Report of Inquiry into Complaints of Discrimination in Employment and Occupation: Redundancy Arrangements and Age Discrimination

Contents

Introduction

This is the second in a series of reports to the Attorney-General on inquiries 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* (the Act).

This report, like the first, concerns complaints of discrimination on the ground of age in employment and occupation. It deals with complaints against two state government employers about the use of age distinctions in the formulations of redundancy entitlements. Five complaints are by former employees of the Public Transport Corporation of Victoria. The other complaint is by a former employee of the Department of Health and Community Services (Victoria). In each case the monetary value of the redundancy packages offered and received by the complainants was less than the value of the packages offered to younger employees, although the age differential varied between 50, 55 and 60 years of age. As the complaints are substantially the same I have decided to report on these in the one report.

These complaints demonstrate an approach to redundancy arrangements that is dismissive of the future employment aspirations and needs of older workers. The approach is based on a perception that, because of their age, older workers do not or should not expect to remain in the workforce and accordingly that they have less to lose than younger workers on separation from employment. Their redundancy entitlements are reduced because of this premise. These perceptions of older workers are clearly at odds with the changing nature of Australian society and the changing aspirations of older workers.

Australians are living longer and healthier lives on average. Many want to remain in the workforce longer rather than have a period of retirement that spans two or three decades. To provide financial security during this longer life, many need to be assured of equality of opportunity at work for as long as they are able to do the job and until such time as they are confident of the adequacy of their retirement savings. The abolition of compulsory retirement in most states and territories and the proposal to do so in the Commonwealth public sector are major steps to enable older workers to pursue their career ambitions and to meet their economic needs. Other policies and practices continue to assume retirement at a certain age and penalise older workers on that basis. Less

generous redundancy arrangements are an example. They constitute discrimination against older employees on the basis of their age.

I recommend the removal of age discrimination against older workers from redundancy entitlement provisions in employment laws, policies and practices.

The disadvantage resulting from this discrimination is made worse by the greater difficulties older workers face in obtaining new employment. According to the *1995 Report on the inquiry into long term unemployment* by the Senate Employment, Education and Training References Committee, older workers, particularly male older workers, face the greatest incidence of long term unemployment. More than half the unemployed males over 45 years experience long term unemployment. Workers aged 55-65 suffered similar unemployment rates to those of younger workers aged 20-24.[1]1 Recent ABS surveys confirm these findings. In these circumstances any different treatment for older workers should be for their benefit, not their disadvantage.

For this reason many redundancy arrangements provide increased notice periods for workers over 45. This aims to provide older employees with sufficient time to adjust to and deal with the consequences of job loss taking account of the difficulties they will face in finding alternative employment. The Australian Conciliation and Arbitration Commission (now the Australian Industrial Relations Commission) in the *Termination, Change and Redundancy Case* accepted these special considerations as warranting extended notice periods for older workers subject to length of service.[2] Section 170CM of the *Workplace Relations Act 1996* (Cth) provides statutory recognition of the need to provide increased notice of termination for older workers.

I have received separate complaints under the Act from employees of a large federal Government department against the provision of higher redundancy benefits for older workers than for younger workers. The provision of increased notice and higher payments for older workers was directed at securing their adequate advancement in the face of widespread disadvantage in the labour market. The evidence established that older workers required additional assistance if they were to receive equal treatment in fact. Accordingly, I found that the practice constituted a special measure in accordance with Article 5.2 in the *International Labour Organisation Discrimination (Employment and Occupation) Convention 1958* and therefore that it was not discriminatory. In this decision I observed that there was a need to monitor the age range affected by additional employment difficulty. I noted that it may no longer be limited to employees over the age of 45. It may be appropriate to consider a graduated scale of increased notice or benefit provision commencing at an earlier age if it were to be shown that workers below the age of 45 also face age-based disadvantage in the labour market. Relevant extracts from that decision are included in this report as Appendix C.

I recommend further examination of age based disadvantage suffered by retrenched workers and consideration of the extension of older worker special measure provisions to workers under the age of 45 on a graduated basis.

Special measures to overcome disadvantage are only justified for as long as the disadvantage exists. The ultimate goal is the elimination of unfair treatment and discrimination. Clear national standards are necessary for this. I restate my comment in my first report on complaints to the Attorney-General that the inadequacy of federal protections against age discrimination requires urgent attention.

Currently the Commission has no power to make determinations in complaints of age discrimination and there is no mechanism for enforcement. It can only make a finding and recommendations and

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1 *1995 Report on the inquiry into long term unemployment* by the Senate Employment, Education and Training References Committee Drawing on ABS survey data on Australia's long term unemployed at p. 19
2 [1984] 8 IR 34-103

report to the Attorney General who is required to table the report in parliament. The ability of the Commission to achieve a negotiated settlement between the parties is hindered by the inability to enforce. In many cases respondents are unwilling to resolve complaints through conciliation and the complainants are committed to pursuing them. The Act intends that unconciliated complaints with substance should be dealt with in the political, not judicial, arena.

The need to address issues of discrimination and disadvantage on the ground of age through federal laws has been a matter of concern for many years. The decision to abolish compulsory retirement in the federal public sector is a positive first step. But these complaints reflect a broader need to accompany this measure with a review of all policies and practices that create or perpetuate age based disadvantage. Equal opportunity policy must be underpinned by comprehensive national prohibitions on age discrimination.

Without national standards and federal laws inconsistencies and gaps in protections remain. One purpose of the *Workplace Relations Act 1996* is to eliminate age based discrimination but the Australian Industrial Relations Commission only has jurisdiction to remove the discrimination if it is contained in a federal award or agreement.[3] There are no other laws in Tasmania or the Commonwealth to prohibit discrimination based on age.[4] Other states and territories have enacted laws prohibiting discrimination on the ground of age but there is considerable variation in approach and exceptions are numerous and inconsistent. In Victoria, where these complaints arose, the *Victorian Equal Opportunity Act 1984* has been amended to include age as a prohibited ground of discrimination with effect from 1 January 1996 but there is an exception for the matters complained of in these complaints.[5]

The needs of older workers to equality of opportunity cannot be adequately addressed without national standards of protection.

I recommend again that the Commonwealth legislate to provide comprehensive national prohibition of age discrimination.

Functions of the Human Rights and Equal Opportunity Commission

The Commission's functions

The Commission has specific legislative functions and responsibilities for the promotion of human rights and the elimination of discrimination under the Act. In particular the Commission is conferred with functions to inquire into acts or practices that may be inconsistent with or contrary to any human right or that may constitute discrimination - s.11(1)(f) and s.31(b).

The Commission is also conferred with functions:

> to promote an understanding, acceptance and public discussion of human rights and equality of opportunity and treatment in employment and occupation in Australia s.11(1)(g) and s.31(c)

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3 See for example the decision of Senior Deputy President MacBean about aged discrimination in redundancy arrangements in relations to the Health Services Union of Australia (Victoria--Public Sector) Interim Award 1993, 13 December 1996, Print N7261.

4 Note, however, there is a prohibition on age discrimination in federal public service decisions in relation to appointments, transfers and promotions in accordance with s.33 of the *Public Service Act 1922* (Cth).

5 s.27A of the *Equal Opportunity Act 1984* (Vic).

to advise on laws that should be made by the Parliament or action that should be taken by the Commonwealth on matters relating to human rights and equality of opportunity and treatment in employment and occupation s.11(1)(j) and s.31(e)
to advise on what action, in the opinion of the Commission, needs to be taken by Australia to comply with the provisions of the *International Covenant on Civil and Political Rights (*ICCPR) or any relevant international instrument and on matters relating to equality of opportunity and treatment in employment and occupation s.11(1)(k) and s.31 (e).

The Act implements in part Australia's obligations under the ICCPR and the International Labour Organisation *Discrimination (Employment and Occupation) Convention 1958* (ILO 111). Each of these instruments is scheduled to the Act. The full text of ILO 111 is at Appendix A.

The Commission's jurisdiction and complaint handling functions

Part II Division 4 of the Act confers functions on the Commission in relation to equal opportunity in employment in pursuance of Australia's international obligations under ILO 111.[6]

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

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

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

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

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

Discrimination in employment and occupation

Under the Act discrimination means:

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

6 Ratified by Australia 1973.

(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; ...[7]

ILO 111 prohibits discrimination on certain specified grounds.[8] Those grounds are contained in the Act in subparagraph (a) of the definition of discrimination. ILO 111 also provides that ratifying States may address discrimination on additional grounds.[9] 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.[10] (The full text of the Regulations is set out in Appendix B.)

It is an accepted principle in domestic law that where a statute contains language that derives directly from an international instrument, such as the Act does, it should be interpreted in accordance with the interpretation the language has been given at the international level.[11] The comments of the International Labour Conference Committee of Experts on the Application of Conventions and Recommendations (the Committee of Experts) are relevant to the interpretation of the Act's definition of discrimination.

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

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

Further the Committee of Experts has expressed the view that "the adoption of impersonal standards based on forbidden grounds" and "apparently neutral regulations and practices [that] result in inequalities in respect of persons with certain characteristics" also constitute discrimination.[12]

The Committee of Experts has commented on the ILO 111 provision of "any distinction, exclusion or preference in respect of a particular job based on inherent requirements of the job". To be an inherent requirement the condition imposed must be proportionate to the aim being pursued and must be necessary because of the very nature of the job in question. The Committee stated for example that the exception "refers to a specific and definable job, function or task. Any limitation within the context of this exception must be required by characteristics of the particular job, and be in proportion to its inherent requirements."[13]

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7 s 3(1)

8 Art 1(1)(a)

9 Art 1 (1)(b)

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

11 *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 (Grummow J)

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

13 ibid, at 138

The Committee of Experts has agreed that an intention to discriminate is not necessary for a finding of discrimination under ILO 111.[14]

The complaints against the Public Transport Corporation (Vic)

Summary

Outline of complaints

The Commission received five complaints under s.31(b) of the Act from Mr B, Mr Alexander Howes, Mr Gino Lodolo, Mr Domenico Mezzatesta and Mr Don Matthews.[15]

The complainants alleged discrimination by the Public Transport Corporation of Victoria (PTC) on the ground of age in the determination of redundancy entitlements offered to them by the PTC.

Attempts to conciliate the complaints were unsuccessful and the Commission took written and oral submissions from each of the parties. As the complaints concern the same respondent and substantially similar circumstances, I have decided to report on these matters in one report.

The complainants submitted, in summary, that the monetary value of the voluntary departure packages they were offered and received as employees over the age of 50, and in one case over the age of 60, were substantially less than the value of packages offered to younger employees and constituted discrimination on the ground of age as defined in the Act.

The respondent submitted, in summary, that the use of an age distinction was reasonable and rational on the basis that:

> older employees were entitled to access superannuation retirement benefits that could not be immediately accessed by younger employees;
> older employees were less likely to seek and/or obtain alternative employment;
> the packages were designed to encourage voluntary departures in accordance with budget objectives; and
> the packages were designed to appeal to employees from a wide age range and were not intended to reward employees for long or meritorious service.

Findings and recommendations

On 16 June 1997 I issued notice of my findings and recommendations in relation to the complaints under s.35(2) of the Act. I found that the acts and practices complained of by the complainants, namely the unfavourable redundancy packages for older employees, constituted discrimination in employment based on age. The reasons for this decision were that

> the formulation of the voluntary departure packages offered to the complainants by the PTC was based on age
> the use of age to determine the value of the package which was less favourable for older workers is a distinction or exclusion on the basis of age
> the exclusion has had the effect of nullifying equality of opportunity or treatment in employment for each complainant as his employment was terminated on a less favourable basis than for younger employees.

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14 ibid, at 22

15 Mr B has requested that his name not be disclosed

I made two recommendations to the respondent

> that the practice of discriminating against older employees in determining the value of voluntary departure packages should be abolished
> that the respondent should pay to Mr B, Mr Howes, Mr Lodolo, Mr Mezzatesta and Mr Matthews compensation for loss suffered by reason of the discriminatory conduct.

The respondent's reply

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

In response to the recommendations the PTC has advised the following:

> For the reasons given in its submission in response to these complaints the PTC does not propose to implement the recommendations. It considers that the Voluntary Departure Package (VDP) arrangements which it has had in place for some time have advantages both to employees and the Corporation. In particular, the PTC would re-emphasise:
> The equity considerations involved in prospectively increasing the benefit for employees over the age 55 years in circumstances where large numbers of employees in that age bracket have accepted the existing arrangements.
> The need to ensure that Government funds are used prudently. As demands for VDPs from employees over 55 years already exceeds available packages, increasing the quantum of the packages would have no impact on the Government's objective in offering VDPs that is, to reduce public sector operating costs.
> No employee is compelled to accept a VDP. The scheme is entirely voluntary and employees have ample time to make an informed decision.
> It is reasonable for the Government and the PTC, in devising VDPs, to distinguish between employees who are able to obtain retirement benefits, including superannuation, on the one hand and those who are being offered an inducement to resign without immediate access to retirement benefits on the other.

Reasons for the decision - the complaints against the Public Transport Corporation of Victoria

The complaints

The nature of the complaint by Mr B

Mr B lodged his complaint with the Commission on 19 February 1991.

Mr B applied for a voluntary Enhanced Resignation Benefit Package' in January 1991. The PTC accepted his application and his employment was terminated on 25 January 1991. At the time he was 52 years of age and had been employed by the PTC for six and a half years. His salary was $84,108 a year.

Mr B alleges that at the same time PTC employees under 50 years of age were offered more financially favourable voluntary redundancy packages than those over 50 years of age.

Employees under 50 years of age were offered an additional payment equal to 5% of the employee's salary for each of the first five years of service, provided that the payment did not exceed 12 months'

pay and was not greater than the amount the employee would receive had his or her employment continued until age 65. This 5% component was not offered to employees over 50 years of age.

Mr B alleges that he was underpaid in the order of $20,955.46 because of his age, this sum being equivalent to the 5% component payable to younger employees of similar length of service.

When his employment was terminated on 25 January 1991 the PTC included the 5% component in the package paid to Mr B. The PTC wrote to Mr B on 26 February 1991 demanding that the sum of $20,955.46 be repaid. He repaid that amount in July 1991.

Mr B has not been able to secure alternative employment, apart from a three month temporary contract.

The nature of the complaint by Mr Alexander Howes

Mr Howes lodged his complaint with the Commission on 21 December 1992 alleging that he was not eligible to apply for a voluntary redundancy package because of his age. Mr Howes had been employed as a boilermaker's help C1" since 30 January 1951. Then on 18 May 1993, Mr Howes was informed that his position was determined as surplus' to the PTC's requirements and that he had not been selected for a limited number of positions at Ballarat workshop on 18 May 1993. Mr Howes indicated that he wanted to continue his employment until he was 65.

Mr Howes alleges that employees under 60 years of age were offered more generous packages. Employees under 60 years of age were offered an additional 10 weeks' severance pay to those employees over 60 years of age. For Mr Howes this would have amounted to $3,975.00

Mr Howes has not been employed since he was made redundant.

The nature of the complaint by Mr Gino Lodolo

Mr Lodolo lodged his complaint with the Commission on 4 March 1993. On 24 February 1993 Mr Lodolo was offered a Separation Package' when his position had been determined as surplus' to the PTC's requirements. He was 61 years of age. Mr Lodolo worked as a ganger-bridge work D2 . His salary at the time was $23,126 and he had accrued 38.4 years of service.

In a further round of voluntary departure packages offered on 9 March 1993, Mr Lodolo was offered an additional $2,500 as an incentive to accept the package. He accepted this package. He says that he experienced ill health and stress as result of the PTC's decision to make him redundant.

Mr Lodolo alleges that the package offered to him in February 1993 was not as favourable as the voluntary departure package offered to employees in December 1992. He alleges that in December 1992, employees under 59 years of age were offered 1 week's pay for each year of service up to a maximum of 40 weeks and a $5,000 incentive payment. He claims that employees over 59 years of age were offered 1 week's pay for each year of service up to a maximum of 10 weeks. The difference in the offers was $15,796.00 for an employee with service equal to Mr Lodolo's.

The nature of the complaint by Mr Domenico Mezzatesta

Mr Mezzatesta lodged his complaint with the Commission on 29 March 1993. He had been employed as a guard by the PTC for 32.4 years. On 14 April 1993, he applied for a voluntary departure package. Mr Mezzatesta in turn accepted the package subject to reserving his rights with respect to a complaint lodged under the Act. Mr Mezzatesta was 62 years old.

Mr Mezzatesta alleges that employees over 60 years of age were offered $2,500 and 1 week's pay for each year of service up to a maximum of 10 weeks, whereas employees under 60 years of age were offered 1 week's pay up to a maximum of 44 weeks and a $5,000 incentive payment. He alleges that if he had been offered the same package as younger employees he would have received a total package of $25,741.73. The difference between the packages was $16,642.28.

In his submissions, Mr Mezzatesta is also seeking interest in accordance with the principles established in *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657 and compensation for stress suffered as a result of these circumstances in the amount of $10,000.

The nature of the complaint by Mr Don Matthews

Mr Matthews lodged his complaint on 21 April 1993 before accepting a package on the basis that the packages offered at the time were not as financially favourable as those offered to younger employees. He says that in April/May 1993 voluntary departure packages offered for employees aged 59-60 years which included an amount equal to 40 weeks' pay but because he had turned 60 years he was not eligible for this offer. He alleges that the PTC employees were lead to believe that future package would not be as good. He was offered a package on 13 December 1993 which he accepted on 24 December 1993. The packages offered to employees under 59 years of age were more favourable and included an additional 10 weeks' pay as part of the severance pay component. The difference was $3,960.00 for an employee with service equal to Mr Matthews.

Mr Mathews alleges that he had no option other than to accept the voluntary redundancy package.

The respondent's response to the complaints

The PTC denied that it had discriminated against the complainants on the basis of age. The PTC said that expressions of interest were sought from all employees who fulfilled the criteria for the several offers. There was no coercion to accept a package, as it was voluntary not targeted.

The PTC said that the values of the packages were different in relation to age groups since different criteria were applicable. The PTC said that:

> an older employee was entitled to greater long service payments and superannuation funded entirely by the employer
> the package was not a reward for long or meritorious service, and
> the package was a buy-out of anticipated future earnings which would be greater for a younger employee.

Finally, the PTC indicated that the criteria for packages were determined by the Victorian Treasury. Funds were made available to the PTC solely on the basis of acceptance of those determined criteria. The PTC could not deviate from or alter those criteria, as a statutory corporation had no discretion and was required to implement Victorian Government policy of specified staff reduction numbers.

Conciliation

In correspondence with the Commission dated 19 July 1993, the PTC said that it did not consider conciliation an appropriate mechanism for resolving the complaints. The PTC formed this view having regard to its responsibility to implement Victorian Government policy. In the circumstances, the Commission formed the view that the complaints were unconciliable.

Submissions

As a result of inquiries into and investigation of the complaints, I formed the preliminary opinion that the policies and practices of the PTC in relation to the calculation of redundancy packages constituted discrimination on the basis of age.

A report was prepared pursuant to s.27 of the Act. The complainants and the respondent were invited to make submissions orally, in writing or both in relation to the practice of using age to determine the quantum of the voluntary departure package.

The parties all elected to make written submissions.

Mr B provided written submissions on 12 April and 8 October 1996.

Ronald Saines & Co, Solicitors lodged submissions on behalf of Mr Howes on 29 April 1996 and 10 December 1996. Mr Howes also lodged a submission on 1 May 1996.

Mr Lodolo provided written submissions on 25 April 1996 and 14 October 1996.

Mr Mezzatesta lodged a written submission on 24 April 1996 and provided the Commission with some additional information by telephone on 18 October 1996.

Mr Matthews provided written submissions to the Commission on 21 April 1996, 14 October 1996 and 8 November 1996.

The PTC lodged written submissions on 5 June 1996 and 25 October 1996.

The basis of the findings and recommendations

Elements of discrimination

In deciding whether the act or practice complained of falls within the definition of discrimination in s.3(1) of the Act, I must consider three main elements:

whether the act or practice arises in employment or occupation
whether there was a distinction based on age and
whether the distinction nullified or impaired equality of opportunity.

(a) Whether the act or practice arises in employment or occupation
All complainants were employed by the PTC when the various voluntary redundancy packages were offered between 1991 and 1996. The complaints concern employment.

(b) Whether there was a distinction based on age
The complainants and the PTC agree that age was a factor in determining the value of the various voluntary departure packages.

(c) Whether the distinction nullified or impaired equality of opportunity
The Act requires that for discrimination to be found the complainants must show that the distinction, exclusion or preference has had the effect of nullifying or impairing equality of opportunity or treatment .

I find that the PTC has impaired the complainants' equality of opportunity or treatment in employment on the ground of the age by offering less financially favourable redundancy packages to them.

Inherent requirements of the job

There was no argument raised by the PTC that the inherent requirements of the job were relevant to determining the value of the packages offered to the complainants.

Discussion of findings and recommendations

Discussion of findings

The PTC said that various voluntary departure packages were offered to its employees between 1991 and 1996. It is estimated that over this period 6000 offers of voluntary packages were made and 4200 of these offers were accepted. A further 4100 targeted packages were offered and accepted.

The packages drew a distinction on the basis of age and the amounts of money available varied depending upon whether the employee had attained the ages of 50, 55 or 60 years. Generally older employees were offered less financial incentive to accept the package than younger employees.

The PTC said that the terms upon which the packages were offered were determined by the Victorian Government and that it had no discretion in determining them. The various packages were offered to all public servants and employees of Victorian government departments, statutory corporations and authorities. The packages were funded by the Treasury. The PTC provided the Commission with a copy of a memorandum dated 28 July 1993 from the Minister for Finance, the Hon. Ian Smith, to all Ministers. The memorandum is as follows:

> **1993-94 SEPARATION PACKAGES IN THE PUBLIC SECTOR**
> *The Government has agreed that two new and restructured separation packages are to be made available in the Budget sector in 1993-94 to assist in the achievement of employment reductions and Budget savings. The packages are described in the attachment to this letter. I am writing to advise you that as in 1992-93, the Budget sector Voluntary Departure Packages (VDP) and Targeted Separation Package (TSP) should be regarded as the benchmark standards which should not be exceeded in non-Budget sector agencies.*
>
> *If there are considered to special reasons for varying the standard conditions in respect of non-Budget sector agency, the matter would need to be referred to me as Chairman of the Committee responsible for implementation issues...*

The attachment states

> ***Voluntary Departure Package (VDP)***
> *The VDP, which is an "approved early retirement scheme" consists of:*
> *4 weeks pay for all participants.*
>
> *For recipients less than 55 years of age: A lump sum voluntary departure incentive of up to $10,000 (for a full-timer); plus 2 weeks pay per year of continuous service for up to 15 years.*
>
> *For recipients at or over 55 years of age: A lump sum voluntary departure incentive of up to $5,000 (for a full-timer); plus 1 weeks pay per year of continuous service for up to 10 years.*

The total of the payments above must not exceed the gross ordinary-time-pay to which the employee would have been entitled had he/she worked until he/she was 65 years of age. Part-time staff receive pro-rata amounts, with the maximum number of weeks pay in their VDP limited by their current part-time rate. Participants may also be entitled to leave-related benefits and a superannuation or retirement benefit.

To be eligible, staff must be employees on an open-ended continuing basis and be on the payroll as at the commencement of the scheme. VDP recipients must agree not to seek or accept re-employment or any other fee for service from any Victorian public sector Department or agency for 3 years from their date of resignation or retirement.

The PTC presented several reasons for offering less generous incentives to older employees:

(a) Experience had shown that the demand for voluntary departure packages from employees in the over 55 year age bracket significantly exceeded available funding for packages.
(b) Most older employees had substantial superannuation entitlements. Under the State Superannuation Schemes the optimum age range to maximise benefits by means of early retirement was 55 and above.
(c) Older employees were less likely to seek and/or obtain alternative employment.
(d) It was desirable, in order to retain a balance of age and experience within the various public sector organisations, that packages should not, overwhelmingly, be offered to older employees who were, in any event, contemplating retirement.
(e) The packages were not intended to reward employees for long or meritorious service. The packages were designed to attract the optimum numbers of employees in a wide age range.
(f) That purpose would have been wholly frustrated if it were not possible to differentiate between employees of different ages in fixing the quantum of benefits.

The PTC submitted that the packages were designed to encourage voluntary departures.

The PTC accepted that it was open for the Commission to form the preliminary view that there was age discrimination. However, the PTC submitted that the Commission should find that there was a reasonable and rational basis for a distinction being drawn on the basis of age.

The PTC's arguments do not affect the legal consequences of its actions. The fact that the terms of packages were set by the Treasury is irrelevant. If they had been set by law the PTC would have had no legal alternative but to offer packages on that basis but they were not. They represented policy, not law.

The argument that older employees were less likely to obtain alternative employment weighs against the PTC. This may in fact justify higher benefits for older employees, as I have held in relation to other complaints. It cannot justify lower benefits.

Intention and reasonableness are irrelevant in situations of direct discrimination. The packages were directly discriminatory on the basis of age and so are contrary to the Act.

Discussion of recommendations

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 on prescribed grounds. Indeed it provides specifically and envisages that, where an act or practice is found to constitute discrimination, I may recommend compensation for a person who has suffered loss or damage as a result.

Having found that the terms upon which the voluntary redundancy packages were offered to each of the complainants is discriminatory under the Act, I am required to consider what recommendations I should make. I have taken into account the submissions of the complainants and the PTC.

The PTC submitted that it would be inappropriate for the Commission to make a recommendation under s.35(2)(c)(i) of the Act for the following reasons:

(a) The PTC said that none of the complainants suffered loss or damage as a result of the application of the terms of the various packages. This assertion by the complainants assumes that their expressions of interest would have led to offers by the PTC if the PTC had to pay them a larger amount of money than was provided for in the relevant package.
(b) There was no compulsion on any employee to express interest in a package or to accept an offer.
(c) It would be grossly inequitable to make recommendations in favour of the complainants when thousands of former employees have accepted packages on the prescribed terms.
(d) Any recommendation for compensation would have implications for the whole of the Victorian public sector. The Commission has not had the benefit of submissions from the relevant central authorities and does not know (as the PTC does not know) the full financial ramifications of such a recommendation.

Notwithstanding the PTC's submissions, I consider it appropriate that I make recommendations in relation to these complaints. The fact is that the complainants were offered a package on a discriminatory basis. These complainants came to the Commission to seek redress and they are entitled to receive it.

The packages offered to the complainants between 1991 and 1993 varied substantially with respect to the inclusion of incentive payments and the formulation of severance pay, over and above the statutory or award entitlements of long service and annual leave entitlements. I am required to focus on variations in the offers from time to time or on the actual loss or damage suffered by each complainant as a result of the PTC's actions rather than on the culpability or otherwise of the PTC's conduct. I am also mindful that the PTC's actions were not unlawful. The appropriate recommendation is compensation equal to the loss due to the lower value of the packages offered at the relevant time.

I have also taken into account the circumstances in which the terms of the packages were determined and I accept that the PTC followed Government directions in formulating the criteria to determine how the packages were calculated.

I do not consider it appropriate to make a recommendation which incorporates a component for interest. Nor do I consider it appropriate to include a sum for general damages although I accept that the complainants may have suffered and in some cases did suffer stress and ill health as result of leaving their employment. With the exception of Mr Howes, the decision was made by each complainant to accept the voluntary redundancy packages.

Finally, complainants must normally show that they have mitigated their loss. It is unclear whether all the complainants attempted to find other income after resigning from their positions at the PTC. In some cases, the complainants were able to secure further short term employment. In other cases, they were not able to secure further employment. This is not surprising having regard to their age and employment prospects in light of their qualifications. In these cases, however, mitigation is irrelevant as the compensation relates not to loss of future earnings but to differential past payments.

Calculations

Mr B
Mr B applied for a voluntary departure package in January 1991. At that time, had he been less than 50 years of age, he would have received an additional payment equal the 5% of his salary for the first five years of his employment based on his salary of $84,108 per annum. This sum amounts the $20,955.46

Mr Howes
Mr Howes was made redundant on 8 March 1993. The severance payment constituted a sum equal the 10 weeks' pay. Had Mr Howes been under 60 years of age, he would have received an additional 10 weeks' pay being a sum equal the $3,975.00. None of the packages offered at that time included an incentive payment.

Mr Lodolo
Mr Lodolo accepted a package in March 1993. The severance payment constituted 10 weeks' pay plus and an incentive of $2,500. Had Mr Lodolo been under 59 years of age he would have been entitled the a severance payment equal the 40 weeks pay and an incentive of $5,000. The difference in the package offered the him is $15,796.00

Mr Mezzatesta
Mr Mezzatesta accepted a package in April 1993. The severance payment constituted a sum equal the 10 weeks' pay and an incentive of $2,500. Had Mr Mezzatesta been under 60 years of age, he would have been offered 44 weeks' pay and an incentive payment of $5,000. The difference in the package offered the him is *$16,642.28*

Mr Mathews
Mr Mathews accepted a package in December 1993. The severance payment constituted a sum equal the 10 weeks' pay and an incentive payment of $5,000. At the time, had Mr Mathews been under 60 years of age, he would have received a severance payment equal the 20 weeks' pay. The differences in the packages amount the $3960.00.

Notice of findings of the Commission

The Commission finds that the acts and practices complained of by the complainants, namely the practice of using age to determine a lower value of redundancy packages for older employees, constitutes discrimination in employment based on age.

Reasons for findings

1. The formulation of the voluntary departure packages offered the complainants by the PTC was based on age.
2. The use of age to determine the value of the package which was less favourable for older workers is a distinction or exclusion on the basis of age.
3. The exclusion has had the effect of nullifying equality of opportunity or treatment in employment for each complainant as his employment was terminated on a less favourable basis than for younger employees.

Recommendations for the prevention of continuation of age discrimination

The practice of discriminating against older employees in determining the value of the voluntary departure packages should be abolished.

Recommendations for compensation

The PTC should pay each complainant the balance of the redundancy packages as if it had been calculated without regard the age as follows:

Mr B	$20,955.46
Alexander Howes	$3,975.00
Gino Lodolo	$15,796.00
Domenico Mezzatesta	$16,642.28
Don Matthews	$3,960.00

The complaint against the Department of Human Services (Vic) (the Department) (formerly known as the Department of Health and Community Services

Summary

Outline of the complaint

The Commission received a complaint under s.31(b) of the Act from Mr Cosgrave on 30 June 1994. The complainant alleged discrimination on the basis of age by the Department of Human Services (Vic) (formerly the Department of Health and Community Services (Vic)).

Attempts to conciliate the complaint were unsuccessful and the Commission took written written submissions from each of the parties.

The complainant submitted, in summary, that the voluntary departure package he received as an employee aged 59 years was substantially less than the package an employee aged below 55 years, with an identical length of service would have been offered and constituted discrimination on the ground of age as defined in the Act.

The respondent submitted, in summary, that the age distinction used was reasonable and financially prudent as older employees were entitled to access superannuation retirement benefits and in view of the demands from employees in the over-55 age bracket for departure packages and the need to meet budget targets.

Findings and recommendations

On 16 June 1997 I issued notice of my findings and recommendations in relation to the complaints under s.35(2) of the Act. I found that the acts and practices complained of by the complainant, namely the offers and payment of a less valuable Voluntary Departure Package to an employee at or over the age of 55 years constituted discrimination in employment based on age. The reasons for this decision were that:

> The lower value of the voluntary redundancy package offered and paid by the respondent to the complainant was the result of the fact that the complainant was over 55 years of age.
> The practice of the respondent of offering and paying less money to employees over 55 years of age in a Voluntary Departure Package is a distinction on the basis of age.
> The distinction had the effect of nullifying or impairing equality of opportunity or treatment in the complainant's employment as he was offered and paid less money to resign from his employment than he would have received had he been under the age of 55 years.

> It is not an inherent requirement of the particular position with the (then) Department of Health and Community Services in Victoria that the complainant is under the age of 55 years.

I made two recommendations to the respondent:

> The practice of discriminating against older employees in determining the value of a Voluntary Departure Package should be abolished. This recommendation applies generally, not only to the policy of the Victorian Government and the practice of the Department of Health and Community Services (now the Department of Human Services).
> The respondent should pay the complainant compensation for financial loss suffered by reason of the discriminatory conduct of the respondent.

The respondent's reply

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

In response to the Commission's recommendation for the prevention of continuation of age-based voluntary departure packages and for compensation to remedy financial loss or damage suffered as a result of the act or practice the Department of Human Services (Vic) has advised the following:

> I have considered your report in consultation with central Government agencies and advise that the Department is not prepared to act on your recommendation for the reasons outlined below.
>
> The Voluntary Departure Package was introduced at a time of significant downsizing across Victorian Government employment. In determining VDP policy, the Victorian Government's aim was to provide a mechanism by which on-going budget savings could be realised by Government Departments and agencies. It was offered to provide a separation incentive for staff who would not otherwise choose to voluntarily leave Government employment.
>
> The structure of VDP for employees aged 55 and over has regard to the fact that these employees are generally eligible to receive retirement benefits from a statutory superannuation fund in addition to the VDP payment. Staff aged less than 55 are being asked to consider resignation without immediate access to retirement benefits, so it is considered quite reasonable that there be a distinction between payment offered to this [group] and the higher age group.
>
> Further, the demand for the package from employees in the 55 and over bracket significantly exceeds available funding for packages. Given that the primary objective is to meet budget reduction targets set by Government, this excess demand suggests that increasing the value of the package for staff aged 55 and over would reduce the effectiveness of the VDP program and would be inconsistent with the requirement to prudently use public funds.
>
> The Government considers that the current VDP is structured to most effectively meet the above objectives. It is therefore expected that the current policy relating to eligibility and payment of VDPs will continue to apply. Further, while the Government may from time to time consider minor variations of its VDP policy to meet the one-off needs of individual agencies, the underlying principle of the VDP being a budget savings strategy will always be preserved. In that context, no variation to the distinction between payments to staff at and below retirement age would be considered.
>
> There are also equity considerations in prospectively increasing the benefit for employees over the age of 55 in circumstances where large numbers of employees in that age bracket have previously accepted the existing arrangements.

It is also of note that while discrimination on the grounds of age is unlawful under the Victorian Equal Opportunity Act 1995, Section 27A of the Act provides a specific exception for age and access to superannuation retirement benefits to be taken into account in deciding the terms on which to offer an employee an incentive to resign or retire. The Government's VDP policy is therefore consistent with equal opportunity practices within this State.

Finally, it is an important facet of the VDP that employees have the ability to choose a course of action that best suits their own needs. The VDP is an entirely voluntary scheme where neither the employer nor the employee are compelled to offer or accept a package. Staff who choose to participate in the VDP do so voluntarily knowing clearly the make-up of VDP policy and payment structures.

Reasons for the decision complaint against the Department of Human Services (Vic) (formerly the Department of Health and Community Services)

The complaint

The nature of the complaint

On 30 June 1994 the Commission received a complaint under s.32 of the Act from Mr Bryan Cosgrave.

At the time he lodged his complaint Mr Cosgrave was employed at the Victorian Department of Health and Community Services, now known as the Department of Human Services (the Department). Mr Cosgrave alleged that an offer of a Voluntary Departure Package (VDP), which was made to him by the Department on 18 April 1994, discriminated against him on the basis of his age. He complained that the offer he received as an employee aged 59 years was $10,478, whereas an employee aged below 55 years with an identical length of service would have been offered $18,359.

Mr Cosgrave resigned from his position on 23 June 1995 after accepting a second offer of a VDP of $11,140, which the Department made on 24 April 1995. In a letter of 3 December 1995 Mr Cosgrave alleged that the subsequent offer made by the Department was no less discriminatory than the first offer. He stated that he accepted the second offer in 1995 because he was advised of the imminent closure of the unit in which he was working. It appears that the Department used the same criteria to calculate both the 1994 offer and the 1995 offer made to Mr Cosgrave. The Department submitted an official statement of criteria for calculating a VDP in 1994-95, which stated that a VDP is to be calculated on the same criteria as a VDP offered in 1993-94. The statement explained the way in which a VDP was to be calculated, depending on whether an employee is aged at or over 55 years or below 55 years.

The relevant issue arising from Mr Cosgrave's complaint is whether the criteria applied by the Department to calculate his VDP discriminated against him on the basis of his age. It is not significant that the allegedly discriminatory criteria were used to calculate two different offers to Mr Cosgrave, the second of which he accepted.

Conciliation

Attempts by the Commission to conciliate this complaint were unsuccessful.

Submissions

As a result of inquiries into and investigation of this complaint, I formed the preliminary opinion that the Department's practice of taking into account an employee's age to determine the value of a VDP constituted discrimination on the basis of age.

Pursuant to sections 33 and 27(a) of the Act, I invited the respondent and the complainant to make submissions, orally or in writing or both, in relation to the practice of including age as a criterion for determining the value of an employee's VDP. The respondent and the complainant elected to make written submissions in addition to the submissions they had made before the preliminary finding.

The basis of the findings and recommendations

Elements of discrimination

In deciding whether the act or practice complained of falls within the definition of discrimination in section 3(1) of the Act I must consider three main elements:

1. whether the act or practice arises in employment or occupation
2. whether there was a distinction based on age and
3. whether the distinction nullified or impaired equality of opportunity or treatment.

I must also consider whether the distinction was based on the inherent requirements of the job.

1. Whether the act or practice arises in employment or occupation

In employment
The complainant was employed by the Department as a pharmacist and worked for the Department's Northern and Metropolitan Psychiatric Service. He commenced full-time continuous service with the Department on 18 December 1989. The parties do not dispute the existence of an employment relationship.

Act or practice
The Department acknowledged that the criteria for determining the value of VDPs were not defined in legislation. The Department therefore cannot defend the allegation of discrimination on the grounds that legislation required it to apply the criteria or that the calculation of the VDP was effected automatically by legislation. The Department stated that the criteria for calculating the VDP were based on Victorian Government policy. A policy decision by a government department is prima facie an act or practice of that public body.

The Department submitted that it was required to comply with the policy approved by the Victorian Government in respect to the VDP scheme. A statement of this policy, prepared by the Victorian Treasury Department, was submitted by the Department. That document demonstrates that the VDP criteria included the criterion distinguishing between employees at or over 55 years and those under 55 years. The document states that the criteria should be used by State departments and agencies. However, this does not alter the nature of the criteria from a practice or policy to a legislative requirement. Moreover, it is significant that the statement of policy allowed for an individual department to make other arrangements with the Victorian Workforce Management Unit as to the criteria used to calculate a VDP.

I find that offering a VDP, including those made to Mr Cosgrave on the basis of these criteria, constituted an act or practice by the Department. The Department was not required to apply the criteria, including the criterion of age, by an Act of Parliament. The criteria were acknowledged to be

based on policy. Further, the policy appeared to leave the Department with an option to negotiate and implement alternative criteria.

2. Whether there was a distinction based on age

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

According to the policy statement submitted by the respondent, the VDP offered to all employees included 4 weeks' pay. In addition to this, a full-time employee under 55 years of age received a lump sum of up to $10,000 and two weeks' pay for each year of continuous service up to 15 years. By contrast, a full-time employee at or over 55 years of age received an lump sum of up to $5,000 and one week's pay for each year of continuous service.

The Department defended its practice of including age as a criterion for determining the value of a VDP on the following grounds:

(i) employees over 55 years of age were generally eligible to receive retirement benefits from a statutory superannuation scheme fund, in addition to the VDP payment;
(ii) demand for VDPs in the over-55 years age bracket significantly exceeded available funding for packages
(iii) the primary objective of the VDP program was to meet budget targets set by the Government and an increase in the value of VDPs for employees over 55 years of age would be inconsistent with the requirement for the prudent use of public funds.

These arguments attempt to establish the reasonableness and intention of the Department's practice of taking into account an employee's age to calculate a VDP. However, under the Act, neither reasonableness nor intention are relevant to the question of whether discrimination arises from a distinction based on age. At no stage in its submissions did the Department deny that it had made such a distinction. Indeed, in attempting to defend the distinction as reasonable and prudent the Department acknowledged that it made a distinction based on age.

Accordingly, I find that the Department's criteria for calculating a VDP included a distinction based on age. This distinction was applied in determining the value of Mr Cosgrave's offers and payment of a VDP.

3. Whether the distinction nullified or impaired equality of opportunity or treatment

The Act requires that for discrimination to be found the complainant must show that the distinction, exclusion or preference has had the effect of nullifying or impairing equality of opportunity or treatment .

The Department did not contest the complainant's submission that he was offered and paid less money in his VDP as a consequence of a distinction based on age. It is common ground that Mr Cosgrave's VDP would have been more valuable had he been under 55 years of age. Prima facie, the Department nullified or impaired Mr Cosgrave's equality of employment or treatment. Its submissions as to insufficient funding and budget targets are not relevant to the issue of equality of opportunity or treatment of employees.
The respondent argues that employees over 55 years of age are generally eligible for statutory superannuation funds and that any disadvantage that Mr Cosgrave (or any other employee at or over the age of 55 years) may suffer from a less valuable VDP will be offset by his likely eligibility for superannuation payments, which an employee under 55 years of age does not have. The submission is that the distinction based on age does not nullify or impair equality of opportunity or treatment.

There are two reasons why I cannot accept this submission. First, even if employees over 55 are "generally" eligible to receive the statutory superannuation payments, the practice of the Department was to apply the distinction based on age regardless of whether an employee was *actually* eligible for the statutory funds. Second, and more importantly, superannuation payments serve a separate function to a VDP and accordingly should not be taken into account in determining the value of a redundancy package. The function of superannuation payments, statutory or otherwise, is to provide additional support to persons during their years of retirement. This support ought not to be undermined by employers offering a less valuable redundancy package to an employee on the basis that the employee may sooner or later receive superannuation payments.

The respondent further submits that Mr Cosgrave's expression of interest in the VDP program and his acceptance of the second offer of a VDP were his voluntary decisions. Mr Cosgrave responded to the Department's submission in two ways. First, he stated that he did not view the issue of whether his conduct was voluntary as relevant to his complaint of discrimination. Second, he submitted that, although the Department did not apply pressure on him to accept the second offer, he felt obliged to accept it after the Department advised him of the imminent closure of the unit in which he was working.

I consider the first of Mr Cosgrave's responses to be the more important ground for rejecting the Department's submission. Employees of all ages could have had their decisions affected by advice that their unit in the Department was subject to imminent closure. The important point is that as an employee over 55 years of age Mr Cosgrave was offered two VDPs which were less valuable than VDPs offered to employees under 55 years of age. His decision to accept this offer, regardless of the extent to which it was voluntary, does not alter the discriminatory nature of the offers and payment. The decision may have been relevant had the Department proposed an alternative offer of a VDP which did *not* make a distinction based on age. However, in the absence of any non-discriminatory offer, Mr Cosgrave had no real choice. He could either accept an offer calculated on an age-based distinction or have no offer at all.

I find that, in offering and paying Mr Cosgrave a less valuable VDP because he was over the age of 55 years, the Department nullified or impaired his equality of opportunity or treatment in employment. This is not affected by the possibility that Mr Cosgrave is entitled to statutory superannuation payments or by Mr Cosgrave's decision to accept a discriminatory offer and payment.

Inherent requirements of the job

This is not an issue in this complaint. The offers of a VDP were made to Mr Cosgrave because of factors unrelated to his ability to perform his job at the Department. The Department does not claim that any of the criteria used to determine the value of a VDP, including the distinction based on age, related to an employee's ability to perform the requirements of a position at the Department.

Discussion of recommendations

Having found the less valuable offer and payment of a VDP to Mr Cosgrave to be 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 on prescribed grounds. It provides specifically and envisages that, where an act or practice engaged in by a person is found to constitute discrimination, I may recommend

compensation for a person who has suffered loss or damage as a result . I consider it appropriate that I do so.

The complainant did not indicate what level of compensation he considers himself entitled to. However, the criteria for determining the appropriate amount of compensation here appear to be clear. Compensation under the Act is to be paid in respect of the loss or damage sustained by the complainant as a result of the discriminatory act or practice. I have no power to award aggravated damages or punitive damages and therefore no account is to be taken of the culpability or otherwise of the respondent's conduct.

In the present case, the loss or damage sustained by the complainant is the additional payment he would have received had he been under the age of 55 years. A VDP for a full-time employee under the age of 55 years is calculated as four weeks pay, a lump sum of up to $10,000 and two weeks' pay for each year of continuous service for up to 15 years. A VDP for a full-time employee at or over the age of 55 years is calculated as four weeks pay, a lump sum of up to $5,000 and one week's pay for each year of continuous service for up to 10 years.

The first offer of a VDP made to Mr Cosgrave in 1994 was of $10,478. He would have been offered $18,359 if he had been under 55 years of age. The second offer of a VDP in 1995, which Mr Cosgrave accepted, was of $11,140. If he had been aged under 55 years Mr Cosgrave would have received $19,684. As Mr Cosgrave accepted the second offer, his loss should be calculated on the basis of that offer and payment. The difference between what Mr Cosgrave received in 1995 and what he would have received had he been under 55 years of age is $8,544. His loss experienced as a result of the discriminatory practice in the 1995 offer and payment is therefore $8,544.

A complainant must normally show that he has mitigated his loss. It is unclear whether Mr Cosgrave attempted to find other income after resigning from his position at the Department. However, it does not appear that Mr Cosgrave was obliged to seek actively other income by obtaining another position. Mr Cosgrave accepted a VDP which was unconditional rather than having been forcibly retrenched. Under these circumstances, I find that Mr Cosgrave was not required to mitigate his loss by seeking other employment.

Notice of findings of the Commission

The Commission finds that the acts and practice complained of by the complainant, namely the offers and payment of a less valuable Voluntary Departure Package to an employee at or over the age of 55 years, constitute discrimination in employment based on age.

Reasons for findings

1. The lower value of the voluntary redundancy package offered and paid by the respondent to the complainant was the result of the fact that the complainant was over 55 years of age.
2. The practice of the respondent of offering and paying less money to employees over 55 years of age in a Voluntary Departure Package is a distinction on the basis of age.
3. The distinction had the effect of nullifying or impairing equality of opportunity or treatment in the complainant's employment as he was offered and paid less money to resign from his employment than he would have received had he been under the age of 55 years.
4. It is not an inherent requirement of the particular position with the (then) Department of Health and Community Services in Victoria that the complainant is under the age of 55 years.

Recommendations for the prevention of the continuation of the practice

The practice of discriminating against older employees in determining the value of a Voluntary Departure Package should be abolished. This recommendation applies generally, not only to the policy of the Victorian Government and the practice of the Department of Health and Community Services (now the Department of Human Services).

Recommendation for compensation

The respondent should pay the complainant the sum of $8,544 for financial loss suffered by reason of the discriminatory conduct of the respondent.

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

The General Conference of the International Labour Organisation,
Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Forty-second Session on 4 June 1958, and
Having decided upon the adoption of certain proposals with regard to discrimination in the field of employment and occupation, which is the fourth item on the agenda of the session, and
Having determined that these proposals shall take the form of an international Convention, and
Considering that the Declaration of Philadelphia affirms that all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity, and
Considering further that discrimination constitutes a violation of rights enunciated by the Universal Declaration of Human Rights,
adopts this twenty-fifth day of June of the year one thousand nine hundred and fifty-eight the following Convention, which may be cited as the Discrimination (Employment and Occupation) Convention, 1958:

Article 1

1. For the purpose of this Convention the term "discrimination" includes:
   (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
   (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employer's and worker's organisations, where such exist, and with other appropriate bodies.
2. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.
3. For the purpose of this Convention the terms employment and occupation include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

Article 2

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

Article 3

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

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

Article 4

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

Article 5

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

Article 6

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

Article 7

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

Article 8

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.
2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.
3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

Article 9

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.
2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 10

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.
2. When notifying the members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 11

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

Article 12

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

Article 13

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides:
   (a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 9 above, if and when the new revising Convention shall have come into force;
   (b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.
2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 14

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

Appendix B: Human Rights and Equal Opportunity Commission Regulations

Statutory Rules 1989 No. 407

Human Rights and Equal Opportunity Commission Regulations

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

Dated 21 December 1989.

BILL HAYDEN
Governor-General

By His Excellency's Command,

LIONEL BOWEN
Attorney-General

Citation

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

Commencement

2. The Regulations commence on 1 January 1990.

Interpretation

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

"Impairment" means:

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

"marital status" has the same meaning as in the Sex Discrimination Act 1984;

"the Act" means the Human Rights and Equal Opportunity Commission Act 1986.

Other distinctions, exclusions or preferences that constitute discrimination

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

(a) on the ground of:
  (i) age; or
  (ii) medical record; or
  (iii) criminal record; or
  (iv) impairment; or
  (v) marital status; or
  (vi) mental, intellectual or psychiatric disability; or
  (vii) nationality; or
  (viii) physical disability; or
  (ix) sexual preference; or

(x) trade union activity; or
(xi) one or more of the grounds specified in subparagraphs (iii) to (x) (inclusive) which existed but which has ceased to exist; or

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

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

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

Appendix C: Extracts from a decision about special measures for older workers

The complaints

On 25 September, 10 October and 17 October 1990, the Commission received complaints from three former transport employees of a large federal department pursuant to s.32 of the Act.

The complaints relate to the act or practice of taking into account an employee's age in determining benefits upon separation from employment.

On 29 June 1990 the Department of Industrial Relations (DIR') issued Determination No.71 of 1990, pursuant to s.82D of the *Public Service Act 1922* (Cth) (PSA'). This Determination provided for specific redundancy packages for persons in the Transport and Storage Group (TSG').

The relevant part of the Determination provides:

> Where a transport classification employee
> (a) is or has been voluntarily retrenched during the period 30 March 1990 and ending on 30 June 1991; and
> (b) at the date of retrenchment, has or had a voluntary retrenchment entitlement under the Award; and
> (c) in each of the two years immediately preceding that date earned through working overtime an amount exceeding 40% of the employee's base salary for that year from overtime; and
> (d) has been continuously employed by the Commonwealth for more than 10 years preceding that date; and
> (e) will attain or has attained 45 years of age on or before 30 June 1990;
>
> an amount equal to 50% of the average weekly amount received by the employee during the 2 years referred to in paragraph (c) through working overtime must be treated as salary of the employee for the purpose of calculating the voluntary retrenchment entitlement for the employee under the Award.

The benefit in the provision is available only to employees who have reached the age 45 upon separation.

The respondents in consultation with the [relevant union] provided this benefit to address the special needs of the older [transport employees of the respondent] leaving [the respondent's] employment.

Further the respondents argued that they had to place some restrictions upon the contents of the voluntary retrenchment packages for budgetary reasons.

Whether the distinction nullified or impaired equality of opportunity

The Act requires that for discrimination to be found the complainant must show that the distinction, exclusion or preference has had the effect of "nullifying or impairing equality of opportunity or treatment".

When considering whether the actions of the respondents nullified or impaired equality of opportunity, Article 5.2 of ILO 111, which is Schedule 1 annexed to the Act, is relevant:

> Article 5
> 2. Any Member may, after consultation with representative employers' and workers' organisations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination.

If Determination No.71 is a special measure designed to meet the particular requirements of persons who for reason of age require special protection or assistance it will not be discriminatory.

It is generally accepted and I am satisfied that persons over 45 as a group require special protection or assistance in redundancy arrangements due to their increased difficulties in finding different work and re-skilling. Evidence was put to me that clearly supported this understanding.

Under Article 5.2 , I must be satisfied not only that the group is generally accepted as requiring special protection but also that there has been adequate consultation with the representative employers' and workers' organisation.

In a letter from [the respondent] to the Commission on 6 February 1991, [the respondent] stated:

> After consultation with unions it was decided to offer all ... employees the opportunity to take a standard APS redundancy entitlement, the details of which had already been established under the Australian Public Service Redeployment and Retirement (Redundancy) Award, 1987. During negotiations with the unions concerned the [relevant union] which represents [the complainants], indicated that it did not consider the standards redundancy package, which is calculated on basic salary rates, to be fair or sufficiently attractive to its membership. The reasons for this position were that employees in the transport categories are comparatively low basic rates of pay and have traditionally relied on substantial overtime as part of their total earnings. In addition, the union argued that older, longer serving [transport employees] had earlier chosen not to join the superannuation scheme and this also would mitigate against their election for voluntary redundancy.
>
> The Department was sympathetic to this position because it recognised that many of the employees in this group, particularly the older ones, would be reluctant to accept the new work practices which were essential to the future commercial viability of [the respondent].
>
> Following consultation between the then Ministers ..., negotiations for a special' package, which recognised the substantial overtime component of the employees take home pay, commenced in June 1989. Since it was a special package' and there were also only funds available for voluntary redundancies purposes, certain criteria for eligibility had to be developed. Due to the enlivenment' early retirement nature of the program, attainment of the age of 50 at the time of retirement because a part of the eligibility criteria which were agreed between the Ministers.

> The special' package was subject to further negotiation with the [relevant union] which sought to reduce the age criteria to 45. It was finally agreed that age 45 would be applied in the Determination as, amongst other things, it was constitute with provisions of industrial awards where special benefits are available to older workers in recognition of their position in the employment market.

The complainants alleged that the [relevant union] failed to consult adequately with members. However I am not required to decide that. Article 5.2 requires consultation with the employees' organisations, not with individual employees. I am satisfied that [the respondent] and DIR consulted with the [relevant union], that being the employee's representative group for the complainants, prior to Determination No. 71 being made.

I am satisfied that the redundancy provisions constitute a special measure and as such are not discriminatory within the meaning of the HREOCA.

While in this instance I am prepared to accept those redundancy arrangements as a special measure I should express my uneasiness abut the degree of difference in the benefits available to those under 45 and those 45 and over. Evidence put to me indicated that the benefits for the latter could be more than twice those for the former. I consider that I am required to consider the reasonableness of any difference in benefits in determining whether any arrangement constitutes a special measure. In future complaints I will examine this issue closely. I have not done so here because these arrangements were made within a short time of the Human Rights and Equal Opportunity Commission Regulations being made. It is reasonable to allow employers a wider margin of appreciation in the period soon after the Regulations were made than would later be tolerated.