employed by JTB showing the respective ages of all guides
- profiles of the work offered to all casual tour guides in JTB's Melbourne office over the six month period beginning January 1996 and ending June 1996
- an undated statement of Mr Hanamo in response to the complainant's allegations concerning comments made by him.

2.3 The complainant's reply

The complainant filed a response to some of the issues raised by the respondent by letter dated 17 October 1996.

In relation to the complainant's ability to carry out the inherent requirements of the position, the complainant states that the principal role of a tour guide is to attend to the needs of tourists in a foreign country and inform them about Australia and their surroundings. The principal tool of a guide is familiarity with the language and customs of both the Japanese tourists and the host Australians.

The complainant further states that the job is not physically demanding. In particular, she states that there is no obligation on tour guides to assist with heavy luggage. She further states that the most physically demanding aspect of the job is walking with the tourists and that she has no trouble walking.

The complainant further states that her interpretation or guide skills are not affected by her age. She also considers that her mental faculties enable her to keep on top of her job and that no complaint has ever been made by the respondent regarding instances where she has failed to perform the job properly.

In relation to the Anti Discrimination Policy provided by the respondent, the complainant claims that she has never seen a copy of the policy.

In relation to the profiles of work offered to all casual guides at the Melbourne office, the complainant states that it shows that she was receiving considerably less work than her fellow guides who were also available for work seven days a week. The complainant further states that she has previously been allocated more hours. In the

absence of any notices to the complainant regarding poor work performance, the complainant alleges that the only reason for the reduction in allocated work was her age. The complainant states that the focus of all discussions with the complainant has been her age and not her work performance. She says that she has been performing satisfactorily.

The complainant provided the Commission with the following additional material:

- an analysis of the profiles of work offered to all casual guides at the Melbourne office
- details of income earned in the financial year ending 30 June 1996 being \$8,990.00.

The complainant also provided a copy of a letter to her dated 3 December 1996 from Mr Hanamo regarding her poor work performance.

2.4 Conciliation

The Commission persisted through 1996 and 1997 in attempts to conciliate this complaint but its attempts were unsuccessful.

2.5 Preliminary finding of discrimination

As a result of inquiries and investigation into this complaint I made a preliminary finding on 27 October 1997 that the act and practice complained of by the complainant constituted discrimination on the basis of age.

2.6 Submissions and evidence

Following this preliminary finding I made directions for the provision of further evidence and submissions by the parties. Pursuant to sections 33 and 27 of the Act I invited the parties to make submissions orally or in writing or both.

The complainant elected not to make any submissions, written or oral, but reserved her right to make submissions in response to any submissions made on behalf of the respondent.

On 27 February 1998 the respondent filed written submissions. The parties then spent some time further attempting to conciliate the matter, again without success. On 4 February 2000, the complainant filed submissions in reply and further submissions in relation to quantum. On 8 March 2000, the respondent filed submissions in reply in relation to quantum only.

2.6.1 Further submissions of the respondent

The respondent submits that the complainant's ability to meet the physical and mental demands of the position as full time tour guide is limited. The physical and mental aspects are critical to the proper performance of the duties including early morning and late night work, assisting tourists to move heavy luggage, continual embarkation

and disembarkation of coaches and management of large groups which are difficult to lead or control.

The respondent further reiterates its concerns about the complainant's ability to undertake early starts and late finishes and about not placing her under unnecessary stress or strain.

The respondent provided the Commission with

- a series of photographs of a group of students in Melbourne from 22 to 24 February 1998, showing the size of the group and the demands placed on the guide to maintain control and assist with luggage
- a sample of travel itineraries detailing tour schedules and
- a job description for tour guides.

2.6.2 Submissions of the complainant in reply and as to quantum

The complainant states that it is not the role of a guide to carry the bags of tourists. She says that she was not made aware of the existence or terms of an equal opportunity employment policy submitted by the respondent and believes it was not made known to other staff.

With respect to quantum, the complainant states that income earned in the 1998 and 1999 financial years (\$39,961 and \$33,457 respectively) was earned for the most part by undertaking less remunerative and more demanding tours. The complainant states that this is evidence of the fact that she is capable of meeting the inherent requirements of the position.

The complainant further claims that, as it has not been submitted that there was a shortage of work in the period 1994 to 1998, she should receive compensation of \$67,828 for lost earnings being the difference between \$40,000, her approximate earnings before 1995 and after 1997, and her actual earnings in 1995 (\$16,925), 1996 (\$8,990) and 1997 (\$26,257).

The complainant also seeks \$6,750 in legal costs.

2.6.3 Submissions from the respondent in relation to quantum

The respondent submits that the complainant was employed as a casual employee and the extent of her workload depended on factors such as the number of tours, the nature of tours and the availability of other tour guides at the time.

Changes in the overall trend of tours since 1992 required the combining of tours and has led to the need for fewer tour guides, with effects on the work available.

The respondent denies the complainant's further allegation that her income in the 1998 and 1999 financial years was earned working on less remunerative work and more demanding tours. The only change in tours is that they have been combined to enable the respondent to give more cost effective tours priced in accordance with changes in tour trends since 1992.

In relation to the complainant's submission that her higher level of income for the 1998 and 1999 financial years shows that she is capable of meeting the inherent requirements of the position, the respondent states

- the complainant was aware of the respondent's belief regarding the difficulties she faced in carrying out her position
- other staff were involved in a co-operative working arrangement to ensure that tours were run efficiently and without incident and
- the complainant's difficulties were not raised as a formal matter of deficiency in performance but rather were "managed" with a view to protecting the company's reputation and efficient operation.

The respondent states that the complainant's earning patterns are and were within the range and patterns as other guiding staff. Some staff earn consistently more, some earn consistently less, some earn more in one year and less in others, all guides being subject to a variation in the income they receive. The respondent submits that it is not possible to establish any economic loss arising out of any discrimination.

The respondent provided data showing

- the variation in the number of guides from 1994 to 2000
- the number of tours and the number of passengers from 1994 to 2000
- the taxable income of all JTB Melbourne guides for 1993 to 1995 and 1996 to 2000.

3. Findings and recommendations

3.1 Issues to be determined

The Act requires me to inquire into acts or practices that may constitute discrimination (s.31(b) of the Act). Discrimination is defined in s.3 of the Act as follows:

'discrimination' means:

- (a) any distinction, exclusion, or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
- (b) any other distinction, exclusion or preference that:
 - (i) has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
 - (ii) has been declared by the regulations to constitute discrimination for the purposes of this Act,

but does not include any distinction, exclusion or preference:

- (c) in respect of a particular job based on the inherent requirements of the job; or
- (d) in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or

creed, being a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

As previously noted, regulation 4(a) of the *Human Rights and Equal Opportunity Commission Regulations* declares age as an additional ground of discrimination for the purposes of the Act.

In deciding whether the matters complained of constitute discrimination within the terms of the Act I must consider five main issues:

1. whether there was an act or practice under the Act
2. whether the act or practice arose in employment or occupation
3. whether there was a distinction, exclusion or preference based on age
4. whether the distinction, exclusion or preference nullified or impaired equality of opportunity or treatment
5. whether the distinction, exclusion or preference in respect of the particular job was based on the inherent requirements of the job.

3.2 Whether there was an act or a practice

The respondent has not challenged the existence of a relevant act or practice. However, the precise nature, time, dates and duration of the discriminatory conduct alleged have not been clearly particularised by the complainant.

In considering the precise nature of the act or practice that was allegedly discriminatory, I make the following findings.

Work allocation

- Ms Ishikuni was employed by the JTB as a travel guide from 2 December 1987.
- The complainant alleges that she received “small jobs” only from around May 1994 until September 1994. No independent evidence of this is presented but it is not denied and I am prepared to infer from the complainant’s drop in income over this period that some change in the work allocated to her did occur (see table below).
- The schedule of tours allocated for the period January 1996 to July 1996 provided by the respondent indicates that Ms Ishikuni was allocated less work than other tour guides.
- The respondent has not denied that it allocated less work to Ms Ishikuni but has stated that Ms Ishikuni was being allocated less work because of concerns regarding her poor work performance and her ability to respond to the inherent requirements of the position.

Comments allegedly made by the respondent

- During the 1991-92 financial year Mr Ue allegedly told the complainant that she should not be doing jobs because she was too old. The making of this statement is denied by the respondent. I am unable on the material before me to make any finding on the balance of probabilities that this statement was made.
- The complainant alleges that in December 1994 Mr Jojima told her that her employment would be terminated in June 1995 on the basis that everything had changed and she was too old to work. The respondent concedes that some discussion did occur concerning her continued employment at JTB and that some comments were made concerning her age. The respondent places the comments in the context of concerns about her health. I find that Mr Jojima did make comments about the complainant's age but I am unable to make any findings about the precise nature of this conversation.
- In July or August 1995 the complainant complained to Mr Hanamo about the lack of work being allocated to her. Mr Hanamo says that he did not treat this as a complaint but rather as a management matter, expressing his concerns. He says that he did not refer to age. However, the respondent concedes that some comments regarding age were made and explains its view of the context. In light of this and Ms Ishikuni's submission, I accept that age was referred to in this conversation.

Work performance

- In November 1995 the complainant lodged her complaint with the Commission.
- In December 1996, a year after her complaint to the Commission, the complainant received a letter from Mr Hanamo detailing various instances of poor work performance. The letter brings to her attention four instances of neglect of her duties in November 1996, October 1996, January 1994 and December 1993.
- I note that the letter was sent to Ms Ishikuni only after the complaint and the investigation pursuant to it were in train. There is no evidence that these matters were raised in any formal way with Ms Ishikuni prior to this.

Income of the complainant

- The income of the complainant for the financial years from 1991-92 to 1998-99 is set out in the following table

Financial year	Earnings	Evidence
1991 - 92	40,731	Income Tax Return
1992 - 93	40,484	Income Tax Return
1993 - 94	27,030	There is some dispute over this figure. The complainant alleges that her income in this year was \$39,250. However, no Income Tax Return or group certificate was provided to verify this. The respondent's material setting out employee

		earnings indicates that her gross income was \$27,030 for this period and, in the absence of any other material, I must accept this figure.
1994 – 95	16,925	Income Tax Return
1995 – 96	8,990	Complainant's submissions verified by respondent's material setting out employee earnings
1996 – 97	26,258	Group Certificates
1997 – 98	39,961	Complainant's submissions verified by respondent's material setting out employee earnings
1998 – 99	33,457	Group Certificate

General Findings

- Over the period 1994 to 1996, a number of comments were made by different people in managerial positions at JTB regarding the complainant's age. I am unable to find precisely when these comments were made or precisely what they were.
- The respondent concedes that references may have been made to Ms Ishikuni's age. I am not satisfied that such references were simply a method to express concerns regarding the complainant's health and physical ability to meet the requirements of the tour.
- Ms Ishikuni suffered very significant decreases in income in the 1994-95 and 1995-96 financial years and lesser decreases in income in the 1993-94 and 1996-97 financial years.
- Ms Ishikuni's decrease in income was due to less work being allocated to her as a travel guide.

I therefore find that the respondent engaged in a series of acts or a course of conduct amounting to a practice which could amount to discrimination on the basis of age when it reduced significantly the work allocated to Ms Ishikuni in the period between approximately January 1994 and December 1996.

3.3 Whether the act or practice arose in employment or occupation

The act or practice complained of clearly arises in employment or occupation. No issue was raised as to this.

3.4 Whether there was a distinction, exclusion or preference based on age

Ms Ishikuni must establish on the balance of probabilities that the treatment she experienced amounts to a distinction, exclusion or preference made on the basis of age. The acts or practices of the respondent in allocating Ms Ishikuni a reduced workload from 1994 to 1996 amounts to a distinction. Was this distinction made on the basis of Ms Ishikuni's age?

Any concerns the respondent may have had about Ms Ishikuni's health or physical ability to perform the job were not adequately communicated to her. Ms Ishikuni

states, and the evidence does not refute, that she was ready, willing and able to perform her duties as a tour guide. The respondent says that it referred to Ms Ishikuni's age as a "shorthand" to indicate her failure to carry out her job effectively and to express concerns regarding her health and physical ability to perform the job.

The respondent submits that there were a number of other factors involved in the allocation of work, such as the number of tours, the nature of tours and the availability of other tour guides at the time. However, Ms Ishikuni was clearly distinguished from other travel guides because of her age. Certain assumptions were made about a person of her age – assumptions concerning her health and her work capacity – and these assumptions were never tested to see whether they were valid. For example, had the respondent had concerns about the complainant's capacity to perform heavy lifting work, it could have sought advice concerning her health. It did not do this. Instead, it relied on stereotypical assumptions about the health, strength and capacity of a person of a certain age. As Chief Justice Black on the Full Federal Court said in *Commonwealth v HREOC and Others* (1999) 167 ALR 268 at 284 (*Bradley's case*), also in the context of age discrimination,

“respect for human rights and the ideal of equality – including equality of opportunity in employment – requires that every person be treated according to his or her individual merit and not by reference to stereotypes ascribed by virtue of membership of a particular group, whether that group be one of gender, race, nationality or age”.

I find that the respondent, through its managers, judged Ms Ishikuni incapable of adequately performing her job because of her age. I find that the respondent's acts or practice in reducing the allocation of work to Mrs Ishikuni in 1994 to 1996 was a distinction made on the basis of her age.

3.5 Whether the distinction nullified or impaired equality of opportunity

For an act or practice to be discriminatory, the Act requires the complainant to show that the distinction, exclusion or preference has had the effect of “nullifying or impairing the equality of opportunity or treatment”.

There was no suggestion from either party that Ms Ishikuni did not wish to work or was not available to work. It is also clear that Ms Ishikuni did receive some work which, she states, were smaller jobs the remuneration for which was less than the larger “full tour” jobs.

I therefore find that the act of allocating a reduced workload to Ms Ishikuni nullified or impaired her equality of opportunity or treatment in that she was not allocated work for which she was available and which she was able to perform and wished to perform.

3.6 Whether the distinction was based on the inherent requirements of the job

Not all distinctions, exclusions or preferences are discriminatory within the meaning of the Act. Under the Act an employer does not discriminate on the basis of age if the distinction, exclusion or preference “in respect of a particular job [is] based on the inherent requirements of the job”.

In its submissions dated 6 September 1996 the respondent states that its difficulty is not with age as much as it is with the complainant's ability to respond to the inherent requirements of the position.

It is for the Commission and not for the employer to determine what is an inherent requirement (*X v The Commonwealth* (1999) 167 ALR 529 (*X's case*) per McHugh J at 538). I must consider whether a distinction on the basis of age in respect of the job of tour guide is based on the inherent requirements of the particular job.

Inherent requirements are those which are "characteristic or essential requirements of the employment as opposed to those requirements that might be described as peripheral" (*X's case* per Gummow, Hayne JJ at 553; *Qantas Airways Limited v Christie* (1998) 152 ALR 365).

In its submissions the respondent does not set out the claimed "inherent requirements" of the position of tour guide. In its letter dated 27 February 2000, however, the respondent highlights four particular aspects of the job as examples of the physical and mental demands that must be met as part of the proper performance of the duties of tour guide. These are

- early morning and late night work
- assisting tourists to move heavy luggage
- continual embarkation and disembarkation of coaches and
- management of large groups which are difficult to lead or control.

In the usual course I would have to consider whether these requirements constitute *inherent requirements* of the position. However, for present purposes I do not think it necessary to do so, as even if they were inherent requirements, I consider that the distinction made by the respondent in reducing the work allocated to the complainant was not based on those requirements.

As Chief Justice Black stated in *Bradley's case*, "[a] distinction, exclusion or preference will only be justified by reference to the inherent requirements of a given position if it corresponds objectively and closely to those requirements, and if it takes account of individual capacities" (at 285).

The respondent submits that the complainant has limited ability to meet the physical and mental demands of the position, particularly those outlined above. However, there has been no objective assessment as to whether Ms Ishikuni could actually meet the physical and mental demands of the position, or at least those aspects of the position outlined by the respondent. Without making any findings as to whether those aspects identified by the respondent are inherent requirements of the position, I note the following about each aspect.

Early morning and late night work

In relation to early morning and late night work, the sample travel itineraries detailing tour schedules indicate that some tours require early mornings and late nights. The itineraries further suggest that the full day tours are lengthy in duration

(approximately 14.45 hours) and operate to a tight schedule. It seems a reasonable conclusion therefore, that where full day tours are being conducted, the tour guide would be required to be able to rise early and finish late at night to carry out the job properly.

However, there is no evidence that the complainant has been unable to handle early mornings and late nights. The respondent's letter to the complainant dated 3 December 1996 refers to one instance in January 1994 when the complainant did not arrive in time for an assigned job. However, no reference was made as to whether this was an early morning job. In addition, in the context of an almost 12 to 13 year employment history, I cannot conclude that one late arrival constitutes an inability to perform the requirement of attending early mornings and late nights. Consequently, there is no evidence to conclude that the distinction drawn by the respondent in reducing Ms Ishikuni's work allocation was *based on* the complainant's inability to meet the requirement to attend early mornings and late nights.

Assisting tourists with heavy luggage

In relation to assisting tourists with heavy luggage, the respondent provided evidence in the form of photographs which appear to show two different guides moving luggage. While this alone is not conclusive of the requirement to assist with heavy luggage the respondent has also provided a job description for a tour guide which lists the "ability to carry luggage and equipment" as a "Job Requirement" and the responsibility "for handling customers baggage eg. at/to/from hotels, coaches, airlines" as a "Specific Responsibility". Subject to what I say below I therefore accept that assisting tourists with their luggage is a task guides are required to perform.

However, there is no evidence that the complainant is unable to so assist. As far as I am aware, none of the photographs provided by the respondent shows the complainant herself having difficulty moving the luggage. There is also nothing in the way of medical or other expert report to show that the complainant is unable to perform that duty. There is no evidence to conclude that the distinction drawn by the respondent in reducing Ms Ishikuni's work allocation was *based on* her inability to meet the requirement to lift luggage. Rather it seems that the distinction was based on a stereotypical assumption that a person of her age is unable to carry or handle luggage. It is precisely this type of assumption, lacking objective assessment of a person's actual capacity, which the Act is intended to address.

Continual embarkation and disembarkation

With respect to the continual embarkation and disembarkation from buses I accept that this would be a requirement of the job. The travel itineraries indicate at least three stops on full day tours in addition to initial embarkation and final disembarkation. It is not unreasonable to accept that the tour guide would have to embark and disembark frequently and comfortably to perform his or her job function properly.

However, there is no evidence to show that the complainant has difficulty with this particular aspect of the job. The respondent submits by way of evidence photographs

to show the steepness of the steps onto the bus. I can accept that the steepness of the steps would make embarkation and disembarkation difficult for someone who is incapacitated. However, it is not the respondent's submission that the complainant is physically incapacitated and there is no evidence at all that she had any difficulty with embarkation or disembarkation of the bus. Again, there is no evidence that the distinction drawn by the respondent in reducing Ms Ishikuni's work allocation was *based on* her inability to meet the requirement to embark and disembark the bus.

Management of large groups

With respect to the management of large groups I accept that some tours require tour guides to manage large groups. The photographs submitted by the respondent provide an example of one such large group of 180 students, requiring five guides. While the photographs are not conclusive that all groups which tour guides are required to manage are large, the respondent has also provided data on the number of tours and passengers for 1994 to 2000 and on the number of tour guides working for the respondent. Certainly some tours would be quite large and the number of tourists for each guide quite large. I am therefore prepared to accept that tour guides sometimes have to manage large groups.

However, there is no evidence that the complainant is unable to manage large groups. Those instances of alleged poor work performance which have been brought to the attention of the complainant do not relate any instances of mismanagement of a large group. In the respondent's letter to the complainant dated 3 December 1996, the respondent refers to an instance in December 1993 when the complainant forgot to transfer two customers to the airport but no reference is made to the size of the group of which those customers were a part. Once again, it is simply not possible to conclude that the distinction drawn by the respondent in diminishing Ms Ishikuni's work allocation was *based on* her inability to meet the requirement to manage large groups.

As noted, I make no specific findings about whether these requirements are "inherent requirements" according to the tests in *X's case* and *Qantas v Christie*. I do not need to do so because I am not satisfied the distinction in this case can be said to be *based on* all or any of these requirements. I am not satisfied that the complainant is in fact unable to perform these requirements or that any real attempt was made in practice to ascertain whether or not she could perform them.

There is a complete lack of evidence to support the respondent's submission that the complainant's ability to perform the identified requirements is limited. The only conclusion I am able to reach on the evidence is that the distinction on the basis of age was not *based on* the various identified inherent requirements of the position (assuming they could be said to be inherent requirements). I am not satisfied that the respondent's concerns about the complainant's ability to meet the physical and mental demands of the job were not, in the words of Chief Justice Black, "founded upon assumptions about the capacities of a person in a particular age bracket rather than upon the actual capacities of that person" (*Bradley's case* at 284). The only basis for the distinction was the complainant's age.

3.7 Consideration of recommendations

Having found the reduced allocation of work to the complainant in 1994 to 1996 was discriminatory under the Act, I am required to consider what recommendations I should make.

The Act does not make it unlawful to discriminate on the ground of age. However, the division of the Act under which I am conducting this inquiry is directed to the elimination of discrimination in employment and occupation. Section 35(2) expressly provides that, where an act or practice is found to constitute discrimination, the Commission may make such recommendations, including compensation, as it considers appropriate in relation to a person who has suffered loss or damage as a result.

3.7.1 Recommendation of compensation

The complainant is seeking compensation in the amount of \$67,828, being compensation for lost earnings calculated by reference to the difference between a base figure of \$40,000 and her reduced earnings in 1995 (\$16,925), 1996 (\$8,990) and 1997 (\$26,257). The complainant also seeks \$6,750 in legal costs.

With respect to damages for lost earnings I have used the figures from the table in 5.2 above to calculate the amount of damages. Before doing so I note the following preliminary matters.

1. While the evidence suggests a decrease in income, I am not satisfied that the decrease in income was due solely to discrimination on the basis of age.
2. I accept the respondent's submission that the work allocated would depend on other factors such as the number of tours, the nature of the tours and the availability of other persons at the time. I also acknowledge the respondent's submission regarding the changes in the overall trend of tours in Melbourne since 1992 which have seen the combining of tours thus affecting the number of guide positions and the work available. Since income is dependent on the work allocated, a decrease or increase in income could therefore arise as a result of factors other than discrimination.
3. I accept that the nature of the complainant's employment with JTB is that work is not always allocated on a consistent or regular basis.
4. I accept that the income of all guiding staff fluctuates from year to year. In this respect the respondent has provided evidence in the form of graphs and tables. The respondent has also submitted that the charts show that some staff have earned consistently more than the complainant, while some have earned consistently less; some have earned more than the complainant in one year but less in others; all guides have been subject to considerable variation in the income they receive. It is difficult for me to accept this submission fully since there is no way of identifying the other staff in the tables provided.
5. These uncertainties pose considerable problems in awarding an amount of damages for lost income. There is simply no way on the material before me that I

can ascertain with any certainty what Ms Ishikuni would have earned but for the discrimination.

Calculation of damages

I have calculated damages for loss of earnings as follows.

1. The complainant claims decreased earnings for 1996-97. However, the table shows that her earnings for that year were similar to her earnings for 1993-94. In her submissions the complainant puts her earnings in 1993-94 at \$39,250. However, as indicated in the table, in the absence of other evidence, I have accepted that her income for 1993-94 was \$27,030. This affects both the period for which the complainant can be said to have suffered a decrease in earnings and the base earnings from which the calculation of damages can be made.
2. With respect to decrease in earnings, the period I have taken into account as the relevant period in which the complainant suffered a decrease in income is the financial years ending June 1995 and June 1996, in which she earned \$16,925 and \$8,990 respectively. This is because the complainant's earnings in 1996-97 (\$27,030) were consistent with her earnings in 1993-94 (\$26,258) and, as she makes no complaint about her income in 1993-94 decreasing due to discrimination, the level in the later year cannot therefore be said to represent a decrease in income.
3. With respect to the complainant's base earnings, I find there is insufficient evidence of a consistent base of income of approximately \$40,000. First, the complainant's and other employees' incomes clearly fluctuate. Second, no details of the complainant's earnings prior to 1992 have been provided to show that the complainant consistently earned a base approximately of \$40,000. Had the complainant been able to verify that her earnings for 1993-94 were in fact \$39,250, this would have strengthened her claim but in the absence of further evidence I am not satisfied the complainant's base earnings were \$40,000.
4. To ascertain the complainant's base earnings I have excluded those years where her income significantly decreased, 1994-95 and 1995-96, and taken an average of her income for the financial years 1992, 1993, 1994, 1997, 1998 and 1999. The average figure is approximately \$34,650. This reflects and averages the fluctuations in work described by the respondent.
5. Taking the average base at \$34,650, the complainant suffered a loss of \$17,725 for 1994-95 and \$25,660 for 1996-97. This produces a total loss of \$43,385.
6. I therefore recommend that compensation be payable to the complainant in the amount of \$43,385. I note that this is based on Ms Ishikuni's gross income and may be subject to taxation.

Costs

With respect to costs, I note that section 35(2) of the Act allows me to make recommendations for the "payment of compensation to, or in respect of, a person who

has suffered loss and damage as a result of the act or practice". Legal costs have been held not to fall within the scope of compensatory damages contemplated by analogous provisions (see *AMC v Wilson* (1996) 137 ALR 653, per Heerey J at 672 in respect of the *Racial Discrimination Act 1975* (Cth)). I see no reason why s.35(2) of the Act should be interpreted in any different way (although I acknowledge that there is no analogous provision to s.25ZB of the *Racial Discrimination Act* in the Act) and I decline to recommend the payment of Ms Ishikuni's legal costs in addition to the recommended compensation for loss of earnings.

3.7.2 Other recommendations

I further recommend that all future decisions in relation to the employment of Ms Ishikuni, including the allocation of work to her be made without discrimination on the ground of her age.

4. Notice of findings of the Commission

The Commission finds that the act and practice complained of by the complainant, namely that the respondent allocated a reduced work load to the complainant thus reducing her annual income, constitutes discrimination in employment based on age.

This finding is made for following reasons:

1. The respondent engaged in a series of acts or a course of conduct amounting to a practice which amounted to discrimination on the basis of age when it reduced significantly the work allocated to Ms Ishikuni in the period between approximately June 1994 and June 1996.
2. The respondent's act or practice in reducing the allocation of work to Ms Ishikuni in 1994-95 and 1995-96 financial years was a distinction, exclusion or preference on the basis of age which nullified or impaired her equality of opportunity or treatment in employment or occupation.
3. The distinction, exclusion or preference on the ground of age was not based on the inherent requirements of the position.

The Commission recommends that the respondent pay to the complainant \$43,385 being damages for loss of income and that all future decisions with respect to the allocation of work to the complainant be made without discrimination on the ground of her age.

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

Part II Division 4 of the Act confers functions on the Commission in relation to equal opportunity in employment in pursuance of Australia's international obligations under ILO 111.³

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

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

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

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

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

Discrimination in employment and occupation

Under the Act discrimination means:

- (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
- (b) any other distinction, exclusion or preference that:
 - (i) has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
 - (ii) has been declared by the regulations to constitute discrimination for the purposes of this Act;but does not include any distinction, exclusion or preference:
- (c) in respect of a particular job based on the inherent requirements of the job; ...⁴

ILO 111 prohibits discrimination on certain specified grounds.⁵ Those grounds are contained in the Act in subparagraph (a) of the definition of discrimination. ILO 111 also provides that

³ Ratified by Australia in 1973.

⁴ S.3(1).

ratifying States may address discrimination on additional grounds.⁶ The Act provides in subparagraph (b)(ii) of the definition of discrimination for the adoption of regulations to declare additional grounds in accordance with this provision in ILO 111. Under this power the *Human Rights and Equal Opportunity Commission Regulations* in 1989 declared age as a ground of discrimination for the purposes of the Act with effect from 1 January 1990.⁷

It is an accepted principle in domestic law that where a statute contains language that derives directly from an international instrument, such as the Act does, it should be interpreted in accordance with the interpretation the language has been given at the international level.⁸ The comments of the International Labour Conference Committee of Experts on the Application of Conventions and Recommendations (the Committee of Experts) are relevant to the interpretation of the Act's definition of discrimination.

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

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

Further the Committee of Experts has expressed the view that “the adoption of impersonal standards based on forbidden grounds” and “apparently neutral regulations and practices [that] result in inequalities in respect of persons with certain characteristics” also constitute discrimination.⁹

The Committee of Experts has commented on the ILO 111 provision of “any distinction, exclusion or preference in respect of a particular job based on inherent requirements of the job”. To be an inherent requirement the condition imposed must be proportionate to the aim being pursued and must be necessary because of the very nature of the job in question. The Committee stated for example that the exception “refers to a specific and definable job, function or task. Any limitation within the context of this exception must be required by characteristics of the particular job, and be in proportion to its inherent requirements.”¹⁰

The Committee of Experts has agreed that an intention to discriminate is not necessary for a finding of discrimination under ILO 111.¹¹

5 Art 1(1)(a).

6 Art 1(1)(b).

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

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

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

10 *Ibid*, at 138.

11 *Ibid*, at 22.