

*Human Rights and Equal
Opportunity Commission*



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

Age Discrimination in the Australian Defence Force

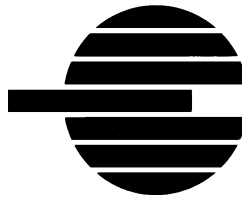
HRC Report No. 8

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*Human Rights and Equal
Opportunity Commission*



The Hon Daryl Williams AM QC
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 four complaints of discrimination in employment and occupation concerning age discrimination in the Australian Defence Force.

Yours sincerely,

A handwritten signature in black ink, which appears to read "Chris Sidoti". The signature is fluid and cursive, with a prominent initial "C" and a long, sweeping tail.

Chris Sidoti
Human Rights Commissioner
May 2000

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Complaints of age discrimination in the ADF

The nature of this report

This is the eighth report to the Attorney-General on inquiries made by the Human Rights and Equal Opportunity Commission ('the Commission') into complaints of discrimination and violations of human rights under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ('the Act'). The Act provides for the Human Rights Commissioner ('the Commissioner') to perform these functions.

The subject of this report is once again age discrimination in employment and, specifically, the report deals with four separate complaints of age discrimination by the Commonwealth in the Australian Defence Force ('the ADF').¹

The complaints were made by three prospective entrants to the ADF and one serving member of the ADF. The complaints were by

- Mr Robert Bradley who complained about the upper age limit of 35 for applicants for helicopter pilots in the army
- Mr Kenneth Barty who complained about the upper age limit of 35 for applicants for Administrative Officer positions in the Royal Australian Air Force ('the RAAF')
- Mr E W Petersen who complained about the upper age limit of 35 for applicants for Administrative Officer positions in the ADF generally and
- Mr Ken Van Den Heuvel who complained about the upper age limit of 35 for remustering to a Load Officer position in the RAAF.

The essence of all four complaints was that the upper age restrictions on entry into various positions within the ADF were discriminatory. In each of these complaints I found that the particular age limit constituted discrimination in employment and that it could not be justified as being based on the inherent requirements of the particular job. In respect of Mr Van Den Heuvel's complaint, discrimination was conceded by the ADF.

I issued notices in respect of my findings of discrimination and made various recommendations for the payment of compensation, for the removal of the age

restrictions and, in one case, for an apology.

In each of these matters, with the exception of Mr Van Den Heuvel's complaint in which liability was conceded, the ADF challenged my findings by way of an application for an order of review in the Federal Court. Following the decision of the Full Federal Court in *Commonwealth v Human Rights and Equal Opportunity Commission and Anor* (1999) 167 ALR 268 which upheld my decision in relation to Mr Bradley's complaint, the proceedings in the matters of Messrs Barty and Petersen were discontinued and I am now in a position to report to the Attorney-General, as required by section 31 of the Act.

This report to the Attorney-General summarises the various complaints and my findings and recommendations in relation to those complaints. It annexes the four notices issued in relation to the various complaints. The report should be read in light of the Commission's broader investigation into age discrimination. In this investigation, I issued a discussion paper entitled *Age Matters? A Discussion Paper on Age Discrimination* in April 1999. Over 50 submissions were received on the discussion paper, and I am now reporting to the Attorney-General on the broader issues of age discrimination in a separate report.

The Commission's jurisdiction and complaint handling functions

The long title of the Act 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 ...'. The Commission has specific statutory functions and responsibilities for the promotion of human rights and the elimination of discrimination under the Act. In particular, the Commission must inquire into complaints of acts and practices that may be inconsistent with or contrary to any human right or that may constitute discrimination (section 11(1)(f) and section 31(b)).

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 the International Labour Organisation *Discrimination (Employment and Occupation) Convention 1958* (ILO 111).²

Section 8(6) of the Act provides that the Human Rights Commissioner shall perform the Commission's function of inquiring into complaints of 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 Commissioner 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 Commissioner is of the opinion that the act or practice constitutes discrimination, and the Commissioner 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.

The Commissioner is required to give the parties an opportunity to make written and/or oral submissions in relation to the complaint (see sections 27 and 33). Where, after an inquiry, the Commissioner finds discrimination, the Commissioner is required to serve notice on the respondent, setting out the findings and the reasons for those findings (section 35(2)(a)). The Commissioner 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 (section 35(2)(b) and (c)).

If the Commissioner makes a finding of discrimination the matter must be reported to the federal Attorney-General under section 31(b)(ii) of the Act. The Attorney-General must table the report in Parliament in accordance with section 46 of the Act. The recommendations made are not enforceable.

Discrimination in employment and occupation under the Act

Under section 3(1) of the Act discrimination is defined as

- (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;...

Article 1(1)(a) of ILO 111 prohibits discrimination on certain specified grounds. Those grounds are contained in the Act in subparagraph (a) of the definition of discrimination. Article 1(1)(b) of ILO 111 provides that ratifying States may address discrimination on additional grounds. 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 1990.³

According to accepted principles in domestic law, a statute such as the Act that contains language that derives directly from an international instrument should be interpreted in accordance with the meaning the language has been given at the international level.⁴ 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 and
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.⁵

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.’⁶

In addition the Committee of Experts has agreed that an intention to discriminate is not necessary for a finding of discrimination under ILO 111.⁷

Summary of the four complaints

This report deals with four complaints relating to age discrimination in the ADF. In summary

- Mr Bradley alleged that he had been denied entry into the Specialist Service Officer (SSO) Pilot Scheme on the ground that he was over the age of 27
- Mr Barty alleged that his application for the position of Administrative Officer with the RAAF had not been considered by reason of his age
- Mr Petersen complained generally about the practice of the ADF in requiring entrants to be within a 17 to 35 age range and specifically that he had been denied the opportunity to apply for a position by reason of his age
- Mr Van Den Heuvel alleged that the ADF discriminated against him on the ground of age when it rejected his application to remuster from his position as a RAAF Ground Support Fitter at Williamstown Air Base to the position of Aircraft Loadmaster.

Summary of findings and recommendations

In relation to Mr Bradley, I found that the act and practice complained of, namely that Mr Bradley was denied the opportunity to apply for a position in the SSO Pilot Scheme on account of his age, constituted discrimination in employment based on age. I recommended that the ADF pay Mr Bradley compensation of \$5,000, being general damages.

In relation to Mr Barty, I found that the act complained of, namely that the ADF refused to process further Mr Barty's application for the position of Administrative Officer in the RAAF, and the practice complained of, namely that the ADF enforced a maximum age of 35 for appointment as an Administrative Officer in the RAAF, constituted discrimination in employment based on age. I recommended that the upper age limit contained in the selection criteria for Administrative Officer positions in the RAAF be removed and that the ADF pay Mr Barty compensation of \$5,000, being general damages.

In relation to Mr Petersen, I found that the practice complained of, namely that the ADF enforced a maximum age of 35 for appointment as Administrative Officer in the ADF, constituted discrimination in employment based on age. I recommended that the upper age limit in the ADF for admission to Administrative Officer positions or equivalent positions, however titled, be removed.

In relation to Mr Van Den Heuvel, I found that the act complained of, namely that the ADF rejected his application to remuster to the position of Aircraft Loadmaster on account of his age, constituted discrimination in employment based on age. I recommended that the upper age limit contained in the selection criteria for Aircraft Loadmaster positions be abolished, that the respondent provide an apology to Mr Van Den Heuvel and pay him compensation of \$10,000, being general damages.

Notice of my findings and recommendations

Under section 31(b) of the Act, I am required to serve notice of my findings and recommendations on the respondent. My notice in respect of each matter is appended to this report as follows:⁸

<i>Notice</i>	<i>Date</i>	<i>Appendix</i>
Mr Bradley	5 March 1998	A
Mr Barty	16 September 1999	B
Mr Petersen	16 September 1999	C
Mr Van Den Heuvel	16 September 1999	D

Procedural history of the four complaints

My inquiries leading up to the issue of the notices in respect of each of the four complaints are detailed in the notices at Appendices A to D. In each matter, I considered the parties' submissions and evidence in making my findings and recommendations.

The notice in the Bradley matter was issued on 5 March 1998. The ADF challenged my findings by way of an application for an order of review in the Federal Court. By decision dated 16 October 1998, his Honour Wilcox J dismissed the application (see *Commonwealth of Australia v Human Rights and Equal Opportunity Commission & Anor* (1998) 158 ALR 468). The ADF appealed against the decision of Wilcox J and the decision of the Full Federal Court was reserved in February 1999.

On 17 September 1999 I issued notices in the Barty, Petersen and Van Den Heuvel matters. The ADF made application to the Federal Court for orders of review in respect of the Barty and Petersen matters.

On 4 December 1999 the Full Federal Court handed down its decision dismissing the appeal from the decision of his Honour Wilcox J in the Bradley matter (see *Commonwealth of Australia v Human Rights and Equal Opportunity Commission & Others* (1999) 167 ALR 268) and thereby upholding my findings.

The ADF subsequently withdrew its applications for review in the Barty and Petersen matters.

The main legal points in issue in the four complaints

In deciding whether each matter complained of constituted discrimination within the terms of the Act I was required to 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 and
5. whether the distinction, exclusion or preference in respect of the particular job was based on the inherent requirements of the job.

I was then required to consider whether, and on what basis, I would make recommendations relating to loss and damage suffered, including recommendations as to compensation.

As is evident from the notices at Appendices A to D, there were a number of matters in dispute in relation to the first four elements.⁹

However, the major matter in dispute became the fifth element listed above. Not all distinctions, exclusions or preferences are discriminatory within the meaning of the Act. An employer may make a distinction, exclusion or preference on the basis of age where the distinction, exclusion or preference is *based on* the ‘inherent requirements’ of the job. In each case (except that of Mr Van Den Heuvel in which liability was conceded), the ADF primarily relied on this aspect of the definition to argue that it had not acted in a discriminatory fashion.

In the Bradley case, I considered the various interpretations as to which requirements could constitute an ‘inherent requirement’. I adopted a narrow construction on the basis that exemptions to human rights provisions should be interpreted narrowly. Although a broader view of the scope of ‘inherent requirements’ was taken by the High Court in its subsequent decisions in *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 and *X v Commonwealth* (1999) 167 ALR 529, the Full Federal Court agreed with Wilcox J that my approach taken in

the Bradley matter did not amount to an error of law.

In the Barty and Petersen cases, I found in favour of the ADF in relation to what could constitute an inherent requirement of the job. Thus, for example, in relation to Mr Barty, I found that it was an inherent requirement of the job of Administrative Officer to possess a level of combat fitness sufficient for ground combat operations to defend a bare base in the north of Australia. The critical question became whether the distinction based on age could be said to be *based on* the inherent requirements of the particular job. In both cases I answered this question in the negative. In coming to this conclusion I relied on the reasoning of Wilcox J in the Federal Court in the Bradley matter. For example, in relation to Mr Barty, I found:

In my view, the critical matter is the possession by a person of a certain level of physical and medical fitness. This level is appropriately set in accordance with the requirement for deployment in combat. The ADF has medical and fitness tests which are designed and intended to be an adequate determinant of whether a person has the requisite level of fitness. Both Colonel Warfe and Wing Commander Johnston gave evidence as to the nature of the relevant tests. There was no suggestion in the evidence that the tests are incapable of detecting physical deterioration or medical problems. The medical and fitness standards are clearly based on the inherent requirement of the requisite level of combat fitness.

The age exclusion, on the other hand, is not so based. It operates instead as a 'proxy' for the possession of the required medical and fitness characteristics. In evidence, the respondent tendered studies to show the increased rate of injury and medical discharge for older persons in the defence forces. These studies indicate that *on average* older persons have higher rates of injury and medical discharge. In *Bradley*, Wilcox J drew specific attention to evidence which pointed to the difference between an average rate of performance and the performance of individuals. The only evidence that I have been presented with in this matter is evidence as to average performances. Indeed, I heard anecdotal evidence from a number of the respondent's witnesses about persons who were over the age of 35 who were performing the relevant jobs and doing so to the required standard.

In my view, I should apply the approach adopted by Wilcox J in *Bradley*. In that case, his Honour said:

The term 'based on' requires more than a logical link. The Macquarie Concise Dictionary gives, as the meaning of the verb 'base' when followed by 'on' or 'upon', 'to establish, as a fact or conclusion'. So the distinction, exclusion or preference must be established upon the inherent requirements of the particular job. The correlation must be, at least, close.

His Honour considered the analysis of Sackville J in *AMC v Wilson* (1996) 68 FCR 46 as to the meaning of 'based on'. However, cases which have considered the meaning of the term 'based on' in the context of establishing whether discriminatory conduct has occurred provide limited assistance in this case. With respect to beneficial legislation the meaning to be given to the phrase in the context of a defence is not necessarily the same as it would be in the context of establishing an element of discrimination. To the extent that the respondent relies on *AMC v Wilson* and *Cosco Holdings Pty Ltd v Do* (1997) 150 ALR 127 for the proposition that an exclusion will be based on the inherent requirements of the job except where the inherent requirements are merely a subterfuge or a specious foundation, I do not accept this submission.

In any event, Wilcox J has addressed this very issue. His Honour required a 'tight correlation between the inherent requirements of the job and the relevant "distinction", "exclusion" or "preference"'. His Honour made reference to the policy behind the legislative scheme and continued:

If the words 'based on' are so interpreted that it is sufficient to find a link between the restriction and the stereotype, as distinct from the individual, the legislation will have the effect of perpetuating the very process it was designed to bring to an end. So it is not appropriate to reason that because extreme fitness is an inherent requirement of a job of an SSO pilot and younger pilots tend to be more fit than older pilots, therefore the requirement for SSO pilots to be under 28 years of age on appointment is 'based on' the requirement of fitness. Unless there is an extremely close correlation between the selected age and fitness requirement so that age may logically be treated as a proxy for the fitness requirement, the legislation will have the effect of damning individuals over the age of 28 years by reference to a stereo-typical characteristic (less physical fitness) of their age group.

The respondent's submissions rely on the inappropriate reasoning described by Wilcox J and, for the reasons he gave, I am unable to accept them.

...

In summary, it may be that more persons over the age of 35 than below it fail to meet the admission standards into the ADF. However, these applicants are entitled to be assessed on their individual merits and, if they fail, to fail on the basis of their individual failure to meet specific medical or fitness or suitability standards that apply to all applicants and not because they fall within a stipulated age bracket, regardless of their ability to meet the other criteria. Applicants outside the stipulated age bracket who can meet the other selection criteria ought to be admitted for training and not excluded on the basis of an age distinction.

For these reasons, I am not satisfied that the exclusion of all persons above the age of 35 years from employment as Administrative Officers in the RAAF is based on the inherent requirements of the job of Administrative Officer. Accordingly, I find that the acts and practices complained of by the complainant constitute discrimination in employment on the grounds of age.

The Full Federal Court in its decision of 4 December 1999 concerning the Bradley matter agreed with this reasoning of Wilcox J. Black CJ found that

the definition adopted by Wilcox J – that is, as requiring a connection that is ‘tight’ or ‘close’ sits easily with the language of par (c) and promotes the objects of the Act by closing a path by which consideration of individual merit may be avoided. I therefore agree with his Honour that no error was made by the Commission in its construction of the expression ‘based on’ for the purposes of par (c) (per Black CJ at 285 and see also Tamberlin J at 288).

I awarded compensation by way of general damages for loss of opportunity in each of the Bradley, Barty and Van Den Heuvel matters. Mr Bradley initially sought review in the Federal Court of the amount of compensation awarded but the application was not pressed. No further applications in respect of the manner of calculating compensation were made. I have set out my reasoning in relation to the calculation of general damages in my notice in the Van Den Heuvel matter at Appendix D.

Action taken by the ADF as a result of my findings and recommendations

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

As indicated above, following the issue of my notices in each of the above matters (except for Mr Van Den Heuvel’s complaint in which liability was conceded), the ADF commenced Federal Court proceedings seeking judicial review of my findings. On 4 December 1999 the Full Federal Court upheld the decision of Wilcox J at first instance which had upheld my findings and recommendations in the Bradley matter. Federal Court proceedings in the Barty and Petersen matters were then discontinued.

Following the conclusion of the various Federal Court proceedings, I wrote to the ADF to seek its advice as to what action it had taken or proposed to take as a result

of my findings and recommendations. I was advised

- in relation to Mr Bradley's complaint that the sum of money awarded as general damages had been paid
- in relation to Mr Barty's complaint that the sum of money awarded as general damages had been paid
- in relation to Mr Van Den Heuvel's complaint, that the sum of money awarded as general damages had been paid, that an apology to Mr Van Den Heuvel from Air Vice-Marshal Titheridge, Acting Chief of the Air Force, had been sent and that the upper age limit for loadmasters was being reviewed.

Further, in relation to the Bradley, Barty and Petersen matters generally, I was advised that

- a review was undertaken to develop revised age guidelines for entry into the ADF which, wherever possible, would replace age-based criteria with merit criteria
- certain age limitations would continue to apply 'taking into consideration the rigours of military training and the physical impacts that such training can have on individuals as they age and the legal occupational health and safety duty of care obligations'
- the review process has resulted in a paper that will be presented to the Chief of Staff Committee ('COSC') by the end of June 2000
- clearance by COSC will be followed by the promulgation of a Defence Instruction (General) giving effect to the new policy which is expected by the end of October 2000
- this process is in relation to entry to the ADF only and does not deal with transfer between services or promotion. These matters will be separately considered when the current review is finalised.

Endnotes

- 1 I have referred throughout to the respondent to the various complaints as the ADF although technically the respondent is the Commonwealth of Australia.
- 2 Ratified by Australia in 1973.
- 3 Notified in the Commonwealth of Australia Gazette on 21 December 1989.
- 4 *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).
- 5 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.
- 6 *Ibid*, at 138.
- 7 *Ibid*, at 22.
- 8 The original appendices to the notices have been omitted as they include material set out in this summary.
- 9 In particular, in the Bradley matter there was an issue concerning whether the failure to make a formal application meant that no discrimination had occurred.

Appendix A – Bradley

Human Rights and Equal Opportunity Commission

Notice under section 35 of the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)*

Concerning Equal Opportunity in Employment

Complainant: Mr Bob Bradley

Respondent: The Commonwealth of Australia; Department of Defence

1. The Commission's jurisdiction

This is a complaint under the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)* (the Act) of discrimination in employment on the ground of age. 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 1 of this notice.

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 notice, age discrimination, is one of those grounds.

2. The complaint

2.1 The nature of the complaint

On 11 May 1993 the Human Rights and Equal Opportunity Commission received a complaint under section 32 of the Act from Mr Bob Bradley alleging discrimination in employment on the basis of age.

Mr Bradley alleged that on 22 April 1993 he attended the Army recruiting unit in Townsville to inquire about entry to the Army aviation unit as an experienced helicopter pilot. He was advised by Corporal Chambers of that unit that the relevant scheme was the Specialist Service Officer (SSO) Pilot Scheme and that to be

eligible for appointment applicants must

- a) be an Australian citizen or be eligible to become one
- b) have a minimum four subject passes in Year 12, or equivalent, which include English, mathematics and physics (physics pass may be at Year 11 level)
- c) meet the Army Aviation medical and dental requirements
- d) meet the current security clearance and civil check requirements
- e) be aged between 19 and under 28 on the date of appointment and
- f) be assessed as suitable by a Selection Board.

According to Mr Bradley, while he did not comply with the age requirement, being 37 years old, he already had considerable flying and training experience. Corporal Chambers advised him to contact Captain Dan Cullen of 5 Aviation Unit Townsville. Mr Bradley said that he contacted Captain Cullen on two occasions and explained his situation. However, each time Captain Cullen was unable to advise him as to his possible entry into the scheme.

On 6 May 1993, Mr Bradley allegedly re-contacted Corporal Chambers who attempted to contact Major Power, the officer in charge of air crew recruitments in Canberra. As he was unsuccessful in doing so, Corporal Chambers advised Mr Bradley that he would try again and contact him once he had spoken to Major Power.

Mr Bradley stated that, in the absence of Corporal Chambers, he was informed by Corporal Judith Pitson that Major Power had informed her on 11 May 1993 of Mr Bradley's ineligibility for the scheme due to his age. He stated that both Corporal Chambers and Captain Cullen had indicated that in view of his experience and training it may have been possible to apply an 'age waiver' to his application for entry as a SSO Army Pilot. He did not so apply.

Mr Bradley complained that he was denied a six year employment contract as a SSO pilot because of his age. He claimed compensation of \$220,000 as fair and reasonable compensation for his loss.

2.2 Conciliation

Attempts by the Commission to conciliate this complaint were unsuccessful.

3. Submissions

As a result of inquiries and investigation into this complaint I formed the preliminary opinion that the practice of requiring that pilots be aged between 19 and 28 on the date of their appointment to the Specialist Service Officer Pilot Scheme constituted discrimination on the basis of age.

Pursuant to sections 33 and 27 of the Act I invited the Department to make submissions orally or in writing or both in relation to that practice. The Department elected to make oral submissions in addition to its written submissions made earlier in the inquiry and after the preliminary finding.

On 3 and 4 February 1997 I convened the inquiry in Sydney to take oral submissions from the Department. As a matter of procedural fairness Mr Bradley was also invited to participate in the process. Mr Bradley elected to appear in person. The Department was represented both by solicitors and counsel.

4. The basis of the findings

4.1 Elements of discrimination

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

- whether there is an act or practice under the Act
- whether the act or practice arises in employment or occupation
- whether there was a distinction based on age
- whether the distinction nullified or impaired equality of opportunity.

If I find that the complaint involves an act or practice arising in employment or occupation and that there was a distinction based on age which nullified or impaired equality of opportunity, then I must consider whether the distinction was based on

the ability of the complainant to fulfil the inherent requirements of the job.

4.2 Whether there is an act or practice

The complainant submitted that there was both an act and practice of discrimination by the respondent on the basis of age. The respondent did not dispute that the setting of the upper age limit constitutes a practice.

4.3 Whether the act or practice arises in employment or occupation

I note that the complainant asserted and the respondent denied that the act or practice complained of arose in employment.

The complainant alleged that he attended the Townsville Recruiting Office and inquired about his suitability to join the pilot training scheme. He alleged that he contacted Captain Cullen and Corporal Chambers and that he was advised by Corporal Pitson, speaking on behalf of Major Power, that he was unsuitable for entry to the scheme due to his age. He alleged that, contrary to the normal procedure of the ADF recruiting staff, he was not counselled as to his rights to continue with the application and was not offered the necessary assistance to do so.

On behalf of the respondent, in oral submissions, Lt. Col. Littlewood, Director of Army Recruitment, stated that the ADF had found no record of a Mr Bob Bradley making an official enquiry or lodging an application for recruitment into the Australian Regular Army from 1993. However, the respondent did not dispute that Mr Bradley did make inquiries about admission to the SSO scheme.

The respondent contended that the complainant has no standing to make this complaint because he had not made a formal application for appointment to the training scheme; he had merely made preliminary enquiries. On that basis, the respondent alleged that the complainant is not a person who has suffered loss or damage as a result of any act or practice in employment on the part of the respondent.

The Act does not require the complainant to be an aggrieved party in the sense that other Commonwealth anti-discrimination legislation requires a complainant to be personally aggrieved by the conduct complained of. Further, it is reasonable that a person, after inquiring about a position and being told he or she was unsuitable because of a characteristic that cannot be changed, such as age, would not proceed

to lodge a written application. The circumstances would be different where someone was told he or she was unsuitable to apply for a position because, for example, of insufficient experience. If there had been a misunderstanding at the time of inquiry about the applicant's level of experience, the applicant could then address his or her experience in a written application. However, where someone asks for information about a position and is told an age criterion precludes a successful application, it would be an improper restriction on the application of this legislation to then hold that by not proceeding to lodge a formal application the person's complaint did not arise in the context of employment.

Since the complaint arises in relation to inquiries about an employment opportunity I am satisfied that the act or practice complained of arises in employment.

4.4 Whether there was a distinction based on age

Mr Bradley must establish that the treatment he experienced was a consequence of a distinction based on age.

The Department argued that the issue for the Commission to consider was not whether it was satisfied on the material provided that the stipulated age range is an inherent requirement of the position of a military line pilot but whether the exclusion of persons outside the age range of 19 to 28 years, on the basis of age, from employment as military line pilots is based on the inherent requirements of the job of a military line pilot.

The intention of the respondent in enforcing the age requirement is not at issue under this head of consideration. The Act obliges me to look only at effect. The effect of the requirement is to distinguish between applicants and between potential applicants on the basis of age.

4.5 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 equality of opportunity or treatment'. It is not disputed that the assessment of an applicant's unsuitability for the pilot program on the basis of age nullified or impaired that applicant's entitlement to apply for the position. It therefore nullified or impaired the complainant's equality of opportunity.

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

4.6.1 The law

Not all distinctions, exclusions or preferences are discriminatory within the meaning of the Convention. Article 1, paragraph 2 of the Convention provides that measures based on the inherent requirements of a particular job will not be discriminatory. That is, an employer may discriminate on the basis of age where age is an occupational requirement justified by the nature of the job. Under the Act also there is no discrimination if the distinction, exclusion or preference 'in respect of a particular job (is) based on the inherent requirements for the job?.'

In this complaint the selection criteria for the job Mr Bradley applied for specify that applicants must be within the age range of 19 to 28 years of age. I must now consider whether the requirement that the applicant be aged between 19 and 28 years of age is an inherent requirement of the job.

There have been several notable domestic cases in recent years which have dealt with the proper construction of the term 'inherent requirements'.

The narrow construction

Commissioner Carter in *X v Department of Defence* considered the meaning of the words 'inherent requirements' in relation to section 15(4) of the *Disability Discrimination Act 1992* (Cth).³ He distinguished between the 'inherent requirements of the employment' and the 'incidents of employment'. He stated

... for the exemption to apply, there must be a clear and definite relationship between the inherent or intrinsic characteristics of the employment and the disability in question, the very nature of which disqualified the person from being able to perform the characteristic tasks or skills required in this specific employment. Only then can the employer avoid the unlawfulness which attaches to the discrimination.⁴

Commissioner Carter suggested that a narrow and restrictive definition was appropriate in the context of legislation which aims to protect human rights.

Commissioner Carter's view was cited with approval by Justice Marshall in *Christie v Qantas Airways Ltd* (1996) 138 ALR 19 in the context of section 170DF(2) of the *Industrial Relations Reform Act 1993* (Cth) and by Judicial Registrar Ritter in

Wannberg v Alloa Holdings (decision No. 346/96 of 31 July 1996 in the Industrial Relations Court of Australia).

In the Industrial Court decision in *Christie v Qantas Airways Ltd* (1995) 60 IR 17 (*Christie*) Chief Justice Wilcox considered a challenge to the policy of Qantas Airways Limited of compulsorily retiring pilots at the age of 60. Mr Christie challenged the age limit on medical and operational grounds. He succeeded on the medical ground but failed on the operational ground and so consequently His Honour held that it was an inherent requirement of his position that he be under 60 years of age. In relation to construing the meaning of ‘inherent requirement’ his Honour held

... the question whether a particular requirement is an inherent requirement of a particular position is a matter to be determined objectively. It does not depend on the attitude or operational methods of the particular employer. I also agree that the word ‘inherent’ refers to a requirement that is fundamental, intrinsic, or essential to the position, not something that is truly unnecessary, although insisted on by a particular employer.⁵

The respondent appealed to the Full Industrial Court comprised of Justices Spender, Gray and Marshall. Justice Spender, dissenting, confirmed Chief Justice Wilcox’s view that it was an inherent requirement of the position occupied by Mr Christie that he be less than 60 years of age.

Justice Gray, however, concluded that the age requirement was not an inherent requirement of the position. In the course of his decision he commented on determining the correct construction of ‘inherent requirement’.

An inquiry as to whether something is an inherent requirement of a particular position must involve the characterisation of the particular position...In my view both the contractual requirements to fly anywhere in the world and the bidding and roster system are irrelevant to the inherent requirements of the appellant’s particular position, for the purposes of s. 170DF (2). That subsection refers to an ‘inherent’ requirement, namely something that is essential to the position, rather than being imposed on it. I do not think that an employer, by stipulating for contractual terms, or by creating or adhering to roster systems, can create inherent requirements of a particular position. An employer could not, by term of contract, give itself the right to dismiss a woman who became pregnant... Despite any contractual term, those characteristics would not become ‘inherent’ requirements of the employee’s position. ... Protection against discrimination is provided by s. 170DF, even when there is a cost to the employer in adopting a rostering system, so as to avoid terminating the employee for a prohibited reason.

I recognise that the distinction between an inherent requirement and one imposed by a term of the contract of employment, or by the adoption of some system by the employer, is not always clear...They are nonetheless easily recognisable as part of the 'particular' position, rather than being added to it as obligations or functions....The policy underlying the section is one that, wherever possible, protects employees from discrimination in termination of their employment for any prohibited reasons. That policy would be undone completely if an employer could arrange the terms of the contract, or its operating systems, so as to permit it to terminate the employment of employees on those prohibited grounds...no system is immutable. Efficiency might have to be sacrificed in order to avoid unlawful discrimination.⁶

Justice Marshall concurred with Justice Gray.

The broader construction

The Full Federal Court in the *Commonwealth of Australia v. The Human Rights and Equal Opportunity Commission and 'X'* heard an appeal from a decision of Commissioner Carter in a complaint under the *Disability Discrimination Act 1992* (Cth).⁷ His Honour Justice Burchett found for a broader construction of inherent requirements.⁸

The inherent requirements of a particular employment are not to be limited to a mechanical performance of its tasks and skills ... a narrow construction of [inherent requirements] would have serious consequences for employers and third persons. I do not think Parliament intended the section to be construed so as to have those consequences. It is to be borne in mind that the decision whether a person would be unable to carry out the inherent requirements of the particular employment must be reached taking into account 'all ... relevant factors that it is reasonable to take into account' ... If operations, at least operations at the core of employment, cannot be carried on safely or satisfactorily, its inherent requirements are not being met in a practical sense which would accord with the context. In such a case, the distinction between operational and non-operational requirements is not of utility... What is to be distinguished is a requirement that does not arise out of the nature of the employment or any aspect of it.⁹

Later, Justice Burchett rejected the approach taken by Justice Gray in *Christie*:

The construction of [inherent requirements] demands a different approach from that taken by Gray J in *Christie*. It must look, not to inherent requirements as contrasted to contractual requirements, but to inherent requirements being matters essentially bound up with the nature of employment, as contrasted with matters stemming, not from the nature of employment, but rather from a view about the disability itself.¹⁰

Justice Drummond held

[T]he sub-section [s.15(4)(a)] cannot be read as drawing a dichotomy between the inherent requirements of a job and the employer's operational requirements for that job. Section 15 deals with employments offered by employers, ie with work activities that form part of each employer's business or organisational operation. The word 'inherent' in s.15(4)(a), in my opinion, limits the exemption created by the sub-section to those requirements of a particular position the satisfaction or fulfilment of which will directly, as opposed to remotely, further or aid in the furthering of the particular employer's operations. A requirement can, in my opinion, have the quality of being an inherent one even though that is a reflection of the business structure which the employer has elected to adopt ... An employer may adopt an organisational structure which results in a requirement for a particular job that qualifies as an inherent one for that job. But an employer will not escape infringing the prohibitions in s.15(1)(b) and 2(c) even though the requirement discriminates against a worker with a disability, if the balancing exercise called for by s.15(4)(b) is adverse to him. The more idiosyncratic an inherent requirement imposed by an employer is, the more likely it will be that s.15(4)(b) will operate to deny the employer exemption from the prohibitions in s.15(1) and (2).¹¹

Justice Drummond held, further, at page 4 of his decision

It will, in each case, be a question of fact just what are the boundaries of the environment in which the employees must perform the physical and mental operations required to carry out the duties of the position by reference to which the inherent requirements of a particular employment must be identified.

Finally, Justice Mansfield held

It will be a matter of fact for each case to determine what are the inherent requirements of particular employment. That test will exclude matters relating to a particular employer's convenience; such matters might be relevant if the employer invokes s.15(4)(b) that in that employer's circumstances, the accommodation of the person with the disability who can perform the inherent requirements of the particular employment nevertheless imposes an unjustifiable hardship on the employer. It is a question of objective fact whether the particular methods by which the purpose of a job is presently achieved or the particular way in which the work is performed reflects its inherent requirements or not. An employer's operational requirements are not necessarily or even commonly, inherent requirements of the particular employment. That is so whether such operational requirements are directed to efficiency, cost of production, safety, or other considerations. If such matters do not comprise inherent requirements of the job, then the employer must endeavour, despite its existing systems, to accommodate the disability by modification or adjustment of systems or procedures; the employer will only be

excused from failure to do so if they would impose an unjustifiable burden. Safety or health considerations may arise at that point. But that is not to say, for the reasons expressed above, that there will not be circumstances where the inherent requirements of the particular employment involving its competent performance will exclude a person or persons by reason of health or safety consideration from those who are able to carry out the inherent requirements of the particular employment.¹²

The decision seems to have five key points.

1. The inherent requirements of a particular position or job are not to be limited to a mechanical performance of its tasks and skills. They are matters essentially bound up with the nature of the employment, as contrasted with matters stemming not from the nature of the employment but rather from a view about the characteristic such as disability or age itself.
2. The decision maker must consider the consequences not only for the employer itself and third persons but also for the actual or prospective employee.
3. A dichotomy should not be drawn between the inherent requirements of a job and the employer's operational requirements for that job. The word 'inherent', however, limits the exemption to those requirements of a particular position the satisfaction or fulfilment of which will directly, as opposed to remotely, further or aid in the furthering of the particular employer's operations.
4. It will be a matter of fact for each case to determine what are the inherent requirements of particular employment. It is a question of objective fact whether the particular methods by which the purpose of a job is presently achieved, or the particular way in which the work is performed, reflects its inherent requirements or not.
5. An employer's operational requirements are not necessarily, or even commonly, inherent requirements of the particular employment. That is so whether the operational requirements are directed to efficiency, cost of production, safety or other considerations. If a matter does not comprise an inherent requirement of the job, then the employer must endeavour, despite its existing systems, to accommodate the characteristic by modification or adjustment of systems or procedures. The employer will only be excused from failure to do so if it would impose an unjustifiable burden.

4.6.2 *The correct test for this complaint*

Although the Full Federal Court in *X* came to a unanimous view that there had been an error of law in Commissioner Carter’s determination, each of the three judges constituting the Court gave his own reasons for judgement. Each formulated the test of ‘inherent requirements’ in different terms. Regrettably, therefore, the Court has provided at best very limited assistance to anyone seeking to apply the law. Fortunately I do not need to decide in this complaint what the Court in *X* actually decided on this important point. The decision of the Full Industrial Court in *Christie* is of greater relevance and bears greater resemblance to the facts in the complaint before me than that in *X*.

In *Christie* the Full Industrial Court was considering the interpretation of the term ‘inherent requirements’ by recourse to the International Labour Organisation *Discrimination (Employment and Occupation) Convention 1958* (ILO 111). That Convention is also the basis of the term ‘inherent requirements’ in this complaint. Further the context of the use of the term in the Act is more similar to that in section 170DF of the *Industrial Relations Act 1988* (Cth) which was interpreted in *Christie* than it is to section 15 of the *Disability Discrimination Act 1992* (Cth) which was interpreted in *X*.

In *X*, Justice Drummond distinguished the decision of the Full Industrial Court of Australia in *Christie* from the matter he was considering.

It is the absence in s.170DF of the *Industrial Relations Act 1988* (Cth) of any provision comparable to s.15(4) (b) of the *Disability Discrimination Act* that makes the former materially different from the latter; for that reason alone, the decision in *Christie v. Qantas Airways Limited (1996) 138 ALR 19*, in which the majority adopted a very narrow construction of the phrase ‘the inherent requirements of the particular position’ in s.170DF, has little relevance to the proper construction of s.15(4)(a) of the *Disability Discrimination Act*.¹³

For these reasons I rely more on the decision in *Christie*, in which the majority adopted a narrow construction of the phrase ‘the inherent requirements of the particular position’ than on the decision of the Full Federal Court in *X*.

4.6.3 *The facts*

In relation to this complaint the selection criteria for the position specified that applicants must be within the age range of 19 to 28 years of age. This is clearly a

distinction based on age. I must consider therefore whether the requirement that an applicant be aged between 19 and 28 years of age was an inherent requirement of the job.

The respondent argued that the complainant, being aged 37 at the time of making his application to join the pilot program, was unable to fulfil the inherent requirements of the position. It advised that the SSO Pilot Scheme is designed to recruit and train pilots to operate the Army's aircraft. The Department advised that the upper age limit is set to enable an officer to have a structured career progression and an opportunity to reach higher ranks. The upper age limit is consistent with the Army's promotion system, by which an Army officer is only considered for promotion over a period of 2 to 3 years. The Department stated that this system guarantees the youth of officers entering the next higher rank and that the use of specific entry ages ensures equitable promotion chances.

The Department further advised that from a technical training perspective the upper age limit is an inherent requirement for the position. It stated

the younger a trainee is the more adaptable to learning he or she is. Some experienced commercial pilots have not been able to modify their behaviour to meet the military requirement. (Department's response dated 12 November 1993)

The Department stated that the nature of military flying requires a high level of a high level of physical and medical fitness, particularly in respect of visual acuity and hearing standards, instinctive reactions and resilience to the rigours involved. The Department stated that a number of factors established a direct correlation between the age of the pilots and their ability to perform in a combat flying environment safely and effectively. These factors are

- a) **medical fitness:** on a statistical basis, a high percentage of persons in the 35 year plus age bracket develop one or more medical conditions which disqualify them or severely restrict their capacity to maintain a medical flying category suitable to military aviation
- b) **physical performance:** medical data show that for people in excess of 35 years of age there is a marked deterioration in reaction time and the capacity to withstand and recover from the stresses involved in military flying
- c) **training failures:** experiences in Australian and overseas armed forces have shown that mature aged qualified pilots encounter a high incidence of difficulty

in ‘unlearning’ acquired habits and skills to adapt to the requirements of military aviation

- d) **peer group integration:** because the average age of line pilots in the Army’s two aviation regiments is 23 years and the actual deviation from that mean is small, an older person would experience problems in integrating with that group where teamwork, mutual trust and acceptance is vital
- e) **return on investment:** the likelihood of an older trainee developing some disqualifying medical condition in the near future is very high with the consequential effect that the Army would not recoup sufficient service from him to justify the very high cost of training.

The respondent argued that these factors correlating age and a pilot’s ability to perform in combat flying situations were based on medical data and the experience of the Australian Defence Force and a number of overseas military organisations.

Furthermore, the respondent claimed that the possession of flying skills is not a guarantee of the successful completion of the pilot training course. Experience has shown that individuals with a significant civilian flying background can have difficulties adjusting to the military aviation environment.

In reply, the complainant contended that there was nothing in the Department’s response that led him to think that he could not perform the same combat pilot duties as a 23 year old individual with no aviation background prior to training. The complainant claimed that his fitness had not changed since his application in April 1993. If he had been accepted in the 1993 intake, he said, he would now still be able to perform flying duties, contrary to the Department’s argument that most pilots over 37 years of age would be disqualified from or restricted in flying duties due to medical grounds.

The complainant argued that his existing qualifications and skills would have significantly reduced the cost of training. He claimed that, as he had not developed any disqualifying medical condition, the Army would have recouped a significant amount of its investment, if not completely recovering the outlay.

The complainant further argued that he was not given the opportunity to prove his skills, which he suggested would have attracted a waiver of the age criterion.

The Department stated that waiver approval may be sought for an applicant who does not meet the selection criteria but who is considered to possess special skills or qualities which may warrant waiving one or more of the initial criteria. The respondent noted that an applicant has no entitlement to have a waiver request processed and that the decision is made by recruiting staff on the basis of vacancies and suitable applicants. The Department advised that, should the Army be unable to fill vacant positions with applicants who meet the initial selection criteria, then the recruiting staff may seek approval from Army Office in Canberra to grant a waiver. The Department said that it had no record of the complainant making such an application.

The respondent argued that the complainant, being aged 37 at the time of making his application to join the pilot program, was unable to fulfil the inherent requirements of the position.

4.7 Findings

I am satisfied from the submissions put by the respondent and the oral evidence adduced at the hearing that the respondent included the stipulated age range in the application criteria as part of a genuine attempt to ensure that applicant pilots would be physiologically and psychologically equipped to complete their training successfully and that they would do so at an age where the respondent would be able to recoup its training expenditure. However, I am not satisfied that the exclusion of persons such as the complainant from employment as military line pilots based only on the fact that they fall outside the age range of 19 to 28 years is non-discriminatory on the basis that the age-bracket is an inherent requirement of the job of a military line pilot.

Being within the stipulated age bracket is but one of several criteria stipulated by the Army for eligibility for appointment. The other criteria could most probably be defended as inherent requirements: that an applicant must be an Australian citizen or be eligible to become one; that an applicant must have a minimum of four subject passes in Year 12, or equivalent, which include English, mathematics and physics (physics pass may be at Year 11 level); that an applicant must meet the Army Aviation medical and dental requirements; that an applicant must meet the current security clearance and civil check requirements and be assessed as suitable by a Selection Board.

The concerns raised by the Army to justify the age criterion are arguably met by these other selection criteria, in particular the medical criterion. For this reason

the age criterion is not necessary to achieve the Army's purpose in imposing the criterion. In its defence of the age criterion the respondent stated that the nature of military flying requires a high level of physical and medical fitness, particularly in respect of visual acuity and hearing standards, instinctive reactions and resilience to the rigours involved. There is no direct correlation between a person's age and medical fitness. In any event, the requirement that applicants meet the Army Aviation medical and dental requirements would achieve the maintenance of the Army's medical and fitness standards directly, more assuredly and more appropriately than an arbitrary age requirement.

I am also not satisfied of the relevance of age to the other factors raised by the respondent. It argued that these factors established a direct correlation between the age of the pilots and their ability to perform safely and effectively in a combat flying environment. As in relation to the medical fitness requirement these other criteria are better assessed directly rather than indirectly through the arbitrary use of age as a proxy. As with medical fitness, the other criteria need to be assessed individually for all applicants. Physical performance and reaction time should be individually assessed in the medical or aptitude examinations.

I also consider that the respondent's Assessment Board would be able to assess an applicant's suitability for 'unlearning' acquired habits and skills to adapt to the requirements of military aviation and for peer group integration. Again, while these may be inherent requirements of the job, I find that there is insufficient evidence to establish a direct correlation between an applicant's age and the ability to meet these criteria. The respondent does not need to use age to achieve the ends sought. Indeed doing so may well have the very opposite effect to that intended. It may well result in unsuitable people being recruited simply because they are under the designated age.

The respondent also argued that the age criterion is necessary to ensure the respondent's return on investment. It asserted that the likelihood of an older trainee developing some disqualifying medical condition in the near future is very high with the consequential effect that the Army would not recoup sufficient service from him or her to justify the very high cost of training. While return on investment is obviously relevant this consideration cannot form the basis for making age an inherent requirement of the position. I note that the ILO Committee of Experts states in its Report that 'exclusively economic reasons do not constitute a justification'. Consideration of the potential for return on investment could form part of the criteria used by the Assessment Board when assessing an applicant's

overall suitability but it should be assessed directly and not assumed because of the individual's age.

I do accept that in some circumstances it may be appropriate to use age as a proxy. For example, it would be futile to require the respondent to assess persons below fifteen years or over seventy years for acceptance to the SSO scheme. However, it is only acceptable to use an age proxy where there is no, or so little, possibility of someone in that age group being able to comply with the inherent requirements of the job that to require the respondent to expend resources on assessing the applicant through the selection process would be unreasonable.

It may be that, as the respondent argues, more persons outside the stipulated age bracket may fail to meet the admission standards. However, these applicants are entitled to be assessed on their individual merits and, if they fail, to fail on the basis of their failure to meet specific medical or fitness or suitability standards that apply to all applicants, and not because they fall within a stipulated age bracket, regardless of their ability to meet the other criteria. Conversely, applicants outside the stipulated age bracket who can meet the other selection criteria ought to be able to be admitted for training and not excluded on the basis of an arbitrary age distinction.

I am not satisfied that the exclusion of persons, such as the complainant, outside the age range of 19 to 28 years from employment as military line pilots is based on the inherent requirements of the job of a military line pilot. Accordingly, I find that the acts and practices complained of by the complainant constitute discrimination in employment based on age.

5. Discussion of recommendations

Having found the failure to promote the complainant discriminatory under the Act I am required to consider what recommendations I should make.

The complainant submitted that he was denied a six year employment contract as a SSO pilot because of his age. He claimed compensation of \$220,000 as fair and reasonable compensation for his loss.

The respondent denied that it had acted in a discriminatory manner and argued that accordingly compensation was not necessary.

The Division of the Act under which I am conducting this inquiry provides specifically 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.

I do not consider that it is appropriate that I make the recommendation proposed by the complainant. There is no evidence that, even if the respondent had accepted the complainant's application to join the scheme, the complainant would have ultimately been accepted into the scheme. His loss, therefore, is the loss of the opportunity to be assessed on his individual merits. This loss has been seen in other matters as justifying a small award or recommendation of damages. I do recommend that the complainant be awarded compensation for his loss as a consequence of the discrimination in the sum of \$5,000.

6. Notice of findings of the Commission

The Commission finds that the act and practice complained of by the complainant, namely that he was denied the opportunity to apply for a position in the SSO Pilot Scheme on account of his age, constituted discrimination in employment based on age.

7. Reason for findings

1. The respondent's refusal to accept the complainant's application to join the SSO scheme was by reason of his being 37 years of age at the time of making the application.
2. The respondent's refusal to accept the complainant's application to join the SSO scheme by reason of his age is a distinction or exclusion on the basis of age.
3. The exclusion has had the effect of nullifying the complainant's equality of opportunity or treatment in employment.
4. It is not an inherent requirement of the particular position that applicants for the SSO scheme be aged between 19 and 28 on the date of appointment.

8. Recommendation for compensation

The respondent should pay the complainant the sum of \$5,000 being general damages.

Dated at Sydney this 5th day of March 1998



Chris Sidoti
Human Rights Commissioner

Endnotes

- 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.
- 3 (1995) EOC 92-715.
- 4 See p. 78,378.
- 5 *Christie v. Qantas Airways Limited* (1995) 60 IR 17 at 28.
- 6 (1996) 138 ALR 19.
- 7 Full Federal Court, Brisbane, 13 January 1998; QG 197 of 1996.
- 8 Although the comments were made in relation to the *Disability Discrimination Act 1992* (Cth) I find that they are pertinent to the issues I am considering here.
- 9 At pp. 6 and 7.
- 10 At p. 12.
- 11 At p. 4.
- 12 At p. 26.
- 13 At p. 3.
- 14 Report of the Committee of Experts p. 74.

Appendix B – Barty

Human Rights and Equal Opportunity Commission

Notice under section 35 of the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)*

Concerning Equal Opportunity in Employment

Complainant: Mr Ken Barty

Respondent: The Commonwealth of Australia (Australian Defence Force)

1. The Commission's jurisdiction

This is a complaint under the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)* (the Act) of discrimination in employment on the ground of age. 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 1 of this notice.

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 notice, age discrimination, is one of those grounds.

2. The complaint

2.1 The nature of the complaint

On 14 July 1997 Mr Ken Barty lodged a complaint alleging discrimination on the basis of his age.

The complainant applied for a position of Administrative Officer with the Royal Australian Air Force (RAAF) in April 1997. Prior to making this written application, he had attended at the Air Force Travelling Recruiting Service in Bendigo and had discussions with a RAAF officer concerning this application

and, in particular, the need for him to reduce in weight.

Mr Barty wished his application to be considered at the next Selection Board in June 1997. He discussed this with the officer at the Recruiting Service. At the time of his written application, Mr Barty was aged 35 years. He would have been 35 at the time of the proposed Selection Board in June 1997.

The complainant alleges that in May 1997 he was verbally advised by an officer of the respondent that his application had been rejected due to his age. He provided the Commission with correspondence dated 12 June 1997 and 29 June 1997 to the effect that the June 1997 Selection Board had been cancelled and that his application was rejected because at the date of the next Selection Board in March 1998 he would exceed the upper age limit of 35.

2.2 Response by the ADF

In its original response to the complaint, the respondent denied discriminating against Mr Barty on the ground of his age. It stated that the application was unsuccessful because there were no vacancies and the June 1997 Selection Board was cancelled. As Mr Barty did not attend a Selection Board, his age was not addressed. References to age in the correspondence of 12 June 1997 and 29 June 1997 related only to the future processing of his application. In addition, the respondent stated that even if Mr Barty's application had been successful there was no guarantee that he would have been selected for the position.

The respondent stated that the 17 to 35 years age criterion for 'direct entry officers' was adopted following a 1995 tri-service review. The criterion was justified on the basis of the maintenance of a 'fit, vigorous and youthful force capable of effective engagement in combat operations'. In addition, the age limits met the RAAF's organisational needs for selection of personnel for promotion. An age waiver for non commissioned airmen and women is available depending on the circumstances of the case.

The respondent provided statistics on Administrative Officers in the RAAF. In summary, these showed that as at October 1997 there were 267 Administrative Officers with an average age of 39 years. Sixty five percent of the group were 36 years or older.

The respondent provided the Commission with a document outlining the career

details of an Administrative Officer (RAAF-OTS-Administrative Officer). This included details of positions such as unit administrative officer, financial accountant officer, recruiting officer, instructor and staff officer. The Commission was also provided with an extract of a policy document (AAP 6800.003) for the Administrative Officer position which includes, inter alia, the following criteria:

- being medically fit
- aged between 17 and 35 years on appointment if a direct entrant
- having completed year 12 with passes in four subjects including English
- completing an aptitude assessment
- possessing a range of personal attributes
- possessing at least 12 months experience in a managerial position or a thorough understanding of the responsibilities of such a position
- possessing interest in Service and duties of position
- being an Australian citizen or eligible to become one
- assessed as able to adjust to requirements of military life.

2.3 Conciliation

Attempts by the Commission to conciliate this complaint were unsuccessful.

3. Progress of the inquiry

3.1 Course of the inquiry

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

Following this preliminary finding I made directions for the provision of contentions and further 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 respondent elected to make oral submissions.

On 17 and 18 December 1998 I convened the inquiry in Sydney to take oral submissions from the respondent. The complainant was provided with an opportunity to attend but preferred to make written submissions on the basis of a transcript of the proceedings.

At the conclusion of the oral submissions, I directed that each party provide me with further written submissions. Both parties have provided written submissions to me and these submissions are summarised in Section 5 below.

3.2 Statement of issues

At my direction during the course of the inquiry, the respondent provided a statement of the issues in contention as follows:

1. whether, following the cancellation of the June 1997 Selection Board, the respondent engaged in an act of discrimination by not submitting Mr Barty's application to join the RAAF for processing
2. if yes, whether the failure to submit the application was based on a distinction, exclusion or preference on the ground of age which nullified or impaired the complainant's equality of opportunity or treatment in employment or occupation
3. if yes, whether the distinction, exclusion or preference was based on the inherent requirements of the particular position
4. whether, by enforcing a policy of maximum age of entry into the RAAF for Administrative Officers, the respondent has engaged in a practice which is discriminatory on the ground of age
5. if yes, whether the policy was based on a distinction, exclusion or preference on the ground of age which nullified or impaired the complainant's equality of opportunity or treatment in employment or occupation
6. if yes, whether the distinction, exclusion or preference contained in the policy was based on the inherent requirements of the particular position.

Having received no objection from the complainant, I accept this as an accurate statement of the matters in issue in this inquiry.

4. Oral evidence for the respondent

The respondent called the following witnesses relevant to Mr Barty's complaint: Colonel Warfe, Colonel Dittmar, Air Commodore Byrne and Wing Commander Johnston. I have summarised below the major points arising from their evidence.

4.1 Fitness standards in the ADF

Colonel Warfe gave evidence that there are two fitness standards in the ADF, a medical fitness standard and a physical fitness standard. There is regular testing to these standards and everybody in the ADF, regardless of rank, is required to undertake the tests.

In essence, the standards require freedom from any medical conditions which would hamper a person's ability to operate on a battlefield. There is a requirement for everybody to be medically and physically fit to be deployable on military operations.

There was evidence from Colonel Warfe and Colonel Dittmar as to the range of climatic conditions a member of the ADF would need to withstand and the loads required to be carried in combat-related tasks.

Colonel Warfe gave evidence that it is necessary to ensure that people are physically mature and medically fit. They must be able to cope with the privations of a battlefield. The scientific literature indicates that physical training is best conducted in 17 to 30 year age group. From the age of 25, strength reduces with age. Preventable injuries increase at around 30 years of age. Colonel Warfe made reference to three scientific studies tendered to the Commission to the effect that injury rates and medical discharge were more frequent for older persons. The types of injuries which occur during military training (lower limb injuries, lower back, hip, knee and ankle injuries) render persons unsuitable for the military because rehabilitation takes a great deal of time and because they are at risk of future injury.

Colonel Dittmar gave evidence of training requirements and injury rates. He indicated that infantry training was 'essentially designed around the development

of taking young men and building up their physical capacity to be able to meet the operational requirement'. He told the Commission that there would be a 'significant difference' in physical capacity between an individual who was 31 years of age and someone who was 35. In relation to his own experience, he told the Commission that increasing age meant a diminution in the ability to recuperate quickly, the tendency to fatigue more easily and increased difficulty with personal hygiene, along with increased back and knee problems.

Wing Commander Johnston gave evidence as to the fitness test. He said it was graded according to age and he referred to the increased risk of injury with age.

4.2 Restructuring of the ADF

Colonel Warfe gave evidence that the size of the ADF has been significantly reduced in recent years. He said that it was therefore important that everyone be deployable on military operations.

Colonel Dittmar gave evidence as to the structure of the ADF. He told the Commission that the size of the army was reducing and would be reduced to 23,000 persons in the next two years. Of this number, 15,000 would be in the combat force and 8,000 persons would be in training command. He described the process by which the 'core business' of the ADF was separated from 'non-core business' with the latter being contracted to civilians. Many jobs traditionally done by soldiers are now contracted out.

Air Commodore Byrne gave evidence as to the restructuring of the RAAF and the requirement by mid 2001 for 65% of the force to be in combat related positions and the other 35% to have specialist military skills which would allow them to move into combat related areas. He said that every member of the RAAF has a requirement to be a deployable combatant. Every person in uniform must be capable of carrying out ground combatant operations defending a bare base in the north of Australia. Evidence was given concerning the conditions at a bare base.

4.3 Recruitment practices

Colonel Dittmar gave evidence that the vast majority of applicants to the ADF are school leavers -generally between 17 and 19 years of age. He said that only a 'handful' of persons approaching the age of 35 or over applied to join. He said there was a particular need in the ADF for youthful applicants because of the need

for acculturation within the ADF's particular culture and because it was necessary for the ADF to 'grow its own' skill sets in circumstances where lateral recruitment was not possible. He said that a 40 year old applicant with private sector experience would have difficulty in reaching any level of reasonable seniority in rank or remuneration. Other persons in their 40s would be of a higher rank and would have considerable experience. Individuals joining at a later age would find their peers senior to themselves.

The average period of service of a general service officer is 12 years and many leave the service around their late 20s. Colonel Dittmar said that most people do not regard the ADF as a lifelong career and this is why most applicants are school leavers.

Colonel Dittmar gave evidence that there was some degree of flexibility in relation to the recruitment of specialist service officers, particularly medical practitioners, because they are in critical supply. This category also includes lawyers, dentists, psychologists, padres and civil engineers. Specialist service officers are in a different category to general service officers. Administrative Officers fall into the latter category.

Air Commodore Byrne said that the rationale for the age maximum was to enable the RAAF to become a youthful combat force capable of undertaking ground combat operations in the north of Australia. This was aligned to the practice in the army. He said that the ADF tended to attract school leavers due to its heroic, adventurous image.

The Air Commodore said that lateral recruitment was not possible and that the only way to get people with the right skill sets was to train them. He said that human resources managers could be laterally recruited but that this was only possible up until age 35 'because of the requirement for them also to be capable of ground combat operations in a bare base which, in fact, is their primary role'.

4.4 Requirements of position of Administrative Officer

Air Commodore Byrne gave evidence that Administrative Officers in the RAAF are mainly human resource managers and administrators. They are also required to have specialist military skills and perform command and management responsibilities on bare bases. In recognition of the actual role, the Air Commodore stated that there was a proposal to change the title of the position to 'Operations

Support Officer’.

The Air Commodore described the competencies of the Administrative Officer as including the requirement to ‘fight a bare base’, that is, to be responsible for the internal security of bare bases and have the skills to deploy forces within the base and maintain a secure environment. Evidence was given as to the meaning of a ‘bare base’ and the conditions found there.

Wing Commander Johnston referred to his personal experience with Administrative Officers. He described their role as resource management – both human and financial. At Fairbairn, the role of the deputy base commander, an Administrative Officer, is to run the base on a day-to-day basis. The internal security of a base is a matter for Administrative Officers and such an officer would be likely to command base combat personnel.

The Wing Commander gave evidence that lateral recruitment of Administrative Officers was possible and that private sector experience was relevant and applicable. It would be necessary to look at the individual case to see if the non-military skills were applicable to military uses, including combat-related roles.

Colonel Warfe said that all Administrative Officers had to be deployable on military operations. They would be expected to be able to look after themselves, not be a threat to anyone else and do their jobs in a hostile physical environment. In Colonel Warfe’s opinion, persons over 35 could carry on the task of Administrative Officer but only if they were recruited and trained at a much younger age.

All witnesses gave evidence about the rotational policy of the ADF. Wing Commander Johnston said that Administrative Officers were required to undertake postings in the north of Australia.

5. Written submissions of the parties

5.1 Submissions of the complainant

In written submissions dated 18 November 1998, the complainant referred to the matter of *Commonwealth of Australia v HREOC and Bradley*, unreported, 16 October 1998, Wilcox J (‘*Bradley*’). He contended that the spirit of the age limit was to encourage a mix of youthful and mature age persons. He submitted that the respondent had a flawed interpretation of the upper age limit.

In respect of damages, the complainant referred the Commission to its earlier finding in *Bradley* to the effect that the loss is the loss of opportunity to be assessed on the individual merits and that such loss has been seen in other matters as justifying a small recommendation of damages. The complainant submitted that his life has been substantially affected by this episode and that he has suffered loss of self esteem, depression and loss of career prospects and opportunity. Mr Barty offered to substantiate the psychological damage with expert reports if the Commission so required.

After being provided with the transcript of the oral inquiry and the exhibits tendered there Mr Barty, by letter of 7 January 1999, made further submissions:

- The position was not a ‘sedentary’ one.
- Why does a doctor or a lawyer have ‘critical skills’ and not other tertiary educated people?
- The ADF’s view of inherent requirements is wrongly based on physical attributes only and not on a holistic view of skills and experience and attributes.
- The ADF’s overall view of equality in the forces must be considered and is at odds with the evidence given.
- The ADF’s decision to cancel the June 1997 Selection Board was due to political expediency in an attempt to disenfranchise his application and so was ultra vires the legislation.
- The evidence of the RAAF officers is not supported by the RAAF culture which has a reputation for highly skilled and educated personnel.
- The RAAF has failed to demonstrate that the inherent requirements as a physical standard are appropriate and reasonable for modern defence forces.

5.2 Submissions of the respondent

In its written submissions of 28 February 1999, the respondent contended as follows:

- The ADF is reducing in size. The cancellation of the Selection Board in June 1997 must be seen in this context. There is no evidence that this was based on

any personal animus towards Mr Barty or with a view to discriminating against any candidate.

- The reduction of the ADF emphasises core activities by uniformed personnel. The mid 2001 force structure as described by Air Commodore Byrne requires combat fitness.
- An Administrative Officer is not a sedentary role. It is not comparable to the specialist officers who perform particular limited functions.
- Normal levels of combat fitness apply to all personnel, including Administrative Officers.
- Administrative Officers must perform duties outside their specialisation to train for eventual promotion. Commanders cannot be laterally recruited.
- A distinction, exclusion or preference on the ground of age will not amount to discrimination if it is based on the inherent requirements of a particular job.
- This does not mean that the Commission must determine whether age is an inherent requirement of the job.
- The approach to the meaning of ‘based on’ is that set out in *AMC v Wilson* (1996) 68 FCR 46 and *Cosco Holdings Pty Ltd v Do* (1997) 150 ALR 127, that is, the act must have occurred ‘by reason of or by reference to’ the distinction or the distinction must be a ‘material factor’ or ‘the true basis’ for the act.
- The Commission’s task is to determine whether the exclusion of persons over the age of 35 from the job of Administrative Officer is *based on the inherent requirements of the job*.
- The evidence reveals that most applicants present themselves for enlistment at the lower end of the age range and that many leave after some years of service. General Service Officers serve an average of 12 years. The ADF has a preponderance of youthful members.
- Some members of the ADF are older but evidence was given as to the decline with age in physical capacity.

- Evidence indicates that the 35 year limit is grounded in the inherent requirements of the job and, in particular, the physical rigours of the position.
- The respondent has determined that 35 years is the upper limit at which applicants can be expected to embark on training for ground combat operations at a bare base and embark on a career to maintain this level of fitness.
- The respondent has so determined based on its experience of training.
- The exclusion is based squarely on the inherent requirements of the job and does not constitute discrimination.

For completeness, in correspondence of 26 November 1998 the respondent requested an opportunity to consider any psychological reports concerning Mr Barty if the Commission proposed to receive them.

5.3 Submissions of the complainant in reply

The complainant elected not to make any submissions in reply.

6. Findings

6.1 Elements of discrimination

One of the functions conferred on me by the Act is to inquire into any act or practice that may constitute discrimination (section 31(b) of the Act).

Discrimination is defined in section 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 ‘any distinction, exclusion or preference made on the ground of age’ constitutes discrimination for the purposes of the Act.

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

- whether there is an act or practice under the Act
- whether the act or practice arises in employment or occupation
- whether there was a distinction, exclusion or preference based on age
- whether the distinction, exclusion or preference nullified or impaired equality of opportunity or treatment
- whether the distinction, exclusion or preference in respect of the particular job was based on the inherent requirements of the job.

6.2 Whether there is an act or practice

The respondent has not challenged the existence of a relevant act or practice.

In considering whether there was an act or practice which could amount to

discrimination by the respondent on the basis of age I make the following findings:

- Mr Barty applied for the position of Administrative Officer with the RAAF in April 1997. He made a written application dated 18 April 1997. Mr Barty turned 36 on 10 August 1997.
- The June 1997 Selection Board was cancelled. I do not find that this was due to anything other than valid operational reasons.
- The respondent refused to process Mr Barty's application in June 1997 because he would have exceeded the age limit at the March 1998 Selection Board. This was the next Selection Board which would be held.
- The maximum age for direct entry into the RAAF is 35 years of age.
- I accept that had Mr Barty attended the Selection Board he may not have been successful for reasons other than age. Nevertheless, the refusal to further process his application in June 1997 was an act based on his age.

I find that the respondent in refusing to further process Mr Barty's application in June 1997 engaged in an act which could amount to discrimination. I further find that the respondent's policy concerning the maximum age limit for the Administrative Officer position amounts to a practice within the meaning of the legislation.

6.3 Whether the act or practice arises in employment or occupation

There is no issue raised as to whether the act or practice complained of arose in employment or occupation and I am satisfied that the act or practice complained of arises in employment or occupation.

6.4 Whether there was a distinction, exclusion or preference made on the ground of age

The respondent has not argued that there is no distinction, exclusion or preference made on the ground of age.

Mr Barty must establish that the treatment he experienced was a consequence of a distinction based on age. I am satisfied that this is the case. The relevant act is the

refusal to process the complainant's application in June 1997. This was explicitly done on the basis of the age the complainant would have attained at the time of the March 1998 Selection Board. The relevant policy is the maximum age of 35 for direct entrants into the ADF. This is a distinction on the ground of age.

6.5 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 equality of opportunity or treatment'. It is not disputed that the refusal to process Mr Barty's application on the basis of age nullified or impaired his entitlement to apply for the position. I find, therefore, that it nullified or impaired Mr Barty's equality of opportunity or treatment.

6.6 Whether the distinction, exclusion or preference was based on the inherent requirements of the job

Not all distinctions, exclusions or preferences are discriminatory within the meaning of the Act. An employer may make a distinction, exclusion or preference on the basis of age where this distinction, exclusion or preference is based on the inherent requirements of the job.

The respondent relies on this aspect of the definition of discrimination to argue that it has not discriminated against Mr Barty. I must therefore consider whether the distinction, exclusion or preference on the basis of age in respect of the job of Administrative Officer is based on the inherent requirements of the job.

I have considered the evidence given in these proceedings and the argument of counsel for the respondent as to the inherent requirements. I do not take issue with the manner in which counsel has formulated the test concerning inherent requirements. That is, I agree that I cannot make a finding of discrimination in respect of a distinction, exclusion or preference (on the ground of age) which is based on the inherent requirements of the job. The respondent will succeed if the distinction based on age is in fact *based on* the inherent requirements of the job of Administrative Officer.

The respondent has not clearly indicated which requirements of the job it submits are inherent and which are not. It is clearly not every selection criterion or every element of a person's job which can constitute an 'inherent requirement' for the

purpose of the Act. In its submissions, the respondent has variously indicated that the inherent requirements involve ‘the physical rigours of the position’, the need to ‘embark on initial training that would render [an applicant] fit for ground combat operations at a bare base’ and the need to ‘embark on a career in which [the applicant] will be required to maintain that level of fitness’.

Despite the level of difficulty involved in ascertaining what may constitute an inherent requirement (see *Qantas v Christie* (1998) 152 ALR 365; *Commonwealth of Australia v Human Rights and Equal Opportunity Commission* (1998) 152 ALR 182) and the lack of precision in the respondent’s formulation, I am prepared to accept that it is an inherent requirement of the job of Administrative Officer to possess a level of combat fitness sufficient for ground combat operations to defend a bare base in the north of Australia.

In making this finding, I have accepted the respondent’s evidence that it is an essential part of the job of Administrative Officer that the holder of the job be deployable in ground combat operations. This evidence was given in the context of the requirement for all members of the ADF to be deployable in this way and in the context of the shrinking size of the ADF, in particular, the RAAF. I have taken these structural and operational factors into account in determining that the level of combat fitness described above is an inherent requirement of the job.

The question then becomes: can the distinction based on age be said to be *based on* these inherent requirements? I would answer this question in the negative.

In my view, the critical matter is the possession by a person of a certain level of physical and medical fitness. This level is appropriately set in accordance with the requirement for deployment in combat. The ADF has medical and fitness tests which are designed and intended to be an adequate determinant of whether a person has the requisite level of fitness. Both Colonel Warfe and Wing Commander Johnston gave evidence as to the nature of the relevant tests. There was no suggestion in the evidence that the tests are incapable of detecting physical deterioration or medical problems. The medical and fitness standards are clearly based on the inherent requirement of the requisite level of combat fitness.

The age exclusion, on the other hand, is not so based. It operates instead as a ‘proxy’ for the possession of the required medical and fitness characteristics. In evidence, the respondent tendered studies to show the increased rate of injury and medical discharge for older persons in the defence forces. These studies indicate

that *on average* older persons have higher rates of injury and medical discharge. In *Bradley*, Wilcox J drew specific attention to evidence which pointed to the difference between an average rate of performance and the performance of individuals. The only evidence that I have been presented with in this matter is evidence as to average performances. Indeed, I heard anecdotal evidence from a number of the respondent's witnesses about persons who were over the age of 35 who were performing the relevant jobs and doing so to the required standard.

In my view, I should apply the approach adopted by Wilcox J in *Bradley*. In that case, his Honour said:

The term 'based on' requires more than a logical link. The Macquarie Concise Dictionary gives, as the meaning of the verb 'base' when followed by 'on' or 'upon', 'to establish, as a fact or conclusion'. So the distinction, exclusion or preference must be established upon the inherent requirements of the particular job. The correlation must be, at least, close.

His Honour considered the analysis of Sackville J in *AMC v Wilson* (1996) 68 FCR 46 as to the meaning of 'based on'. However, cases which have considered the meaning of the term 'based on' in the context of establishing whether discriminatory conduct has occurred provide limited assistance in this case. With respect to beneficial legislation the meaning to be given to the phrase in the context of a defence is not necessarily the same as it would be in the context of establishing an element of discrimination. To the extent that the respondent relies on *AMC v Wilson* and *Cosco Holdings Pty Ltd v Do* (1997) 150 ALR 127 for the proposition that an exclusion will be based on the inherent requirements of the job except where the inherent requirements are merely a subterfuge or a specious foundation, I do not accept this submission.

In any event, Wilcox J has addressed this very issue. His Honour required a 'tight correlation between the inherent requirements of the job and the relevant "distinction", "exclusion" or "preference"'. His Honour made reference to the policy behind the legislative scheme and continued:

If the words 'based on' are so interpreted that it is sufficient to find a link between the restriction and the stereotype, as distinct from the individual, the legislation will have the effect of perpetuating the very process it was designed to bring to an end. So it is not appropriate to reason that because extreme fitness is an inherent requirement of a job of an SSO pilot and younger pilots tend to be more fit than older pilots, therefore the requirement for SSO pilots to be under 28 years of age on appointment is 'based on' the requirement of fitness. Unless there is an extremely

close correlation between the selected age and fitness requirement so that age may logically be treated as a proxy for the fitness requirement, the legislation will have the effect of damning individuals over the age of 28 years by reference to a stereotypical characteristic (less physical fitness) of their age group.

The respondent's submissions rely on the inappropriate reasoning described by Wilcox J and, for the reasons he gave, I am unable to accept them.

In so far as this argument is made, I do not accept that the *maintenance* of a level of combat fitness can be construed as a separate inherent requirement. At any point in time, the inherent requirement of the job is to have a particular level of fitness. It is up to the ADF to design a test, at sufficiently frequent intervals, to assess the maintenance of this fitness. I consider that 'maintenance of combat fitness' is too vague and ill defined to constitute a requirement. Further, no one can be subject to a present *requirement* to do something which depends upon foreseeable or unforeseeable future contingencies. In any event, even if I were to accept that the maintenance of the fitness level could be an inherent requirement, for the reasons given above I would be of view that the age exclusion is not based upon it.

The only other requirement which has any connection with the age exclusion is the criterion of adjustment to military life. This was not specifically raised by the respondent in submissions as constituting an inherent requirement but evidence was put before me of the age differentials within a peer group or rank and the need for acculturation into the defence forces. Even if I accept that this could constitute an inherent requirement of the job, for the reasons already given I do not think the age exclusion can be said to be 'based on' this requirement. There are selection criteria for Administrative Officers involving suitability for military life. As a matter of logic, the ADF must have a method for assessing candidates against this criterion. The use of age as a 'proxy' for the suitability for military life requirement has the same 'damning' effect referred to by Wilcox J. The age distinction is not, therefore, based on the requirement for adjustment to military life.

In summary, it may be that more persons over the age of 35 than below it fail to meet the admission standards into the ADF. However, these applicants are entitled to be assessed on their individual merits and, if they fail, to fail on the basis of their individual failure to meet specific medical or fitness or suitability standards that apply to all applicants and not because they fall within a stipulated age bracket, regardless of their ability to meet the other criteria. Applicants outside the stipulated

age bracket who can meet the other selection criteria ought to be admitted for training and not excluded on the basis of an age distinction.

For these reasons, I am not satisfied that the exclusion of all persons above the age of 35 years from employment as Administrative Officers in the RAAF is based on the inherent requirements of the job of Administrative Officer. Accordingly, I find that the acts and practices complained of by the complainant constitute discrimination in employment on the grounds of age.

7. Recommendations

Having found the decision to reject the complainant's application 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.

7.1 Recommendation of compensation

Mr Barty has submitted that the correct approach to the assessment of damages is that taken in the *Bradley* matter. The respondent has not taken issue with this.

I propose therefore to apply the principles concerning compensation in the matter of *Bradley* and to make a recommendation for an award of compensation by way of general damages.

Overall, awards of damage must be fair and reasonable in the circumstances of each case: *Ritossa v Gray & Anor* (1992) EOC 92-452. In these circumstances, I have concluded that the complainant's loss is the loss of the opportunity to be assessed on his individual merits. General damages can also include factors such as damages for humiliation, loss of dignity, injury to feelings and so on. I note that the complainant said that he suffered loss of self esteem and depression. In making a recommendation for an award of general damages, I do not find it necessary to consider further psychological evidence in this regard.

The complainant was not a serving member of the ADF at the time of his application and did not have a career there. The rejection of his application, therefore, did not have the same consequence for him as discrimination based on age would have for a serving member of the ADF.

Having taken into account all of these matters, I recommend that the complainant be awarded compensation for his loss as a consequence of the discrimination in the sum of \$5,000.

7.2 Other recommendations

I recommend that the upper age limit contained in the selection criteria for Administrative Officers in the RAAF be removed.

8. Notice of findings of the Commission

The Commission finds that the act complained of by the complainant, namely that the respondent refused to process further his application for the position of Administrative Officer in the RAAF, and the practice complained of by the complainant, namely that the respondent enforced a maximum age of 35 for appointment as an Administrative Officer in the RAAF, constitute discrimination in employment based on age.

9. Reasons for findings

1. I find that following the cancellation of the June 1997 Selection Board the respondent engaged in an act of discrimination by not submitting Mr Barty's application to join the RAAF for processing.
2. I find that the failure to submit the application was based on a distinction, exclusion or preference on the ground of age which nullified or impaired the complainant's equality of opportunity or treatment in employment or occupation.
3. I find that the distinction, exclusion or preference was not based on the inherent requirements of the job.
4. I further find that, by enforcing a policy of maximum age of entry into the RAAF for Administrative Officers, the respondent has engaged in a practice

which is discriminatory on the ground of age.

5. This policy is based on a distinction, exclusion or preference on the ground of age which nullified or impaired the complainant's equality of opportunity or treatment in employment or occupation.
6. The distinction, exclusion or preference contained in the policy was not based on the inherent requirements of the job.

10. Recommendations

1. The upper age limit contained in the selection criteria for Administrative Officer positions in the RAAF should be removed.
2. The respondent should pay to the complainant the sum of \$5,000 being general damages.

Dated at Sydney this 16th day of September 1999



Chris Sidoti
Human Rights Commissioner

Endnotes

- 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.

Appendix C – Petersen

Human Rights and Equal Opportunity Commission

Notice under section 35 of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth)

Concerning Equal Opportunity in Employment

Complainant: Mr E W Petersen

Respondent: The Commonwealth of Australia (Australian Defence Force)

1. The Commission's jurisdiction

This is a complaint under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (the Act) of discrimination in employment on the ground of age. 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 1 of this notice.

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 notice, age discrimination, is one of those grounds.

2. The complaint

On 4 July 1996 and 5 February 1997 Mr Petersen lodged complaints alleging discrimination on the basis of his age.

The complainant initially complained generally about the practice of the ADF in requiring entrants to be within a 17 to 35 age range. He then made further complaint concerning a conversation he had with a Sergeant Hubbard on 29 January 1997. Sergeant Hubbard allegedly stated that Mr Petersen would be wasting his time submitting his curriculum vitae because it was not army policy to employ persons older than 35 years of age. Mr Petersen said that he did 'submit' his CV to the

respondent as he verbally recited his qualifications and experience to ADF representatives.

Mr Petersen then spoke to Captain Elliott in public relations who advised that the age limit might be stretched to 40 years but no further.

At the time of these conversations, Mr Petersen was 43 years of age.

Mr Petersen did not indicate to the Commission that he wished to apply for any particular job. However, he advised the Commission that he wishes to apply for

various administrative positions which might have been vacant acquiring (sic) a job specification with a background in Logistics Management, Human Resources Management, Operations Management, Project Management, Inventory or Warehousing Management, Financial Management or Information Systems.

The complainant described himself as

a graduate with 23 years experience gained in an overseas armed service. I held various equivalent military officer positions and references from my overseas Air Logistics Command can be furnished to the ADF in support of my application, regarding my ability and character.

Mr Petersen alleged that he had suffered 'lesser opportunity than others, with less experience, to join the ADF'. He requested a change in policy and an opportunity to apply for a position on his merits. He indicated that detriment was suffered not only by him but by all Australians of his age or older who wished to join the ADF.

3. Progress of the inquiry

3.1 Course of the inquiry

On 21 May 1997 I wrote to the respondent and advised that I made a preliminary finding that the practice complained of by Mr Petersen constituted discrimination on the basis of age. This practice was the practice of the ADF of employing persons between the age of 17 and 35 years only.

Following this preliminary finding I made directions for the provision of contentions and further 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 respondent elected to make oral submissions.

On 17 and 18 December 1998 I convened the inquiry in Sydney to take oral submissions from the respondent. The complainant was provided with an opportunity to attend but preferred to make written submissions on the basis of a transcript of the proceedings.

At the conclusion of the oral submissions, I directed that each party provide me with further written submissions. Both parties have provided written submissions to me and these submissions are summarised in Section 5 below.

3.2 Written submissions of the complainant

On 21 September 1997 Mr Petersen provided written submissions to the following effect:

- The ADF's restricted hiring policy adversely impacts on a group of Australians.
- The policy is unfair because age is not a predictor of job performance.
- The ADF must show this policy is justified as business necessity in each job category.
- If it is justified, all employees over 35 should be made redundant.
- Qualifications and experience are more valuable key performance criteria to consider.
- How can one justify a policy that would mean that the present Commissioner of Police would be rejected from entrance?
- His own experience includes 20 years experience in an overseas air force as a systems manager. He is a business graduate having obtained honorary status within a unit, is accustomed to military protocol and real war time experience and has vast experience in logistics management of aircraft systems.
- This complaint looks to the removal of the hiring policy for the benefit of all Australians.

3.3 Statement of issues

At my direction during the course of the inquiry, the respondent provided a statement of the issues in contention as follows:

1. whether, having made no formal application to join the ADF, the respondent can be said to have engaged in an *act* of discrimination against the complainant
2. if yes, whether the respondent engaged in any distinction, exclusion or preference on the ground of age which nullified or impaired the complainant's equality of opportunity or treatment in employment or occupation
3. If yes, whether the distinction, exclusion or preference was based on the inherent requirements of the job
4. whether, by enforcing a policy of maximum age of entry to the ADF, the respondent has engaged in a practice which is discriminatory on the ground of age
5. if yes, whether the policy was based on a distinction, exclusion or preference on the ground of age which nullified or impaired the complainant's equality of opportunity or treatment in employment or occupation
6. if yes, whether the distinction, exclusion or preference contained in the policy was based on the inherent requirements of the job.

I received no objection from the complainant concerning these issues. However, my preliminary finding of discrimination was based on the existence of a discriminatory *practice* only. I therefore accept items 4, 5 and 6 above as an accurate statement of the matters in issue in these proceedings. I do not regard items 1, 2 and 3 above as being in issue here.

4. Oral evidence for the respondent

The respondent called the following witnesses relevant to Mr Petersen's complaint: Colonel Warfe, Colonel Dittmar, Air Commodore Byrne and Wing Commander Johnston. I have summarised below the major points arising from their evidence.

4.1 Fitness standards in the ADF

Colonel Warfe gave evidence that there are two fitness standards in the ADF; a medical fitness standard and a physical fitness standard. There is regular testing to these standards and everybody in the ADF, regardless of rank, is required to undertake the tests.

In essence, the standards require freedom from any medical conditions which would hamper a person's ability to operate on a battlefield. There is a requirement for everybody to be medically and physically fit to be deployable on military operations.

There was evidence from Colonel Warfe and Colonel Dittmar as to the range of climatic conditions a member of the ADF would need to withstand and the loads required to be carried in combat-related tasks.

Colonel Warfe gave evidence that it is necessary to ensure that people are physically mature and medically fit. They must be able to cope with the privations of a battlefield. The scientific literature indicates that physical training is best conducted in the 17 to 30 year age group. From the age of 25, strength reduces with age. Preventable injuries increase at around 30 years of age. Colonel Warfe made reference to three scientific studies tendered to the Commission to the effect that injury rates and medical discharge were more frequent for older persons. The types of injuries which occur during military training (lower limb injuries, lower back, hip, knee and ankle injuries) render persons unsuitable for the military because rehabilitation takes a great deal of time and because they are at risk of future injury.

Colonel Dittmar gave evidence of training requirements and injury rates. He indicated that infantry training was 'essentially designed around the development of taking young men and building up their physical capacity to be able to meet the operational requirement'. He told the Commission that there would be a 'significant difference' in physical capacity between an individual who was 31 years of age and someone who was 35. In relation to his own experience, he told the Commission that increasing age meant a diminution in the ability to recuperate quickly, the tendency to fatigue more easily and increased difficulty with personal hygiene, along with increased back and knee problems.

Wing Commander Johnston gave evidence as to the fitness test. He said it was

graded according to age and he referred to the increased risk of injury with age.

4.2 Restructuring of the ADF

Colonel Warfe gave evidence that the size of the ADF has been significantly reduced in recent years. He said that it was therefore important that everyone be deployable on military operations.

Colonel Dittmar gave evidence as to the structure of the ADF. He told the Commission that the size of the army was reducing and would be reduced to 23,000 persons in the next two years. Of this number, 15,000 would be in the combat force and 8,000 persons would be in training command. He described the process by which the 'core business' of the ADF was separated from 'non-core business' with the latter being contracted to civilians. Many jobs traditionally done by soldiers are now contracted out.

Air Commodore Byrne gave evidence as to the restructuring of the RAAF and the requirement by mid 2001 for 65% of the force to be in combat related positions and the other 35% to have specialist military skills which would allow them to move into combat related areas. He said that every member of the RAAF has a requirement to be a deployable combatant. Every person in uniform must be capable of carrying out ground combat operations defending a bare base in the north of Australia. Evidence was given concerning the conditions at a bare base.

4.3 Recruitment practices

Colonel Dittmar gave evidence that the vast majority of applicants to the ADF are school leavers -generally between 17 and 19 years of age. He said that only a 'handful' of persons approaching the age of 35 or over applied to join. He said there was a particular need in the ADF for youthful applicants because of the need for acculturation within the ADF's particular culture and because it was necessary for the ADF to 'grow its own' skill sets in circumstances where lateral recruitment was not possible. He said that a 40 year old applicant with private sector experience would have difficulty in reaching any level of reasonable seniority in rank or remuneration. Other persons in their 40s would be of a higher rank and would have considerable experience. Individuals joining at a later age would find their peers senior to themselves.

The average period of service of a general service officer is 12 years and many

leave the service around their late 20s. Colonel Dittmar said that most people do not regard the ADF as a lifelong career and this is why most applicants are school leavers.

Colonel Dittmar gave evidence that there was some degree of flexibility in relation to the recruitment of specialist service officers, particularly medical practitioners, because they are in critical supply. This category also includes lawyers, dentists, psychologists, padres and civil engineers. Specialist service officers are in a different category to general service officers. Administrative Officers in the RAAF fall into the latter category.

Air Commodore Byrne said that the rationale for the age maximum was to enable the RAAF to become a youthful combat force capable of undertaking ground combat operations in the north of Australia. This was aligned to the practice in the army. He said that the ADF tended to attract school leavers due to its heroic, adventurous image.

The Air Commodore said that lateral recruitment was not possible and that the only way to get people with the right skill sets was to train them. He said that human resources managers could be laterally recruited but that this was only possible up until age 35 ‘because of the requirement for them also to be capable of ground combat operations in a bare base which, in fact, is their primary role’.

4.4 Requirements of job of Administrative Officer and other administrative jobs

Air Commodore Byrne gave evidence that Administrative Officers in the RAAF are mainly human resource managers and administrators. They are also required to have specialist military skills and perform command and management responsibilities on bare bases. In recognition of the actual role, the Air Commodore stated that there was a proposal to change the title of the position to ‘Operations Support Officer’.

The Air Commodore described the competencies of the Administrative Officer as including the requirement to ‘fight a bare base’; that is, to be responsible for the internal security of bare bases and have the skills to deploy forces within the base and maintain a secure environment. Evidence was given as to the meaning of a ‘bare base’ and the conditions found there.

Wing Commander Johnston referred to his personal experience with Administrative Officers in the RAAF. He described their role as resource management – both human and financial. At Fairbairn, the role of the deputy base commander, an Administrative Officer, is to run the base on a day-to-day basis. The internal security of a base is a matter for Administrative Officers and such an officer would be likely to command base combat personnel.

The Wing Commander gave evidence that lateral recruitment of Administrative Officers to the RAAF was possible and that private sector experience was relevant and applicable. It would be necessary to look at the individual case to see if the non-military skills were applicable to military uses, including combat-related roles.

Colonel Warfe said that Administrative Officers in all three services had to be deployable on military operations. They would be expected to be able to look after themselves, not be a threat to anyone else and do their jobs in a hostile physical environment, including on a ship at sea. In Colonel Warfe's opinion, persons over 35 could carry on the task of Administrative Officer but only if they were recruited and trained at a much younger age.

The Colonel indicated that a person who would be in charge of a stores area in a base would need to be fit to deploy to an operation environment and look after the stores in that context. This person must look after himself and others and not be a threat to anyone else. The requirements on a quartermaster appear to be 'exactly the same as many combat-involved troops'.

Colonel Dittmar said that the vast majority of storemen and clerks in the army will live within the combat force. As such, they are 'soldiers first and specialists second'. They are required to live in the field, undertake the protective tasks required of an infantry soldier, including patrolling and ambushing, and must be able to conduct counter-ambush drills. The clerical function includes matters such as grades registration, notification of casualties, evacuation of casualties and a range of other military specific tasks. Stores personnel must be able to operate in a potentially hostile environment and require navigation and protection skills. Colonel Dittmar also indicated that there were no longer any specific 'Administrative Officer' positions within the army. These jobs were now performed by civilians.

Wing Commander Johnston gave evidence of the work of engineering officers and supply officers in the RAAF which positions may match the skill set described by Mr Petersen. These persons are subject to the same requirements for combat

fitness as any other officer. They work close to the aircraft systems as part of their role.

All witnesses gave evidence about the rotational policy of the ADF. Wing Commander Johnston said that Administrative Officers in the RAAF were required to undertake postings in the north of Australia.

5. Written submissions of the parties

5.1 Submissions of the complainant

By letter dated 8 February 1999, the complainant made the following submissions:

- The job specifications he mentioned are not vague and refer to universal functions carried out by Human Resources Managers, Financial Managers and so on.
- He did not wish to be appointed as an artisan, technician or pilot.
- The witnesses are all over 35 and are fit to be deployed. Why does this not apply to people not currently in the military?
- Colonel Dittmar's comment about difficulty in reaching a level of seniority is irrelevant because people have different aspirations.
- It is discriminatory for persons over 35 to remain in the military when persons over 35 are not able to join.

5.2 Submissions of the respondent

In its written submissions of 10 March 1999, the respondent contended as follows:

- The complainant has not given oral evidence and no opportunity has been given for cross-examination. The lack of clarity in regard to the positions sought has hampered the respondent in the preparation of its case.
- It is assumed from the complainant's material that the complainant wished to join the RAAF as an officer other than a pilot.

- The complainant could perform the work he desires without joining the ADF. He may be able to compete for civilian vacancies within the Department of Defence.
- The ADF is reducing in size. There are no longer Administrative Officers in the army.
- In the RAAF, the mid 2001 force structure as described by Air Commodore Byrne requires combat fitness.
- Officer career involves duties outside specialisation with a view to eventual promotion to command. Commanders cannot be laterally recruited. An officer career requires regular rotation and the officer must be able to withstand extremes of climate.
- A distinction, exclusion or preference on the ground of age will not amount to discrimination if it is based on the inherent requirements of a particular job.
- This does not mean that the Commission must determine whether age is an inherent requirement of the job.
- The approach to the meaning of ‘based on’ is that set out in *AMC v Wilson* (1996) 68 FCR 46 and *Cosco Holdings Pty Ltd v Do* (1997) 150 ALR 127, that is, the act must have occurred ‘by reason of or by reference to’ the distinction or the distinction must be a ‘material factor’ or ‘the true basis’ for the act. The criterion must not be a ‘subterfuge’ or a ‘specious foundation’.
- The Commission’s task is to determine whether the exclusion of persons over the age of 35 from the job of Administrative Officer is *based on the inherent requirements of the job* or whether the inherent requirements are a ‘subterfuge’ or a ‘specious foundation’ for that requirement.
- The evidence reveals that most applicants present themselves for enlistment at the lower end of the age range and that many leave after some years of service. General Service Officers serve an average of 12 years. The ADF has a preponderance of youthful members.
- Some members of the ADF are older but evidence was given as to the decline with age in physical capacity.

- Evidence indicates that the 35 year limit is grounded in the inherent requirements of the job and, in particular, the physical rigours of the position.
- The respondent has determined that 35 years is the upper limit at which applicants can be expected to embark on training for ground combat operations at a bare base and embark on a career to maintain this level of fitness.
- The respondent has so determined based on its experience of training.
- The exclusion is based squarely on the inherent requirements of the job and does not constitute discrimination.

5.3 Submissions of the complainant in reply

The complainant elected not to make any submissions in reply.

6. Findings

6.1 Elements of discrimination

One of the functions conferred on me by the Act is to inquire into any practice that may constitute discrimination (section 31(b) of the Act).

Discrimination is defined in section 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 ‘any distinction, exclusion or preference made on the ground of age’ constitutes discrimination for the purposes of the Act.

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

- whether there is a practice under the Act
- whether the practice arises in employment or occupation
- whether there was a distinction, exclusion or preference based on age
- whether the distinction, exclusion or preference nullified or impaired equality of opportunity or treatment
- whether the distinction, exclusion or preference in respect of the particular job was based on the inherent requirements of the job.

6.2 Whether there is a practice

While the respondent initially indicated that the existence of an ‘act’ was in issue in proceedings (see Statement of Issues, 15 May 1998), my preliminary findings were limited to the practice of excluding persons over the age of 35 years from entrance into the ADF.

The existence of this practice is not disputed.

6.3 Whether the practice arises in employment or occupation

There is no issue raised as to whether the practice complained of arose in employment or occupation and I am satisfied that the practice complained of arises in employment or occupation.

6.4 Whether there was a distinction, exclusion or preference made on the ground of age

The respondent has not argued that there is no distinction, exclusion or preference made on the ground of age in respect of this practice.

6.5 Whether the distinction nullified or impaired equality of opportunity

For a 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 equality of opportunity or treatment’. It is not disputed that Mr Petersen was 43 years of age at the time that he wished to apply for positions in the ADF and it is not disputed that he did wish to apply for those positions. I find, therefore, that the distinction nullified or impaired Mr Petersen’s equality of opportunity or treatment.

6.6 Whether the distinction, exclusion or preference was based on the inherent requirements of the job

Not all distinctions, exclusions or preferences are discriminatory within the meaning of the Act. An employer may make a distinction, exclusion or preference on the basis of age where this distinction, exclusion or preference is based on the inherent requirements of the job.

The respondent relies on this aspect of the definition of discrimination to argue that it has not discriminated against Mr Petersen. I must therefore consider whether the distinction, exclusion or preference on the basis of age contained in the maximum age of 35 years in respect of the positions referred to by Mr Petersen are based on the inherent requirements of the job.

I have considered the evidence given in these proceedings and the argument of counsel for the respondent as to the inherent requirements. I do not take issue with the manner in which counsel has formulated the test concerning inherent requirements. That is, I agree that I cannot make a finding of discrimination in

respect of a distinction, exclusion or preference (on the ground of age) which is based on the inherent requirements of the job. The respondent will succeed if the distinction based on age is in fact *based on* the inherent requirements of the relevant jobs.

I appreciate the respondent's difficulty in formulating its argument in respect of this aspect of the claim because the actual 'jobs' which Mr Petersen wished to apply for have not been clearly defined. However, the respondent called evidence in relation to a range of administrative positions, including Administrative Officers in the RAAF and positions involving human resources management, financial management and stores positions in so far as they exist elsewhere in the ADF. For the purpose of this decision, I have considered this range of jobs to be the positions in issue and I have referred to them compendiously as 'Administrative Officers'.

The respondent has not clearly indicated which requirements of these types of job it submits are inherent and which are not. It is clearly not every selection criterion or every element of a person's job which can constitute an 'inherent requirement' for the purpose of the Act. In its submissions, the respondent has variously indicated that the inherent requirements involve 'the physical rigours of the position', the need to 'embark on initial training that would render [an applicant] fit for ground combat operations at a bare base' and the need to 'embark on a career in which [the applicant] will be required to maintain that level of fitness'.

Despite the level of difficulty involved in ascertaining what may constitute an inherent requirement (see *Qantas v Christie* (1998) 152 ALR 365; *Commonwealth of Australia v Human Rights and Equal Opportunity Commission* (1998) 152 ALR 182) and the lack of precision in the respondent's formulation, I am prepared to accept that it is an inherent requirement of the job of Administrative Officer to possess a level of combat fitness sufficient for ground combat operations to defend a bare base in the north of Australia.

In making this finding, I have accepted the respondent's evidence that it is an essential part of the job of Administrative Officer that the holder of the job be deployable in ground combat operations. This evidence was given in the context of the requirement for all members of the ADF to be deployable in this way and in the context of the shrinking size of the ADF, in particular, the RAAF. I have taken these structural and operational factors into account in determining that the level of combat fitness described above is an inherent requirement of the job.

The question then becomes: can the distinction based on age be said to be *based on* these inherent requirements? I would answer this question in the negative.

In my view, the critical matter is the possession by a person of a certain level of physical and medical fitness. This level is appropriately set in accordance with the requirement for deployment in combat. The ADF has medical and fitness tests which are designed and intended to be an adequate determinant of whether a person has the requisite level of fitness. Both Colonel Warfe and Wing Commander Johnston gave evidence as to the nature of the relevant tests. There was no suggestion in the evidence that the tests are incapable of detecting physical deterioration or medical problems. The medical and fitness standards are clearly based on the inherent requirement of the requisite level of combat fitness.

The age exclusion, on the other hand, is not so based. It operates instead as a ‘proxy’ for the possession of the required medical and fitness characteristics. In evidence, the respondent tendered studies to show the increased rate of injury and medical discharge for older persons in the defence forces. These studies indicate that *on average* older persons have higher rates of injury and medical discharge. In *Bradley*, Wilcox J drew specific attention to evidence which pointed to the difference between an average rate of performance and the performance of individuals. The only evidence that I have been presented with in this matter is evidence as to average performances. Indeed, I heard anecdotal evidence from a number of the respondent’s witnesses about persons who were over the age of 35 who were performing the relevant jobs and doing so to the required standard.

In my view, I should apply the approach adopted by Wilcox J in *Bradley*. In that case, his Honour said:

The term ‘based on’ requires more than a logical link. The Macquarie Concise Dictionary gives, as the meaning of the verb ‘base’ when followed by ‘on’ or ‘upon’, ‘to establish, as a fact or conclusion’. So the distinction, exclusion or preference must be established upon the inherent requirements of the particular job. The correlation must be, at least, close.

His Honour considered the analysis of Sackville J in *AMC v Wilson* (1996) 68 FCR 46 as to the meaning of ‘based on’. However, cases which have considered the meaning of the term ‘based on’ in the context of establishing whether discriminatory conduct has occurred provide limited assistance in this case. With respect to beneficial legislation the meaning to be given to the phrase in the context of a defence is not necessarily the same as it would be in the context of establishing

an element of discrimination. To the extent that the respondent relies on *AMC v Wilson* and *Cosco Holdings Pty Ltd v Do* (1997) 150 ALR 127 for the proposition that an exclusion will be based on the inherent requirements of the job except where the inherent requirements are merely a subterfuge or a specious foundation, I do not accept this submission.

In any event, Wilcox J has addressed this very issue. His Honour required a ‘tight correlation between the inherent requirements of the job and the relevant “distinction”, “exclusion” or “preference”’. His Honour made reference to the policy behind the legislative scheme and continued:

If the words ‘based on’ are so interpreted that it is sufficient to find a link between the restriction and the stereotype, as distinct from the individual, the legislation will have the effect of perpetuating the very process it was designed to bring to an end. So it is not appropriate to reason that because extreme fitness is an inherent requirement of a job of an SSO pilot and younger pilots tend to be more fit than older pilots, therefore the requirement for SSO pilots to be under 28 years of age on appointment is ‘based on’ the requirement of fitness. Unless there is an extremely close correlation between the selected age and fitness requirement so that age may logically be treated as a proxy for the fitness requirement, the legislation will have the effect of damning individuals over the age of 28 years by reference to a stereotypical characteristic (less physical fitness) of their age group.

The respondent’s submissions rely on the inappropriate reasoning described by Wilcox J and, for the reasons he gave, I am unable to accept them.

In so far as this argument is made, I do not accept that the *maintenance* of a level of combat fitness can be construed as a separate inherent requirement. At any point in time, the inherent requirement of the job is to have a particular level of fitness. It is up to the ADF to design a test, at sufficiently frequent intervals, to assess the maintenance of this fitness. I consider that ‘maintenance of combat fitness’ is too vague and ill defined to constitute a requirement. Further, no one can be subject to a present *requirement* to do something which depends upon foreseeable or unforeseeable future contingencies. In any event, even if I were to accept that the maintenance of the fitness level could be an inherent requirement, for the reasons given above I would be of view that the age exclusion is not based upon it.

The only other requirement which has any connection with the age exclusion is the criterion of adjustment to military life. This was not specifically raised by the respondent in submissions as constituting an inherent requirement but evidence

was put before me of the age differentials within a peer group or rank and the need for acculturation into the defence forces. Even if I accept that this could constitute an inherent requirement of the job, for the reasons already given I do not think the age exclusion can be said to be ‘based on’ this requirement. There are, for example, selection criteria for Administrative Officers in the RAAF which refer to adjustment to military life. As a matter of logic, the ADF must have a method for assessing candidates against this criterion. The use of age as a ‘proxy’ for the suitability for military life requirement has the same ‘damning’ effect referred to by Wilcox J. The age distinction is not, therefore, based on the requirement for adjustment to military life.

In summary, it may be that more persons over the age of 35 than below it fail to meet the admission standards into the ADF. However, these applicants are entitled to be assessed on their individual merits and, if they fail, to fail on the basis of their individual failure to meet specific medical or fitness or suitability standards that apply to all applicants and not because they fall within a stipulated age bracket, regardless of their ability to meet the other criteria. Applicants outside the stipulated age bracket who can meet the other selection criteria ought to be admitted for training and not excluded on the basis of an age distinction.

For these reasons, I am not satisfied that the exclusion all persons above the age of 35 years from employment as an Administrative Officer (as defined above) is based on the inherent requirements of the relevant jobs. Accordingly, I find that the practice complained of by the complainant constitutes discrimination in employment on the grounds of age.

7. Recommendations

Having found the practice of a maximum age of 35 for entry 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.

7.1 Recommendation of compensation

Mr Petersen has not asked for financial compensation. Since he did not apply for any particular position I do not consider it appropriate to make a recommendation for compensation.

7.2 Other recommendations

I recommend that the upper age limit in the ADF for admission to Administrative Officer positions as defined above or equivalent positions however titled be removed.

8. Notice of findings of the Commission

The Commission finds that the practice complained of by the complainant namely that the respondent enforced a maximum age of 35 for appointment as Administrative Officer in the ADF constitutes discrimination in employment based on age.

9. Reason for findings

1. I find that by enforcing a policy of maximum age of entry for Administrative Officers in the ADF the respondent has engaged in a practice which is discriminatory on the ground of age.
2. This policy is based on a distinction, exclusion or preference on the ground of age which nullified or impaired the complainant's equality of opportunity or treatment in employment or occupation.
3. The distinction, exclusion or preference contained in the policy was not based on the inherent requirements of the job.

10. Recommendation

I recommend that the upper age limit in the ADF for admission to Administrative Officer positions as defined above or equivalent positions however titled be removed.

Dated at Sydney this 16th day of September 1999

A handwritten signature in black ink, appearing to read 'Chris Sidoti', written in a cursive style.

Chris Sidoti
Human Rights Commissioner

Endnotes

- 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.

Appendix D – Van Den Heuvel

Human Rights and Equal Opportunity Commission

Notice under section 35 of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth)

Concerning Equal Opportunity in Employment

Complainant: Mr Ken Van Den Heuvel

Respondent: The Commonwealth of Australia (Australian Defence Force)

1. The Commission's jurisdiction

This is a complaint under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (the Act) of discrimination in employment on the ground of age. 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 1 of this notice.

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 notice, age discrimination, is one of those grounds.

2. The complaint

2.1 The nature of the complaint

On 1 July 1997 the Commission received a complaint under section 32 of the Act from Mr Ken Van Den Heuvel. The complainant alleges that the Australian Defence Force (the ADF) discriminated him against on the ground of age when it rejected his application to remuster to the position of Aircraft Loadmaster.

The complainant was employed by the RAAF as a Ground Support Fitter at Williamstown Air Base. In April or May 1996 he made enquiries in relation to an advertisement by the RAAF for applicants for the position of Aircraft Loadmaster.

He was aged 37 years at the time. He examined the requirements for the position and found one selection criterion was an upper age limit of 35 years. He telephoned the relevant RAAF contact person, Dr Leonie Ryder, to clarify why there was an age restriction. He claims Dr Ryder stated that the statistics indicated there were two reasons for not accepting a person over this age. First, a person's ability to learn diminishes at this age. Second, a person is less likely to be able to change his or her lifestyle past this age. He claims he gave Dr Ryder some examples of why he believed he did not fit into this category of applicant. He claims Dr Ryder replied that she was not saying he could not apply but that she would be on the selection board.

On 3 June 1996 the complainant submitted a written application for the position of Aircraft Loadmaster. In his application he requested that an age waiver be granted. He addressed the reasons for the age restriction provided by Dr Ryder and submitted information concerning his recent completion of tertiary studies and his experience as a facilitator. He claimed these examples demonstrated his ability to perform the job and that he and his family were prepared to make adjustments. He listed his knowledge and skills which he felt were transferable to the position.

The complainant provided a copy of a letter dated 25 July 1996 from the RAAF stating his application had not been approved. It stated that he did not meet the minimum selection criteria 'in that he exceeds the maximum age for entry'.

2.2 Response by the ADF

In its original response to the complaint, the respondent stated that the complainant was one of 53 applicants for six remuster training positions. It claimed that a final determinant in processing an application is an airman's reported history contained in annual evaluation reports and that only the most competitive applicants were approved for further processing. It claimed that it is normal practice not to grant an age waiver where there is a sufficient pool of personnel to select from who meet the minimum selection criteria. It also stated that the complainant was excluded from further processing because he exceeded the age limit and that the age waiver was not applied because he had not demonstrated exceptional performance and there were sufficient applicants who met the prerequisite criteria.

The respondent provided a copy of Defence Instruction (Air Force) AAP 6800.003 Section 13 Chapter 3 containing the selection criteria for the position of Aircraft

Loadmaster. These required an applicant to:

- be medically fit
- be aged between 17 and 35 years
- be able to work under conditions adversely affecting physical comfort
- have completed year 10
- be assessed as suitable on tests for LOADM training and able to meet other abilities and aptitudes
- possess a range of personal attributes
- possess some exposure to flying
- be assessed as having an adequate interest and realistic understanding of LOADM training
- be an Australian citizen or eligible to become one
- be assessed as able to adjust to requirements of military life.

The respondent provided a copy of course objectives for the Basic Loadmaster Course which it claims give an indication of the duties of the position. The respondent also provided a list of birth dates of Aircraft Loadmasters. These showed that as at October 1997 there was a total of 76 Loadmasters of whom 55, or 72 percent, were over the age of 35 years. The respondent stated that it was unable to explain why Loadmasters aged 36 years and over were considered fit for the position whereas other servicemen in this age group were not.

The respondent provided a copy of a Note of Action dated 14 June 1996 by Dr Ryder concerning the complainant's application. Dr Ryder recorded 'not suitable for further processing' and 'Aged 37'. She also recorded that the complainant had called her to discuss an age waiver and she had told him that she would not recommend it. She stated that he had told her that his motivation for applying was that he was looking for a change after 20 years as a Ground Support Fitter and that she told him 'this was not adequate motivation for review'.

In a further response dated 2 February 1998, the respondent stated that it is not saying that servicemen over 35 years could not perform the duties of the position as an age waiver exists. However, waivers are only granted in exceptional circumstances, such as an applicant demonstrating exceptional performance. It stated that the ‘fundamental rationale’ for the respondent’s age policies is ‘the need to maintain a young and fit force’. Preference is given to applicants under 35 years as ‘they are more likely to remain fit for operational service and perform well in training’.

2.3 Conciliation

Attempts by the Commission to conciliate this complaint were unsuccessful.

3. Process of the inquiry

As a result of inquiries and investigation into this complaint I formed the preliminary opinion that the act complained of by the complainant constituted discrimination on the basis of age.

Pursuant to sections 33 and 27 of the Act I invited the respondent to make submissions orally or in writing or both in relation to that practice. The respondent elected to make oral submissions.

On 1 February 1999 I convened the inquiry in Sydney to take oral submissions from the respondent. On that date, however, the respondent, without notice to the complainant, sought an adjournment of the proceedings so that it could attempt to resolve the matter with the complainant. The respondent also indicated that it was in the process of conducting a review of the policy which was the subject of Mr Van Den Heuvel’s complaint. I indicated that I would not view favourably an application for a further adjournment for the provision of oral submissions. I also directed that the complainant had four weeks, and the respondent four weeks thereafter, within which to provide me with any further written submissions.

4. Submissions and findings on liability

One of the functions conferred on me by the Act is to inquire into any act or practice that may constitute discrimination (section 31(b)).

Discrimination is defined in section 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, under regulation 4(a) of the *Human Rights and Equal Opportunity Commission Regulations* 'any distinction, exclusion or preference made on the ground of age' constitutes discrimination for the purposes of the Act.

On 19 April 1999 the respondent wrote to me and advised that it concedes liability in this matter. It also advised that Mr Van Den Heuvel's complaint has sparked a comprehensive review of age restrictions within the ADF. I was advised that on 9 April 1999 Major General Dunne, the Head of the Defence Personnel Executive, endorsed the recommendations of that review, and that the review and recommendations were currently being considered by the Chief of the Australian Defence Force, Admiral Chris Barry. His decision on the review was expected within two weeks. I was also informed that the age restriction applicable to

Loadmasters is encompassed within the scope of the review.

In conceding liability in this matter, the respondent has admitted that it discriminated against the complainant in his application for the position of Aircraft Loadmaster on the basis of his age and that it was not an inherent requirement of the particular position that applicants be under the age of 35 years. I agree with this.

In these circumstances, I find that the act complained of by the complainant constitutes discrimination in employment based on age.

5. Submissions on recommendations

Having found the decision to reject the complainant's application to remuster to the position of Aircraft Loadmaster 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.

Both parties have provided submissions to me concerning the quantum of damages that I should award in this matter should I be minded to recommend an award of compensation.

5.1 Complainant's submissions on recommendations sought

The complainant submitted that, as he was 'unable to pursue a satisfactory career path in a discriminatory free working environment', he requested a discharge from the ADF. It appears from correspondence from the respondent that the discharge took place in September 1996. The complainant also submitted that his loss should be assessed on the assumption that he would have been successful in the selection process for the position of Aircraft Loadmaster had the respondent not engaged in discriminatory acts.

The complainant provided details of his ‘minimum estimation’ of loss of opportunity and pain and suffering as a result of the discriminatory act. He has listed heads of damage which include loss of flying allowance until retirement at age 55 years, loss of pay through no promotion until retirement at age 55 years, loss of superannuation and pain and suffering. The complainant suggests a total figure of approximately \$370,000.00.

The complainant also requested that the following recommendations be made:

- removal of the age criterion for the requirements of the Aircraft Loadmaster position
- statement of regret by the respondent and
- enlistment of the complainant in the RAAF Reserves with a minimum of 30 days service a year.

5.2 Respondent’s submissions on recommendations sought

The respondent submitted that a convenient and logical approach for assessing the quantum of damages is that taken by the Commission in relation to a complaint made by Robert Bradley against the Commonwealth of Australia. This was a decision made by the Commission on 5 March 1998 and also involved a complaint of age discrimination against the Department of Defence. In that case, the Commission awarded the complainant a sum of \$5000.00 by way of compensation. The respondent sought a review of the matter pursuant to the *Administrative Decisions (Judicial Review) Act 1977 (Cth)*. The Federal Court found no error of law in the decision: *Commonwealth of Australia v Human Rights and Equal Opportunity Commission and Robert Bradley*, unreported, 16 October 1998, Wilcox J (‘Bradley’). The award of compensation was not the subject of the review.

The respondent also made further submissions concerning the way in which an assessment of damages should be made in this matter. It submitted that, although the complainant had served for approximately 22 years in the RAAF, he had not progressed beyond the rank of Sergeant. The respondent also referred to the assessment made by an RAAF psychologist, Dr Ryder, which classified him as ‘not suitable for further processing’. It states that on its calculations the complainant had only a 11% chance of being selected for the position. This calculation is made on the basis that the complainant’s application was one of fifty three applications

for six remuster training positions. The respondent also queried whether the complainant could have taken up a posting if he had been successful in the application process.

The respondent stated that the complainant did not suffer a direct economic loss, as he was not sacked or demoted, and so his loss in reality is no more than the loss of the opportunity to be assessed on his merits in a highly competitive process in which he may or may not otherwise have been successful. The respondent submitted that the available indicators suggest that in fact the complainant would not have been successful in being appointed as a Loadmaster, although it accepts that this cannot be stated with absolute certainty. It submitted that the complainant's loss should therefore be assessed on this basis and not on the assumption that he would have been successful if he had not been excluded from the selection process on a discriminatory ground.

The respondent also submitted that the complainant has not provided any material to indicate his earnings since his discharge in September 1996 and has not provided a clear basis for the calculation of his economic loss. It requested that, if I was minded to make a significant award for economic loss, I provide the respondent with an opportunity to be heard further on this issue.

5.3 Complainant's submissions in reply on recommendations sought

The complainant responded at length to the submissions made by the respondent. He pointed out a number of matters which he thought made the consideration of compensation in his matter different from that in *Bradley*. These matters are that the complainant had been serving in the RAAF for approximately 20 years at the time of his application for the position as Aircraft Loadmaster, that he had cleared all of the necessary fitness tests and medical checks for the position, that he was obviously well respected by his peers and that he had an excellent history of service. The complainant also stated that he has quickly progressed to the highest level in his current employment, that he has met or exceeded the training requirements for the RAAF and his current employer and that this leads him to believe that he could pass all Loadmaster training requirements.

The complainant also stated, 'I believe that what has happened to me is far worse than being sacked or demoted. Had I been sacked or demoted I assume that I would have done something wrong, this would have been far easier to accept than the current situation.'

6. Discussion of recommendations

6.1 Recommendation of compensation

Taking all of these matters into account, I do not consider that it is appropriate that I make the recommendation proposed by the complainant for an award of damages based on economic loss calculated on the basis that he would have been successful in his application for the position. There is still no way to determine with any certainty that, even if the respondent had considered his application for the position of Aircraft Loadmaster in a non-discriminatory way, the complainant would ultimately have been selected.

I also note the respondent's request that, if I was minded to make a recommendation for damages based on actual economic loss, I provide it with an opportunity to test the complainant's evidence about the loss he suffered. I did not consider cross examination of the complainant necessary in this regard as I am of the view that the appropriate measure of damages in this matter is one of general damages.

The principles of assessment of damages in discrimination cases are flexible, although based generally on the principles applied when assessing damages in tort: *Hall v A&A Sheiban Pty Ptd* (1989) 85 ALR 503 at 502. However any damages are statute based and the wording of the statute is the principal basis for assessment for this head of damage: *Stephenson v Human Rights and Equal Opportunity Commission* (1995) 61 FLR 134 at 142-3.

Overall, awards of damage must be fair and reasonable in the circumstances of each case: *Ritossa v Gray & Anor* (1992) EOC 92-452. In these circumstances, I have concluded that the complainant's loss is the loss of the opportunity to be assessed on his individual merits. In other cases where damages have been awarded for the denial of the opportunity to have a job application properly considered, together with the loss of the enjoyment of working in a preferred occupation, it has been stated that these damages cannot be calculated on a simple basis of loss of earnings and do not depend on proof that the complainant would in fact have been employed: *Reddrop v Boehringer Ingelheim Pty Ltd* (1984) EOC 92-031³. It has been held that it is enough if there can be shown to have been a 'real chance' that the complainant would in fact have been employed (*Reddrop, ibid*) or that it is 'probable' that the hiring or a promotion would have occurred: *Hill v Water Resources Commission* (1985) EOC 92-127.

I have carefully considered the submissions made by the complainant and respondent on this issue. I have taken into account the respondent's submissions concerning its view on the complainant's career progression in the RAAF, its suggestion that the complainant may not have been able to take up a posting even if he had been successful in the application process and the submissions about the likelihood of the complainant obtaining the position had the respondent not engaged in a discriminatory act. In relation to this last point, I have considerable difficulty with the respondent's mathematical calculation concerning the complainant's prospects in obtaining the position. I do not find this proposed method of calculation particularly accurate or helpful. I have also taken into account Dr Ryder's assessment of the complainant as 'not suitable for further processing'. I note however that this would be only one of a number of considerations that would have been taken into account had the complainant's application been considered further.

I have also considered the complainant's submissions including his service in the RAAF for approximately 20 years at the time of his application for the position as Aircraft Loadmaster, that he had cleared all of the necessary fitness tests and medical checks for the position, that he was obviously well respected by his peers and that he had an excellent history of service.

General damages can also include factors such as damages for humiliation, loss of dignity, injury to feelings and so on. While the complainant has provided little in the way of submissions about these kinds of issues, he said that he feels that what has happened to him is far worse than if he had been sacked and demoted and that he experienced pain and suffering as a result of the actions of the respondent.

Having taken into account all of the matters before me, I recommend that the complainant be awarded compensation for his loss as a consequence of the discrimination in the sum of \$10,000.00.

6.2 Other recommendations

I have been advised by the respondent that it has undertaken a comprehensive review of age restrictions within the ADF. The Commission has not been provided with any information as to the content of the review and what, if any, changes are to be made. I therefore make further recommendations on the basis of the information currently available to me.

1. I recommend that the upper age limit contained in the selection criteria for Aircraft Loadmaster positions be abolished. It appears that, if the upper age limit is abolished, it is unnecessary to make any recommendation concerning age waivers on the basis of exceptional skill.
2. In the circumstances, I also recommend that the respondent provide an apology to the complainant.

I do not consider it appropriate to recommend that the complainant be enlisted in the RAAF Reserves with a minimum of 30 days service a year. In making this decision, I have taken into account the respondent's submissions concerning the uncertainty of a position vacancy and the complainant's employment suitability including trade qualifications and currency.

7. Notice of findings of the Commission

The Commission finds that the act complained of by the complainant, namely that the respondent rejected his application to remuster to the position of Aircraft Loadmaster on account of his age, constituted discrimination in employment based on age.

8. Reason for findings

1. The respondent conceded liability in this matter. On the basis of this concession and my own inquiries, I am satisfied of the following matters.
2. The respondent's rejection of the complainant's application to remuster to the position of Aircraft Loadmaster was by reason of his being 37 years of age at the time of making the application.
3. The respondent's decision to exclude the complainant's application from further processing by reason of his age is a distinction or exclusion on the basis of age.
4. The respondent's exclusion has had the effect of nullifying the complainant's equality of opportunity or treatment in employment.
5. The distinction, exclusion or preference was not based on the inherent requirements of the particular position.

9. Recommendations

On the basis of the matters discussed above, I recommend that:

1. the upper age limit contained in the selection criteria for Aircraft Loadmaster positions be abolished
2. the respondent provide an apology to the complainant
3. the respondent pay the complainant the sum of \$10,000.

Dated at Sydney this 16th day of September 1999

A handwritten signature in black ink, appearing to read 'Chris Sidoti', written in a cursive style.

Chris Sidoti
Human Rights Commissioner

Endnotes

- 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.
- 3 This decision was overturned (but not on the issue of damages) by the NSW Court of Appeal: (1984) EOC 92-108.