

*Human Rights and Equal
Opportunity Commission*



**Report of an Inquiry into Complaints of Discrimination
in Employment and Occupation**

Discrimination on the Ground of Trade Union Activity

HRC Report No. 9

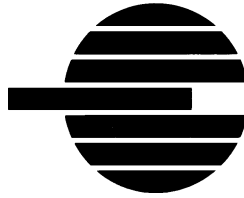
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*Human Rights and Equal
Opportunity Commission*



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. 3 1 (b) of the *Human Rights & Equal Opportunity Commission Act 1986* I attach a report of my inquiry into a complaint of discrimination in employment and occupation concerning discrimination on the ground of trade union activity.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Chris Sidoti', with a stylized flourish at the end.

Chris Sidoti
Human Rights Commissioner
May 2000

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1. The Commission's jurisdiction

These are complaints under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ('the Act') of discrimination in employment on the ground of trade union activity. 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, an extract from which appears as Appendix A to this Report.¹

In 1989 the *Human Rights and Equal Opportunity Commission Regulations* (Cth) declared a number of additional grounds of discrimination for the purposes of the Act with effect from 1 January 1990.² A copy of the regulations appears as Appendix B to this Report. These additional grounds relate to the International Labour Organisation *Discrimination (Employment and Occupation) Convention 1958* (ILO 111) which appears as Appendix C. Trade union activity is one of those grounds.

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

The declaration of this ground under the Act promotes and protects the basic human rights of freedom of association and freedom to form and join trade unions. Anti-discrimination laws in Victoria, Queensland, Western Australia, the ACT and the NT also prohibit discrimination on the ground of trade union activity or the related grounds of political belief or industrial activity. The State and Territory laws make this discrimination unlawful and provide an enforceable right to compensation for victims of this form of discrimination. The New South Wales *Anti-Discrimination Act 1977* does not include this ground but the NSW Law Reform Commission recently recommended that that Act should do so.³

Under the federal Act this discrimination is not unlawful and there is no enforceable remedy. Complaints may be made to the Commission which will attempt to conciliate them. If these attempts are unsuccessful and discrimination is found, recommendations for compensation and changes to policies and practices can be made but there is no mechanism for enforcement. The only step is to report to the Attorney-General who is required to table the report in Parliament. That is the basis of this report.

In the previous reports to the Attorney-General I have recommended the enactment of comprehensive national laws to prohibit discrimination on all grounds specified in or under ILO 111 that are not already the subject of more effective federal legislation. This would be one way of resolving the current inadequacies in federal legislation regarding discrimination on the basis of trade union activity, religion, political opinion, social origin, medical record, criminal record and sexual orientation. I still consider that a comprehensive federal anti-discrimination law should be enacted to ensure effective protection from discrimination on any prescribed ground in or under ILO 111 through enforceable remedies.

2. Summary of the complaint

2.1 Outline of complaint

The complainants, Mr Ernest Edwards, Mr Ian Farrell and Mr Wayne Moate, were employed by O'Brien Metal Products Pty Ltd ('the Company'), a small steel fabrication business comprising a metal section and warehouse. They and several co-workers joined the National Union of Workers ('the Union') on 28 May 1997 because of their concerns about perceived unsafe working conditions following some accidents in the factory. Until then, no employee of the Company had been a member of a union. The complainants allege that, after they joined the Union and attended two meetings with its organiser in June 1997, they were subjected to less favourable treatment in the workplace, including harassment by management, a reduction in the level of their work duties and a reduction in the amount of work allocated. Each alleges that he was forced to leave his employment because of the discriminatory treatment based on his trade union activity.

The respondent denied that it discriminated against any of the complainants on the basis of trade union membership.

2.2 Findings and recommendation

On 14 February 2000 I issued a notice of my findings and recommendations in relation to the complaint under section 35(2) of the Act.

I found that the complainants had each suffered discrimination in employment within the terms of the Act. I recommended that the respondent pay each of the complainants the sum of \$5000.00 as compensation for damages resulting from the discrimination.

2.3 The respondent's reply

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

I received a letter from Australian Business Lawyers dated 11 April 2000. It is evident from that letter that a liquidator has been appointed to the respondent. The letter stated:

We have been instructed by the liquidators of O'Brien Metals not to do any further work on this matter and therefore we are unable to assist our client in responding to the report.

3. Process of the inquiry

3.1 The nature of the complaint

Messrs Edwards and Farrell

On 2 July 1997 Mr Edwards, Mr Farrell and another employee were retrenched. Messrs Edwards and Farrell allege their retrenchment was based on their membership of the union. Mr Farrell was the union workplace delegate and Mr Edwards the co-delegate. Union members commenced a strike on 3 July 1997 and the dispute went to the Industrial Relations Commission ('IRC') the same day. Justice Cahill of the IRC did not make formal orders but recommended that the status quo be maintained, that is, their employment be continued, pending further negotiations to resolve the dispute. He did not make a finding on why their employment was terminated. He also ordered that all industrial action cease.

Mr Edwards did not return to work following the IRC hearing because, he says, he 'knew' he would be harassed by the Company. He lodged his complaint with the Commission on 30 March 1998.

Mr Farrell returned to work following the IRC hearing and strike action. He alleges that he faced continued harassment by management until he was forced to resign on 8 July 1997. His complaint to the Commission was received on 23 June 1998.

Mr Moate

Mr Moate was a welder at the Company for three and a half years. He alleges that after joining the Union he was 'cold-shouldered' by managers, harassed by his supervisor and placed on more junior duties. He alleges that on 3 July 1997, during the strike to protest the retrenchments, he was singled out for verbal and physical abuse by the factory manager, Mr Hynie Rasch. He alleges that on the following Tuesday, 8 July 1997, when he returned to work after a day's illness, he was harassed by a manager, Ms Suzanne Jacobs, for not having a medical certificate. He alleges that, after he raised this with the union delegate, he was further berated by Ms Jacobs and Mr Rasch. He claims that, as he was still feeling ill and because of the abuse, he sat at his work station not working and was told by Ms Jacobs and Mr Rasch to go home and return the next day with his union delegate. He alleges that he felt forced to resign and resigned on the spot. He ceased employment with the Company on 8 July 1997. He lodged his complaint with the Commission on 23 August 1997.

3.2 The respondent's response

The Company denies that Messrs Edwards, Farrell and Moate had been discriminated against on the basis of their trade union activity.

3.3 Conciliation

Attempts at conciliation were unsuccessful.

3.4 Submissions and evidence

As a result of the investigation of these complaints, I formed the preliminary opinion that the respondent had engaged in various acts and practices that constituted discrimination on the basis of trade union activity.

Pursuant to sections 33 and 27 of the Act, I invited the complainants and the respondent to make submissions orally or in writing or both. Messrs Edwards and Farrell and the Company provided further submissions but Mr Moate did not.

During the course of the investigation of the complaints, the complainants provided statements by each of them and by Mr Darren Hillard, Mr Peter Edwards, Mr Chris Edwards, Mr Jason Hitchings, Mr Peter Mudd and Ms Fay Campbell. Mr Mudd was a driver employed by a contractor to the Company. Ms Campbell was an organiser employed by the Union. All the other witnesses for the complainants were employees or former employees of the Company.

The Company provided statements by Mr Phil O'Brien, Ms Suzanne Jacobs, Mr Warren Jacobs, Mr Hynie Rasch, Ms Natalie Williamson, Mr Shane Ferguson, Mr Steven Loi On, Mr Larry Cannon and Mr Ashley Robinson. Mr O'Brien was managing director of the Company and Ms Jacobs and Mr Jacobs were managers. Mr Rasch was employed by the Company as factory supervisor or foreman. All the other witnesses for the Company were ordinary employees of the Company who were still employed by the Company when they made their statements. Only one, Mr Robinson, was a union member. Mr Robinson made a later statement to the effect that Ms Jacobs 'had reworded, cut and chopped a few things' from his draft of his statement and that, although his signed statement was 'truthful and correct', he considered it to be 'very single sided'.

4. The findings and recommendations

4.1 Issues to be determined

In deciding whether the acts or practices complained of fall within the definition of discrimination in section 3(1) of the Act I had to consider three main issues:

- whether the act or practice arises in employment or occupation
- whether there was an distinction based on trade union activity, and
- whether the distinction nullified or impaired equality of opportunity.

4.1.1 Was there an act or practice in employment or occupation?

The complainants allege that the respondent engaged in a range of acts and practices that were threatening, harassing and demeaning and that led in the end to their ceasing their employment. All the parties agree on the fact that the Company employed the three complainants. The acts and practices alleged, if they occurred, clearly took place in employment and clearly were to the detriment of the complainants, impairing their equality of opportunity in employment.

I had therefore to consider and determine on the balance of probabilities whether the alleged acts occurred and, if they did, whether they involved a distinction based on trade union activity. The complainants referred to a series of alleged comments and acts up to and including the retrenchments of Messrs Farrell and Edwards (and another) on 2 July, the strike and the departures of Messrs Farrell, Edwards and Moate from the Company. I considered that the complainants' allegations had to be assessed as a whole, as a single course of action or pattern of conduct, rather than as a series of discrete acts.

4.1.2 What were the alleged distinctions based on trade union activity which were alleged to have nullified or impaired equality of opportunity?

Alleged comments in April-May 1977 concerning joining the Union

The statements provided by all parties make it clear that there were tensions and concerns at the workplace for some time. The statement by Mr Jason Hitchings refers to safety issues and three specific accidents at the factory. Mr Hitchings said that quite some time before the events of April to July 1997 employees of the Company had discussed joining a union. On that occasion, Mr Hitchings said, Phil O'Brien, the managing director of the Company,

spoke to all the workers, he said if a union rep walked in the door, he would shut up shop and close down, and re-open somewhere else, or under another name.

Mr Hitchings said that the worker who was proposing union membership at that time had been sacked about a month after Mr O'Brien allegedly made these comments.

The concerns of the employees appear to have built up early in 1997 and to have come to a head in April. The complainants allege that a staff meeting was held in

late April 1997. This meeting was called by one of the managers in the Company, Mr Warren Jacobs. Mr Moate alleges that Mr Jacobs told staff that Mr O'Brien had heard that some people were thinking of joining the Union, that he (Mr O'Brien) was not happy about this and that, if they did, he would

play by the book, reduce people's wages that are above award wages, ban smoking, mobile phones, and stop talking, altogether make life a lot harder for us.

Mr Edwards and Mr Farrell claim in their statements that they were told at a meeting by Mr Jacobs 'not to join the Union and if we did, our pays would be cut or we would be sacked'. Mr Farrell states

In May 1997, Warren Jacobs came into the staff room during the morning tea break to tell everyone that he and Phil O'Brien had heard rumours that there was talk of employees joining a union and how upset he and Phil were about this. He continued by saying 'You know how much Phil (O'Brien) hates unions, he will close the factory', a statement that Phil was to repeat many times himself. Warren also stated that Phil had done this before and would just start another business at home employing only Jim and Hynie Rasch (both didn't want to join the union unsurprisingly). As a further threat, Warren stated that everyone who joined the union would get a pay cut, as he claimed everyone was above award wages and also smoking would be banned from the factory.

In its response the Company generally denies that management had made any threats to staff. In his statement, Mr Jacobs denied that he threatened other employees if they joined the Union. He claimed he would talk to employees in the lunchroom on occasions and that, on one of these occasions (date unspecified), he said

Phil is upset at the fact that you are thinking of joining the union. Phil cannot understand why you need to join a union when he has always had an open door policy where any grievances and problems that you have can be addressed. However, if you feel there is a need and want to join a union, you have my blessing.

He denied having threatened to reduce employees' wages and other conditions if they joined the Union. He claims his reference to Mr O'Brien being upset was made

purely on Phil O'Brien's belief that in all his 23 years as an employer, all problems have been quickly and amicably resolved when people approached him with any problem.

Another witness for the Company, Ashley Robinson, who worked in the warehouse section, stated that Mr Jacobs came into the lunchroom on many occasions and recalls him saying on one occasion

Phil feels hurt that you see the need to join a union because he feels that he looks after all employees by paying above award rates, providing personal loans, time off to attend family matters and whatever we pleased.

He claimed Mr Jacobs said that joining the Union was up to them but they had his blessing if they did so. He stated that he did not feel threatened or intimidated by the tone of his words and that no other employee made a comment that they felt intimidated. He felt at ease to join the Union.

In his statement, Mr O'Brien vigorously denied threatening to reduce wages or to make life harder if employees joined the Union. He stated that his only comment was that he was paying well above award wages. He claimed the Company policy towards union membership had never changed, that it was an employee's choice whether to join a union and that the Company did not interfere in that choice. He did not refer to the allegation that he had regularly expressed his dislike of unions and threatened to close the factory.

There is no dispute that Mr Jacobs addressed staff in the lunchroom. All three complainants relate in substantially the same terms that Mr Jacobs indicated certain consequences if people joined the Union. Of the six other witnesses who provided statements for the Company, only one, Mr Robinson, makes reference to this alleged meeting and provides an account similar to that of Mr Jacobs. Mr Jacobs has denied making specific threats regarding Mr O'Brien's alleged unhappiness with some staff's proposal to join a union. However, in the context of the atmosphere in the Company at the time, I find it difficult to accept the account of the conversation provided by Mr Jacobs. Mr Hitchings described an earlier episode in which he alleges Mr O'Brien made comments similar to those alleged to have been made on Mr O'Brien's behalf by Mr Jacobs. I accept the evidence of Messrs Edwards, Farrell and Moate that Mr Jacobs did foreshadow at a meeting detrimental consequences for employees and their working conditions if any employee joined the Union.

Alleged 'cold-shouldering' by managers

The complainants allege that those who joined or expressed an interest in joining the Union were cut off and ostracised by the Company's managers.

Mr Moate alleges that after he decided to join the Union he was ‘cold-shouldered’ by various managers. He claims Ms Jacobs’ attitude towards him changed the day he joined the Union on 28 May 1997 from being friendly, always saying ‘good morning’, to refusing to speak to him and averting eye contact. He claims that the attitude of Mr Jacobs also changed from always saying ‘hello’ to no longer greeting him or acknowledging him. He says that the attitude of Mr O’Brien did not change after he joined the Union.

Mr Farrell claims that in June 1997, after the factory became unionised, phone calls were no longer put through to Union members but continued to be put through to non-Union members.

In its initial response, the Company alleges Mr Moate was treated in the same manner before and after he attended union meetings and denies he was ‘cold-shouldered’ by the owner or managers. Mr Jacobs denied that his attitude to Mr Moate changed after he joined the Union. Ms Jacobs did not respond specifically to this allegation. Two of the Company’s witnesses, Mr Shane Ferguson and Mr Larry Cannon, claimed that they had never seen Mr O’Brien or the other managers harassing Mr Moate. Mr Robinson stated that Ms Jacobs was ‘fair and reasonable’ and she did not harass him or any other employee who decided to join the Union.

This is a difficult issue to determine as this type of alleged behaviour can occur subtly, in ways not readily obvious to other employees. Some ‘cooling off’ in a working relationship may be expected when employees, explicitly or implicitly, claim management has failed to address the safety and welfare of staff. It is also possible that those employees joining the Union were themselves more sensitive and cautious in their dealings with management, particularly given their awareness of Mr O’Brien’s displeasure with their actions. Consequently, they may have contributed to this ‘cooling’ of the working relationship with managers. Further, there may have been a ‘cooling’ of the working relationship between Mr Moate and the Company because the Company perceived there were problems with Mr Moate’s work performance. I do not need to make any finding on this question in view of my other findings and I refrain from doing so.

Alleged general harassment of Mr Moate by Mr Rasch

Mr Moate alleges that he had little problem with his supervisor, Mr Rasch, before any union activity, although he claims that he had known Mr Rasch to become confronting and aggressive and use threats of violence if he did not get his way.

He claims that Mr Rasch had thrown ‘things’ at him, including on one occasion a bedhead while his back was turned. He claims that in the past these events were short-lived but that Mr Rasch’s behaviour worsened after he joined the Union. He alleges Mr Rasch tried to talk other workers out of joining the Union.

In his statement, Mr Peter Edwards said that he had worked with Mr Moate for two and half years at the Company. He said Mr Moate had been a loyal and consistent worker, never aggressive towards his co-workers, was shy in nature and tended to stick to himself. Despite this, he said Mr Moate was often singled out by Mr Rasch and insulted, humiliated and sometimes physically threatened. He said this occurred before Mr Moate joined the Union and ‘more so afterwards’.

Similarly, Mr Ernest Edwards said he had observed Mr Moate to be a loyal and conscientious employee and had never known him to be aggressive. He said he had witnessed Mr Rasch subject Mr Moate to verbal abuse and physical intimidation though he did not specify when.

Mr Chris Edwards had worked for the Company for two years. He said that he had witnessed ‘a lot of unfair treatment’ of workers and that he himself was physically and mentally abused. He did not state that he observed Mr Moate being abused by Mr Rasch. He recounted one incident in late 1995 when he was falsely accused of breaking a trolley jack and was verbally abused and then grabbed by Mr Rasch who then rubbed his fist in his face. He claimed Mr Rasch subsequently admitted to punching him and apologised to him. He said that during the next year and half of his employment he was subjected to constant abuse, accusations and unfair treatment by Mr Rasch and management.

Mr Rasch denied harassing or singling out Mr Moate after he joined the Union. The Company provided statements from five witnesses who stated that they had never seen Mr Rasch behaving rudely or aggressively to any employee, including Mr Moate. Ms Natalie Williamson, who was employed by the Company as a clerk, stated that she had known Mr Rasch for eight years and worked closely with him for 14 months and had never known him to be aggressive, intimidating or violent and had never received a complaint from staff about him. She had observed him to be friendly, co-operative and polite to all staff including Mr Moate.

Mr Shane Ferguson, a welder, stated that he had worked with Mr Rasch for two years and had never witnessed him being aggressive or violent to any person, including Mr Moate. He claimed that he worked at the bench alongside Mr Moate’s

work area and that he never saw Mr Rasch throw a bed frame at Mr Moate, nor did Mr Moate or anyone else mention this to him. He claimed that Mr Moate was talkative during work hours and would frequently leave his work station to talk to others. He stated that Mr Rasch would instruct Mr Moate to cease but he always did this in a polite manner.

Mr Steven Loi On, another welder, had been employed by the Company for two years. He said that he had never seen Mr Rasch act aggressively or rudely towards any employee, including Mr Moate, and claims that Mr Rasch is not aggressive by nature. He said that he worked closely to Mr Moate and never witnessed Mr Rasch throw a bedhead at Mr Moate nor heard about this incident. He never saw Mr Rasch treat Mr Moate differently from other employees or harass him. He stated that he was the most senior and competent welder.

Mr Larry Cannon stated that he had worked with Mr Rasch for eight years in the metal section. He said that he had never seen Mr Rasch be aggressive or violent towards any employee and that Mr Rasch treated all employees equally, including Mr Moate. He never saw Mr Rasch single out Mr Moate for abuse or harassment. He also said that Mr Moate often stopped and talked to other employees during work hours. When this occurred, Mr Rasch instructed him to stop and get back to work. He said Mr Rasch was always polite and respectful talking to Mr Moate.

Mr Ashley Robinson, who was employed in the warehouse, stated that he had worked with Mr Rasch for three years. He stated that Mr Rasch treated all employees fairly and equally. He had never witnessed Mr Rasch harass or abuse Mr Moate and Mr Moate had never complained to him about being harassed.

However, Mr Hitchings confirms Mr Chris Edwards' account of one prior incident in which Mr Rasch was allegedly violent. He states

At one stage there was a broken trolley. Chris, who was dispatch manager, walked pass the trolley to move it because it was in the walkway. Hyni seen Chris moving the trolley and blamed him for breaking it. Chris denied breaking it, then an argument started. Hyni, who was the factory manager, grabbed Chris by the shirt aggressively, broke his neck chain and hit him with his elbow while yelling and screaming.

I take 'Hyni' to be Mr Rasch. Mr Hitchings links this incident directly with the employees' wish to seek union assistance and to the anticipated response of Mr O'Brien to that. Mr Hitchings said

The next day at lunch time, the workers decided to get a union rep in, no matter what Phil said...

The claims of Mr Moate and his witnesses and the Company and its witnesses are completely at odds concerning Mr Rasch's alleged harassment of Mr Moate and Mr Rasch's behaviour generally. Indeed it would be hard to imagine a greater difference than in the pictures the two sides paint of the personality and character of this person. If I were to accept Mr Moate's account and that of his witnesses, then I would have to find that Mr Rasch had been harassing Mr Moate and others verbally and violently for a long period of time but that this conduct did not begin when Mr Moate joined the Union and so was not necessarily related to or based on his trade union activity. In the event, however, I am unable to find on the balance of probabilities that Mr Moate had been the subject of general harassment by Mr Rasch. I deal with specific incidents of alleged harassment later in this Report.

Alleged placement of Mr Moate on more menial duties

Mr Moate worked for the Company for three and half years as a welder. He claims that he was qualified as a 'first class welder' with six years' experience and that he was the most senior welder at the Company. He claims that in June 1997, after he joined the Union, he was assigned more menial duties.

Mr Moate claims that his duties before June 1997 were:

- (a) special orders - custom made beds for customers with their own designs, including the making of special parts;
- (b) standard welding jobs; and
- (c) cutting and drilling.

Mr Moate alleges that his duties after June 1997 were:

- (a) sweeping floors;
- (b) wrapping beds for delivery; and
- (c) welding rails.

Mr Moate claims that he had been the only person who did special orders, unless he was very busy. He claims that approximately 20 per cent of his job was special orders. He states that he was taken off his normal duties on or around 25 June 1997.

Mr Farrell stated that in June 1997, after the factory became unionised, Mr Moate's duties were reduced to those of the least experienced welders although he was the most senior welder. Mr Peter Edwards stated that Mr Moate was a very competent first class welder. He said that approximately one week before the strike Mr Moate's duties were reduced to cleaning, a task usually performed by general hands. Similarly, Mr Ernest Edwards claimed he observed Mr Rasch reduce Mr Moate's duties 'from a first class welder to wrapping beds and cleaning duties'. Mr Farrell also stated that in June 1997, shortly after the factory became unionised, Mr Moate's duties were reduced to those of the least experienced welders.

In support of his claims, Mr Moate also refers to an incident following the strike when Mr O'Brien called a meeting of staff to discuss the industrial dispute. He claims that, when Mr O'Brien finished speaking, he asked if anyone had any questions. He claims he said

Why have I been taken off my normal welding duties? How come I've been forced to sweep floors and wrap beds in (the) wrapping section and weld rails, work that is left for non-tradesmen?

He claims that Mr O'Brien replied

I'm unaware of this. If you don't want to do that just tell me and I will put you back on normal duties. I don't understand Wayne why you are doing this. I have never done anything to you. You have always kept to yourself and done your work.

He claims that at the same time Mr Rasch said

I thought you liked wrapping beds and sweeping floors. You told me you liked doing that.

Mr Moate denies he liked doing this and claims management never explained to him why he was taken off his normal duties.

Mr Farrell claims he was present at the staff meeting of 4 July 1997 and states

After Phil finished talking, Wayne asked both Phil and Hynie jointly why he had

been taken off welding bed ends shortly after he joined the Union. Phil denied any knowledge and Hynie responded saying 'I didn't realise you felt that way, I'll put you back on beds after morning tea then if you'd like'. Nothing was mentioned about the quality of Wayne's work. Only a few days later Wayne left O'Brien's employ, but until then he was still welding bed ends, his original duty.

In its initial response, the Company denies Mr Moate was treated differently after he attended Union meetings or that he was placed on different duties. In a subsequent response, however, the Company claims that Mr Moate continued to do a 'range of duties' except that he was given less precise work to do as a result of the poor attention to detail that had started to creep into his work over a period commencing in June 1996. It states these problems were raised with Mr Moate on numerous occasions. The Company does not refer to, or deny, the claims concerning the staff meeting of 4 July 1997.

In her statement, Ms Jacobs claimed that Mr Moate's duties primarily consisted of welding metal bed frames. She alleges that he was the most senior welder in years but not in competence and that the Company had a number of problems with his welding which resulted in goods not being delivered to customers on time. Ms Jacobs states that this was brought to his attention on each occasion, especially since June 1996. She said Mr Moate's duties did not change as a result of him attending Union meetings and that, because Mr Farrell worked in another department, he could not have observed Mr Moate's day to day duties.

Mr Rasch stated that Mr Moate's duties included welding, drilling, cutting, swagging and 'anything else that was required' and that at any time he could be asked to perform any of these duties. He said that Mr Moate was the second most senior but not the most expert of welders. He claimed the welding required was not difficult but that a number of welds needed to be neat, particularly on white coloured frames where bad workmanship was more visible than black frames. He claimed that on several occasions Mr O'Brien and the painting contractor advised him the welding done by Mr Moate either required re-doing or had been the subject of complaints by customers. He said one example was when Mr Moate welded scrolls to 20 mirrors back to front. Mr Rasch said he spoke to Mr Moate on several occasions about these problems and reduced the amount of more critical welding he was doing for white coated products and that he drew Mr Moate's attention to his unsatisfactory welding work. He claimed, however, that Mr Moate failed to achieve what was required of him over the next three months and that he was only given work on white coated products 'as a last resort' but continued to do welding work 'within his skill and competence'.

Mr Rasch stated that, as the Company was small, all employees were called on from time to time to perform various duties within their competence and that Mr Moate had willingly accepted non-welding duties. He claimed that the range of tasks assigned to Mr Moate did not change over the period of Mr Moate's employment. He claimed that neither Mr Moate nor any other employee was allocated work on the basis of union membership.

Mr O'Brien said that, during the last year of Mr Moate's employment, he noticed a deterioration in the standard of his work, particularly with white coated products, and that this also was noticed by the paint contractor and other employees. He claimed that he asked Mr Rasch to take appropriate action. He claimed that Mr Moate's work did not improve and that the Company received complaints from customers about products he had worked on. He claimed this was resolved by taking him off white coated products and only allocating him welding on black coated products. Mr O'Brien detailed the Company's 'open management' policy and 'pro-active' approach to problem solving and gave examples involving Mr Moate.

Among the Company's other witnesses, Mr Ferguson, a welder, claimed that Mr Rasch assigned work to whoever was free at the time and that no employee was singled out to perform certain duties. Mr Loi On stated that he was the most senior and competent welder. He claimed he had never had a problem being asked to weld side rails and considered this to be an important part of his duties. Mr Robinson, who worked in the warehouse section of the Company, claimed that he wrapped beds with Mr Moate and claimed Mr Moate did not mention that he disliked that task. He claimed Mr Moate was given a choice between machine work and wrapping beds and he would choose to wrap beds. He claimed that, if Mr Moate had said he did not want to wrap beds, Mr Rasch would have given him other work. He stated there had been several occasions when Mr Rasch had accommodated Mr Moate's preferred work tasks.

In his statement of 20 April 1998, Mr Moate disputed the Company's claims about his performance. He claimed that, apart from an occasion in mid-1996 when Mr O'Brien asked him to pay more attention to details, management had not made comments about his standard of work. Mr Rasch only drew attention to 'errors' but not to his standard of work. Mr Moate disputed that he was mainly welding white coated products and listed the range of work he was doing before and after June 1997.

I note the Company's evidence that, prior to joining the Union, Mr Moate's duties

had been varied, including being taken off white coated products, and that the Company outlined a number of performance issues which led to this variation. I also note the Company's claims that Mr Rasch had counselled Mr Moate on many occasions about his workmanship and that the deterioration in Mr Moate's standard of work was noticed by other employees. There is a disparity between the Company and Mr Moate's accounts of the extent to which he was counselled over his workmanship. Mr Moate claims he was never told why his duties were changed. The Company produced no documentary evidence, however, of any assessments of Mr Moate's performance or counselling of Mr Moate. I find on the balance of probabilities that there was a shift in the nature of the work that Mr Moate was performing before and after he joined the Union. Although I accept that the Company may have altered Mr Moate's duties partly because of work performance issues, I also find that Mr Moate's trade union activity was a factor in the Company's decision to alter his duties.

The retrenchment of Mr Edwards

The increasing tensions within the Company came to a head at the beginning of July. On 17 June 1997 the Union had initiated a bargaining period with the Company and a meeting with the Company had been scheduled for 1 July 1997. However, the Company postponed that meeting and the day after the meeting was to have taken place, 2 July 1997, it retrenched three persons, all Union members, including Mr Edwards.

The Company states that the retrenchments were due to a downturn in retail business from May to September 1997 and changes in the packaging of the Company products. It claims that this led to overstaffing in the warehouse section. It states that Mr Edwards' position became redundant because it decided to contract out its transporting work. It does not otherwise seek to explain the reason for Mr Edwards' retrenchment.

Mr Edwards questions why he, as a long serving permanent employee with general warehouse, packaging and driving skills, was made redundant when other casual staff remained in employment. He states that he was informed the contract driver was employed because he was doing too much overtime. Mr Mudd, a driver who worked for the contractor in question, supported Mr Edwards' account. He stated that he was concerned about replacing a permanent employee but was told that there was sufficient work for two drivers. The Company denies having employed Mr Mudd or knowing who he was and says that his statement is a fabrication. Mr Mudd produced a reference from his employer, P and P Transport Pty Ltd, that

attested to his honesty and indicated that he worked ‘delivering bedroom furniture from the manufacturer to stores ...’.

The Company did not respond directly to these issues but provided some information about the number and status of employees. It said that in June 1997 it employed nine persons in the metal section, six in the warehouse and one driver. It also employed at least three managers/ salepersons and a factory manager. The Company states that some

time in May or June 1997 its accountant advised it of a severe downturn in business and the need to make some employees redundant. As a result it had reduced staff by retrenching a part-time employee, discontinuing the employment of three casual workers and not replacing another worker who had resigned. However, the Company submits, because of its financial situation, further redundancies were required and, due to new work practices, Messrs Edwards and Farrell were among the three obvious employees to be made redundant.

I have some difficulty with the staffing statistics provided by the Company. It informed the Commission that in June 1997 it had sixteen employees and that all were full time. It stated that in July it employed eighteen employees and that all were full time. I note also that there were nine employees in the metal section in June and then eleven, ten and nine over the next three months. However, on 3 July 1997 the Company informed the IRC that four full time employees (including a welder) and two or three casual employees had been made redundant in the three weeks prior to 3 July 1997. The statement to this Commission and that to the IRC seem difficult to reconcile. The figures do not appear to support the Company’s statement concerning redundancies. In fact the staff profile shows that the Company was increasing its staff up until it terminated the employment of the three employees and that it recruited new staff after they left their jobs.

The Company outlined Mr Edwards’ duties and the changes to the workplace that led to his retrenchment. He had worked for six years in assembly and storage on freight work. The Company had decided to contract out this type of work.

The Company denies the allegation of less favourable treatment of Mr Edwards after he joined the Union, asserting that all workers were treated fairly and equally and that no action was taken on the basis of membership of the Union. The fact that all three retrenched workers were union members and that Mr Farrell and Mr Edwards had been recently elected as the Union delegate and co-delegate was irrelevant.

I accept there may have been a change of circumstances at the Company, particularly in the warehouse section, which required it to rationalise its operations, including staffing. However, the Company acted in haste in selecting Mr Edwards for redundancy. Like the IRC, I note that Mr Edwards was retrenched without the Company consulting the Union or the worker and that the relevant award, which set out an elaborate procedure of discussion and explanation before retrenchment, was ignored. Although this is not of itself an issue in this Commission's jurisdiction, it does indicate a cavalier approach to this retrenchment that is consistent with and supportive of Mr Edwards' allegations. Mr Edwards had worked for the Company for six years and there was no evidence that he could not have undertaken other duties if in fact his position as truck driver had become redundant.

I note that the redundancies occurred just after the Company postponed a scheduled meeting with the Union to discuss workplace issues. I note also that two of the three selected for retrenchment were the Union's delegate and co-delegate at the work site and that the third was also a member of the Union.

On the basis of the evidence before me I am satisfied on the balance of probabilities that the selection of Mr Edwards for retrenchment involved a distinction based on his trade union activity.

The retrenchment of Mr Farrell

I have already outlined, in the context of the retrenchment of Mr Edwards, the circumstances of the retrenchments on 2 July 1997. The additional element in relation to Mr Farrell is the Company's claim that Mr Farrell was retrenched using the 'last on first off' principle. However, I note that other information provided by the Company indicates that two other warehouse workers had been employed approximately two months and three and a half months after Mr Farrell. Furthermore, I note that the information provided to the Commission about employees in June and July 1997 refers only to permanent employees but the Company admitted to the IRC that casual employees were also on the payroll.

For these reasons and for the reasons stated in relation to the retrenchment of Mr Edwards, namely the lack of consultation with workers liable for retrenchment or with the Union, failure to comply with the provisions of the award and the selection of Union members only for retrenchment, I am satisfied on the balance of probabilities that the selection of Mr Farrell for retrenchment involved a distinction based on his trade union activity.

Alleged harassment of Mr Moate during strike action

Following the retrenchments Union members employed by the Company commenced strike action. On 3 July 1997 they picketed the Company's premises. Mr Moate alleges that during this picket Mr Rasch singled him out for harassment, threats and abuse. Again there is conflicting evidence from Mr Moate's and the Company's witnesses as to what occurred.

Mr Moate states that he had been put in charge of the picket line. He claims that on one occasion, when they had lit a fire in a drum because it was cold, Mr Rasch ran up to him and tipped the drum over his legs and called him a 'fucking idiot'. He claims that, when trucks came into the driveway, Mr Rasch came out and singled him out and yelled abuse at him including 'Stand there Wayne and let the fucking truck run over you', 'You pathetic cunt' and 'You are such a pathetic arsehole Wayne'.

All day long Hynie Rasch kept up the verbal and threatening abuse, calling me 'Fucking idiot' and 'pathetic'.

Mr Moate alleges that on one occasion Mr Rasch had physically threatened him.

We held the gate shut. Hynie forced it open. When I tried to close it again he came at me with his fist raised ready to punch me in the face. When I did not retaliate he held his fist inches from my face. I told him I would report him to the police and have him charged with assault if he hit me. The police were present at this time and I made a complaint to one of the officers about the attempted assault and one of them approached Hynie Rasch and spoke to him.

I note that the facts of this incident as related by Mr Moate bear striking similarity to the facts alleged by Mr Chris Edwards of the incident around the end of 1995 in which Mr Rasch had allegedly rubbed his fist in Mr Edwards' face.

Mr Moate's witnesses were consistent in claiming they observed Mr Rasch single out Mr Moate from others at the strike and verbally and physically intimidate him. In her statement Ms Campbell, the Union organiser, states that when she attended the picket line of employees outside the factory on 3 July 1997, she observed Mr Rasch physically 'lash out' at Mr Moate and threaten and abuse him.

In its initial response, the Company did not admit the allegations against Mr Rasch and counter-claimed that Mr Rasch had been the subject of abuse by picketers,

including Ms Campbell. In his statement about the picket line incident, Mr Rasch claimed he was the subject of racial abuse by Ms Campbell and referred to one verbal exchange with Mr Moate. He did not respond to the allegation that he physically threatened Mr Moate and pushed the drum containing fire onto him. The only witness for the Company who denied Mr Moate's claims is Mr Robinson, who said that Mr Moate constantly abused and was trying to provoke Mr Rasch during the strike.

The weight of evidence supports Mr Moate's claims that Mr Rasch behaved in an aggressive way towards him at the picket line. I find that on 3 July 1997 Mr Rasch did physically 'lash out' at Mr Moate and threaten and abuse him when he was on a picket line of striking employees outside the factory. I acknowledge that industrial confrontation can create a set of tense circumstances between employees and management. In this instance, Mr Moate had been appointed the picket line leader and consequently was more likely to be a person with whom management interacted during the strike. There was obviously personal animosity between Mr Moate and Mr Rasch during the strike. Mr Moate may well have provoked or otherwise contributed to any exchanges with Mr Rasch. However, I find on the balance of probabilities, considering this allegation in the context of all the other allegations, that Mr Rasch's behaviour towards Mr Moate was based at least partly on trade union activity.

Mr Edwards' failure to return to work

The industrial dispute between the Company and its Union employees was taken to the IRC. On 3 July 1997 the parties appeared before Justice Cahill. Justice Cahill did not make formal orders but recommended that the status quo be maintained, that is, the employment of the retrenched workers be continued, pending further negotiations to resolve the dispute. He also ordered that all industrial action cease.

Mr Edwards did not return to work following the IRC hearing because, he says, he 'knew' he would be harassed by the Company. I am unaware whether technically Mr Edwards is considered to have been retrenched or to have resigned. I assume the former but it makes no difference to the issue I must consider. The issue for me is whether Mr Edwards' departure from the Company was due to discrimination by the Company on the basis of his trade union activity. I am satisfied on the balance of probabilities that it was.

There was a clear atmosphere of hostility towards the Union and Union members

in the Company from the time some of the employees joined it. This hostility was exacerbated by the retrenchments on 2 July and the strike action taken on 3 July 1997. I have already indicated that I am satisfied on the balance of probabilities that the decision to retrench Mr Edwards was based on his trade union activity. In this context I am satisfied that his decision not to return to work because of fear of harassment was well founded and reasonable. I am of the view that the actions of the managers of the Company in relation to Mr Edwards created a work situation that gave Mr Edwards little option but to do as he did.

Alleged placement of Mr Farrell on more menial duties

Mr Farrell did return to work at the Company following the IRC's recommendation. He alleges that he was then placed on menial duties in an effort to get him to resign. He provided a supporting statement to this effect by Mr Mudd.

Mr Mudd says that Mr Farrell was placed on assembly work and that an untrained employee undertook the dispatch work. Mr Mudd goes on to say that, despite delays and mistakes by the untrained employee, Mr Farrell was not placed back on his normal duties and it appeared to him that this was an attempt to get Mr Farrell to resign. While Mr Mudd is not in a position to comment on the state of mind of the respondent, he was in a position to observe whether Mr Farrell had been taken off his normal duties and whether the loading and dispatch of trucks was then being carried out efficiently.

The Company was requested to provide responses to this allegation but it chose not to address Mr Farrell's specific allegations, simply making a blanket denial that it treated union and non-union employees any differently.

In the absence of any response to this allegation from the Company, I am satisfied on the balance of probabilities that Mr Farrell was placed on menial duties following his return to work and that this involved a distinction based on his membership of and participation in the Union.

The alleged harassment of Mr Moate following the strike

After the strike Mr Moate returned to work on 8 July 1997 after having taken a day off ill. He claims he was approached by Ms Jacobs who asked him for a medical certificate. He told her he did not need one for one day's sick leave. He claims she said she would check the award and referred to a requirement in an employment contract. Mr Moate claims he had never signed this contract.

Mr Moate alleges that, when he later approached Mr Farrell, the Union delegate, in Ms Jacobs' presence to tell him about the request for the medical certificate, Ms Jacobs yelled at him 'you're a fucking lying dog'. Ms Jacobs in her statement acknowledged that she might have sworn at Mr Moate. Mr Moate claims

Later in the day I was talking to Peter Edwards. Hynie Rasch started yelling at me for talking. I went back to my work station. Hynie Rasch followed me, calling me names such as 'Fucking pathetic cunt, arsehole'. He kept saying over and over 'Don't cry Wayne, don't cry'. This I felt was to humiliate me in front of my work mates.

In his statement Mr Farrell stated that, when Mr Moate approached him to tell him about Ms Jacobs' request for a medical certificate, he heard Ms Jacobs yell 'Wayne you're a fucking liar'. He claimed Ms Jacobs later approached him (Mr Farrell) and told him to 'control your union people'.

In his statement Mr Rasch denied he harassed Mr Moate after the strike.

The motive for Ms Jacobs insisting on Mr Moate producing a medical certificate is unclear since it appears that Mr Moate was not bound by the written employment contract referred to by Ms Jacobs and that it was not normal practice to require the production of a medical certificate in such circumstances. Mr Moate claims he saw this as part of the continuing harassment of him and, as he was still feeling ill, decided he would create a situation that would lead to his employment being terminated. Consequently he may have contributed to the tense interactions with Ms Jacobs and Mr Rasch. However, I find on the balance of probabilities that Mr Moate was harassed in the manner he alleged on 8 July 1997 after he had returned from being ill.

Mr Moate's departure from the Company

Following Ms Jacobs' request for a medical certificate and Mr Rasch's alleged taunting, Mr Moate claims that he felt that he had no alternative but to leave his employment.

I couldn't stand any more of this as I was sick with the flu and stressed because of the abuse. I decided it would be best just to get them to sack me. I was not thinking clearly at the time with the flu and stress. I sat at my work station and read the newspaper. Suzanne Jacobs, with Hynie Rasch behind her, came and told me to go home and come back the next day for a meeting with my union delegate. I said I was resigning there and then.

Mr Moate claims that he was forced out of his job because he joined the Union.

I knew the company would not like the union coming in, but I was unprepared for how far they would go to stop it. I was shocked by Hynie Rasch and Suzanne Jacobs' treatment of me. I feared for my safety from Hynie Rasch. Even on the day of the picket line all the union members said to me to watch my back and not to be alone where he could get me.

This was stressful to me. The name calling and profanity from Hynie Rasch was very personal and upsetting. It was clear to me he was trying to get me out of the company. I did not want to leave because I have been unemployed before and I don't like it, but it was difficult under those conditions. I did not want to walk out as I knew I would lose my holiday loading and I needed that.

The Company denies this allegation.

I am of the view that the actions of the Company's managers during the period from April 1997 to the day of Mr Moate's departure from the Company on 8 July 1997 created a work situation that gave Mr Moate little option but to resign.

Mr Farrell's departure from the Company

As I have indicated, unlike Mr Edwards, Mr Farrell returned to work following the IRC hearing. I have referred to his allegation that he was then placed on menial duties in an effort to get him to resign. I have found that Mr Farrell has established this. Mr Farrell left the Company on the same day as Mr Moate, 8 July 1997, after Ms Jacobs approached him (Mr Farrell) and told him to 'control your union people'.

For the reasons already stated in relation to Messrs Edwards and Moate, I am satisfied that Mr Farrell has established on the balance of probabilities that the treatment he received was based on his trade union activity and that this treatment brought about or at least contributed to his departure from his position in the Company. I am of the view that the actions of the managers of the Company in relation to Mr Farrell created a work situation that gave Mr Farrell little option but to leave.

4.2 Findings

The weight of evidence supports the claims of Messrs Edwards, Farrell and Moate that the actions of the Company through its managers occurred solely or partly because of their trade union activity. There was a clear atmosphere of hostility

towards the Union in the Company from the time some of the employees joined it. This hostility was exacerbated by the retrenchments of 2 July 1997 and the strike action taken on 3 July 1997. In this context I am satisfied that Messrs Edwards, Farrell and Moate have established on the balance of probabilities that the treatment they received from at least April 1997 until the dates of their departures from the Company was based on their trade union activity and that this treatment brought about or at least contributed to their departures from their positions in the Company. I am satisfied that the Company, through its managers, discriminated against them as defined in the Act in that the treatment they received was as a consequence of a distinction based on trade union activity. I am therefore satisfied that

1. the less favourable treatment of the complainants in the terms and conditions of their employment was a distinction or exclusion on the basis of trade union activity and
2. the less favourable treatment of the complainants, including their forced departures, had the effect of nullifying their equality of opportunity or treatment in employment in that they were denied fair and just conditions of work and in the end employment itself.

4.3 Notice of findings and recommendations of the Commission

The Commission finds that the complainants, Mr Ernest Edwards, Mr Ian Farrell and Mr Wayne Moate, suffered discrimination in employment within the terms of the Act. I find that based on their trade union activity the respondent, O'Brien Metal Products Pty Ltd, nullified or impaired their equality of opportunity in relation to the terms and conditions of their employment, culminating in the complainants' forced departures from their employment.

Although the situation of each of the complainants differed slightly, the Commission recommends that the respondent should pay each complainant the sum of \$5,000.00 by way of general compensation for the loss and injury he suffered as a result of the discrimination.

Endnotes

1. Human Rights and Equal Opportunity Commission Report into complaints of discrimination in employment and occupation: compulsory age retirement. H. R. C. Report No. 1, 30 August 1996.
1. S R 1989 407, notified in the Commonwealth of Australia Gazette on 21 December 1989.
2. NSW Law Reform Commission *Review of the Anti-Discrimination Act 1977 (NSW)* Report 92,1999

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

The Commission's functions

The long title of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) is 'an Act to establish the Human Rights and Equal Opportunity Commission (and) to make provision in relation to human rights and in relation to equal opportunity in employment ...'.

Part II Division 4 of the Act confers functions on the Human Rights and Equal Opportunity Commission ('the Commission') in relation to equal opportunity in employment in pursuance of Australia's international obligations under the International Labour Organisation *Discrimination (Employment and Occupation) Convention 1958 (ILO 111)*.¹

Section 8(6) of the Act provides that the Human Rights Commissioner ('the Commissioner') shall perform the Commission's function of inquiring into any act or practice that may constitute discrimination as defined by the Act. Under section 31(b) of the Act the Commissioner is to inquire into any act or practice that may constitute discrimination and

- (i) where the Commission(er) considers it appropriate to do so - to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and
- (ii) where the Commission(er) is of the opinion that the act or practice constitutes discrimination, and the Commission(er) has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement - to report to the Minister in relation to the inquiry.²

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; ...³

ILO 111 prohibits discrimination on certain specified grounds.⁴ Those grounds are contained in the Act in subparagraph (a) of the definition of discrimination. ILO 111 also provides that ratifying States may address discrimination on additional grounds.⁵

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 trade union activity as a ground of discrimination for the purposes of the Act with effect from 1 January 1990.⁶ (The full text of the Regulations is set out in Appendix B.)

It is an accepted principle in domestic law that where a statute contains language that derives directly from an international instrument, such as the HREOC Act, it should be interpreted in accordance with the meaning it has been given at the international level.⁷

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.⁸

The Committee of Experts has also 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.’⁹

The Committee of Experts has agreed that an intention to discriminate is not necessary for a finding of discrimination under ILO 111.¹⁰

Endnotes

1. Ratified by Australia in 1973.
2. Section 31(b) HREOCA (Cth) 1986.
3. Section 3(1) HREOCA (Cth) 1986.
4. Article 1(1)(a).
5. Article 1(1)(b).
6. S R 1989 407, notified in the Commonwealth of Australia Gazette on 21 December 1989.
7. *Koowarta v Bjelke-Petersen and Others* (1981) 153 CLR 168 at 265 (Brennan J); *Minister for Foreign Affairs and Trade and Ors v Magno and Another* (1992) 112 ALR 529 at 535-6 (Gummow J).

8. 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.
9. Ibid, at 138.
10. Ibid, at 22.

Appendix B: Human Rights and Equal Opportunity Commission Regulations

Statutory Rules 1989 No. 407

Human Rights and Equal Opportunity Commission Regulations

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

Dated 21 December 1989....

Citation

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

Commencement

2. The Regulations commence on 1 January 1990.

Interpretation

3. In these Regulations, unless the contrary intention appears:

‘impairment’ means:

- (a) total or partial loss of a bodily function; or
- (b) the presence in the body of organisms causing disease; or
- (c) total or partial loss of part of the body; or
- (d) malfunction of a part of the body; or
- (e) malformation or disfigurement of a part of the body;

‘**marital status**’ has the same meaning as in the *Sex Discrimination Act 1984*;

‘the Act’ means the *Human Rights and Equal Opportunity Commission Act 1986*.

Other distinctions, exclusions or preferences that constitute discrimination

4. For the purposes of subparagraph (b)(ii) of the definition of ‘discrimination’ in subsection 3(1) of the Act, any distinction, exclusion or preference made:

(a) on the ground of:

- (i) age; or
- (ii) medical record; or
- (iii) criminal record; or
- (iv) impairment; or
- (v) marital status; or
- (vi) mental, intellectual or psychiatric disability; or
- (vii) nationality; or
- (viii) physical disability; or
- (ix) sexual preference; or
- (x) trade union activity; or
- (xi) one or more of the grounds specified in subparagraphs (iii) to (x) (inclusive) which existed but which has ceased to exist; or

(b) on the basis of the imputation to a person of any ground specified in paragraph (a);

is declared to constitute discrimination for the purposes of the Act.

Endnote

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

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

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Forty-second Session on 4 June 1958, and

Having decided upon the adoption of certain proposals with regard to discrimination in the field of employment and occupation, which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of an International Convention, and

Considering that the Declaration of Philadelphia affirms that all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity, and

Considering further that discrimination constitutes a violation of rights enunciated by the Universal Declaration of Human Rights,

adopts this twenty-fifth day of June of the year one thousand nine hundred and fifty-eight the following Convention, which may be cited as the Discrimination (Employment and Occupation) Convention, 1958 -

Article 1

1. For the purpose of this Convention the term 'discrimination' includes:-

(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

(b) such other distinction, exclusion or preference which has the effect of nullifying

or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employer's and worker's organisations, where such exist, and with other appropriate bodies.

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

3. For the purpose of this Convention the terms 'employment' and 'occupation' include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

Article 2

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

Article 3

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

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

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

Article 4

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

Article 5

1. Special measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination.

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

Article 6

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

Article 7

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

Article 8

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.

2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.

3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

Article 9

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 10

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.

2. When notifying the members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 11

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

Article 12

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

Article 13

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides:

- (a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 9 above, if and when the new revising Convention shall have come into force;
- (b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 14

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