HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

X APPELLANT

AND

THE COMMONWEALTH OF AUSTRALIA FIRST RESPONDENT

THE HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION SECOND RESPONDENT

X v The Commonwealth [1999] HCA 63
2 December 1999
B53/1998

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation:

H B Fraser QC with C E Holmes for the appellant (instructed by Legal Aid Queensland)

R R S Tracey QC with T M Howe for the first respondent (instructed by Australian Government Solicitor)

No appearance for the second respondent

CATCHWORDS

X v The Commonwealth

Discrimination law – Disability discrimination – Appellant discharged from army on account of HIV-positive status – Discrimination admitted – Discrimination alleged to be lawful – Appellant alleged to be unable to carry out the inherent requirements of the particular employment – Meaning of "inherent requirements of the particular employment" in s 15(4)(a) of the *Disability Discrimination Act* 1992 (Cth) – Whether appellant "unable" to perform inherent requirements with reasonable safety.

Discrimination law – Disability discrimination – Infectious disease – Whether s 48 of the *Disability Discrimination Act* 1992 (Cth) provides an exclusive code for determining whether discrimination on account of an infectious disease is lawful.

Discrimination law – Disability discrimination – "Combat duties" and "combat-related duties" – Whether s 53 of the *Disability Discrimination Act* 1992 (Cth) provides an exclusive code for determining whether discrimination in relation to "combat duties" and "combat-related duties" is lawful.

Administrative law – Application for order of review – Error of law – Whether applicant must show a different result was inevitable or merely open if no error was made.

Words and phrases – "inherent requirements", "unable to perform".

Administrative Decisions (Judicial Review) Act 1977, ss 5(1)(f), 16(1).
Defence Force Discipline Act 1982 (Cth), ss 3(1) and 29(1).
Disability Discrimination Act 1992 (Cth), ss 5, 15(2)(c), 15(4), 44(1), 48, 53.

1 GLEESON CJ. This is an appeal from the Full Court of the Federal Court of Australia. That Court (Burchett, Drummond and Mansfield JJ)[1], allowing an appeal from Cooper J at first instance[2], made an order setting aside a decision of the second respondent, the Human Rights and Equal Opportunity Commission, and remitted the matter to the Commission for further consideration.

2 The orders of the Federal Court were made in the exercise of its jurisdiction under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth). The foundation for such an exercise of jurisdiction was a finding that the decision of the Commission involved an error of law[3].

3 The relevant facts, and statutory provisions, and the issues that arose for the determination of the Commission, are set out in the judgment of Gummow and Hayne JJ.

4 Cooper J observed that the Commissioner characterised the inherent requirements of employment for the purposes of s 15(4) of the *Disability Discrimination Act* 1992 (Cth) as being limited to the physical capacity to execute the tasks or skills of the particular employment. This, Cooper J held, was too narrow. The same error was identified by each of the members of the Full Court. Cooper J took the view that the error did not require the setting aside of the decision. However, as was pointed out in the Full Court, this conclusion turned upon an erroneous understanding of the nature of the Federal Court's jurisdiction once error of law in the making of an administrative decision has been demonstrated.

5 The central passages in the Commissioner's reasons are quoted in the judgment of Gummow and Hayne JJ. They followed the making of a distinction between the inherent requirements of a job (which the Commissioner illustrated by the example of a one-armed person's inability to carry out a task which required two hands) and an incident of employment (which he said was exemplified by the deployability of a soldier). The Commissioner held that, on the true construction of the statute, the relevant exemption applied only where there was "a clear and definite relationship between the inherent or intrinsic characteristics of the employment and the disability in question". He acknowledged that this might be thought too narrow and restrictive a construction, but explained why he adopted it.

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1 *Commonwealth v Human Rights and Equal Opportunity Commission* (1998) 76 FCR 513.

2 *Commonwealth v Human Rights and Equal Opportunity Commission* (1996) 70 FCR 76.

3 *Administrative Decisions (Judicial Review) Act* 1977 (Cth), s 5(1)(f).

6 The Commissioner's decision was made before this Court's decision in *Qantas Airways Ltd v Christie*[4]. The approach adopted by the Commissioner is inconsistent with that decision.

7 The members of the Federal Court did not misunderstand the Commissioner's reasoning. They were correct in their identification of his error.

8 In the result, for the reasons given by Gummow and Hayne JJ, the matter must go back to the Commission. I agree with the orders they propose.

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4 (1998) 193 CLR 280.

9 McHUGH J. The question in this appeal is whether the Human Rights and Equal Opportunity Commission ("the Commission") erred in law in holding that the Commonwealth of Australia had unlawfully discriminated against a soldier ("X") by discharging him from the Australian Army on the ground that he was HIV-positive.

10 The Full Court of the Federal Court held that in reaching its decision, the Commission erred in law in construing the phrase "the inherent requirements of the particular employment" in s 15(4) of the *Disability Discrimination Act* 1992 (Cth) ("the Act") and in applying it to the facts of the case. In my opinion, the Full Court was right in so deciding.

11 It was right because, contrary to the reasoning of the Commission, "the inherent requirements" of a "particular employment" are not confined to the physical ability or skill of the employee to perform the "characteristic" task or skill of the employment. In most employment situations, the inherent requirements of the employment will also require the employee to be able to work in a way that does not pose a risk to the health or safety of fellow employees. That is also the situation with Army service. Whether X does in fact pose a risk to his fellow soldiers by reason of his particular employment is a matter that will have to be determined by the Commission in a new hearing.

The factual background

12 On 23 November 1993, X enlisted as a general enlistee in the Australian Regular Army. Prior to his enlistment, X acknowledged that he knew that he would have to be tested for HIV, Hepatitis B and Hepatitis C as part of a post-entry medical check and that he would be discharged from the Army if he tested positive to HIV, Hepatitis B or Hepatitis C.

13 After enlistment, X commenced recruit training, including drill and physical training. During this period he was given a blood test. On 21 December 1993, an Army Medical Officer informed X that he had tested positive to HIV. On 24 December 1993, X was discharged from the Army in accordance with the *ADF Policy for the Detection, Prevention and Administrative Management of Human Immunodeficiency Virus (HIV) Infection*, issued on 6 July 1989, cl 12 of which relevantly provided that, "[a]s with newly inducted entrants in whom other potentially serious diseases have been detected, personnel with HIV infection are to be discharged."

14 Following his discharge, X lodged a complaint with the Commission pursuant to ss 5 and 15 of the Act, alleging that his discharge from the Army upon testing positive to HIV was unlawful discrimination. The Commission conducted an inquiry into the complaint pursuant to s 79 of the Act.

15 The Commonwealth did not contend before the Commission that X was unable to carry out the "inherent requirements" of his employment as a soldier within the meaning of s 15(4) because he was physically incapable, by reason of his illness, of carrying out combat-related tasks of a soldier. The Commonwealth could not do so because the evidence proved that, at the time of his discharge, X was at a stage of HIV infection where no ill effects or symptoms are suffered. Indeed, X's doctor gave evidence that at the time of his discharge, X was in "excellent" health[5]. Instead, the Commonwealth's argument focused on the risk which X may pose to other soldiers by reason of his HIV infection.

16 The Hon W J Carter QC (the "Commissioner"), who constituted the Commission for the purpose of the proceedings, held that the complaint had been substantiated and that the dismissal of X from the Army on the ground that he was HIV-positive was unlawful[6].

17 Subsequently, pursuant to s 39B of the *Judiciary Act* 1903 (Cth), the Commonwealth applied to the Federal Court for writs of certiorari and mandamus directed to the Commissioner and, pursuant to the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the ADJR Act"), for judicial review of the Commission's decision. The applications were made on the ground that the Commissioner had incorrectly interpreted s 15(4)(a) of the Act which provides that, subject to certain conditions, no discrimination exists if an employee "would be unable to carry out the inherent requirements of the particular employment".

18 Cooper J dismissed the Commonwealth's application for judicial review[7]. The Commonwealth then appealed to the Full Court of the Federal Court (Burchett, Drummond and Mansfield JJ) which allowed the appeals and ordered that the matter be remitted to a differently constituted Commission for consideration and determination in accordance with the reasons of the Full Court[8]. Although the application to the Federal Court sought both prerogative writs and relief pursuant to the ADJR Act, the orders of the Full Court indicate that the matter proceeded solely under the ADJR Act. Pursuant to a grant of special leave, X now appeals to this Court against the decision of the Full Court of the Federal Court.

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5 *X v Department of Defence* unreported, Human Rights and Equal Opportunity Commission, 29 June 1995 at 5.

6 *X v Department of Defence* unreported, Human Rights and Equal Opportunity Commission, 29 June 1995 at 15.

7 *Commonwealth v Human Rights and Equal Opportunity Commission* (1996) 70 FCR 76.

8 *Commonwealth v Human Rights and Equal Opportunity Commission* (1998) 76 FCR 513.

The legislation

19 Section 15(2) of the Act makes discrimination against an employee on the ground of the employee's disability *prima facie* unlawful. It relevantly provides:

> "It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against an employee on the ground of the employee's disability ... :
>
> (c) by dismissing the employee".

20 Section 4(1) of the Act defines "disability" to include "the presence in the body of organisms causing disease or illness"[9]; and "the presence in the body of organisms capable of causing disease or illness"[10]. HIV is an infectious disease which is transmissible by the exchange of bodily fluids including blood. That was common ground in the Commission proceedings. The Commissioner found that the HIV infection "usually leads to the onset of Acquired Immune Deficiency Syndrome (AIDS) which is a fatal illness"[11]. It was also common ground that being infected with HIV is a "disability" within the meaning of s 4, under one or both of the limbs discussed.[12]

21 Section 12(5) of the Act makes s 15 of the Act applicable in relation to discrimination against Commonwealth employees in connection with their employment as Commonwealth employees. Section 4 defines "Commonwealth employee" to include "a member of the Defence Force". "Defence Force" is not defined in the Act. However, s 30 of the *Defence Act* 1903 (Cth) declares that: "The Defence Force consists of 3 arms, namely, the Australian Navy, the Australian Army and the Australian Air Force". X was a member of the Australian Army and was therefore a Commonwealth employee. Because that is so, s 15 applies in this case. Indeed, before the Commissioner, counsel for the Commonwealth conceded that, by discharging X from the Army, the

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9 Paragraph (c) of the definition of "disability" in s 4(1) of the Act.

10 Paragraph (d) of the definition of "disability" in s 4(1) of the Act.

11 *X v Department of Defence* unreported, Human Rights and Equal Opportunity Commission, 29 June 1995 at 5.

12 *X v Department of Defence* unreported, Human Rights and Equal Opportunity Commission, 29 June 1995 at 5.

Commonwealth had discriminated against him because of his disability and that the discharge fell within the scope of s 15(2)(c)[13].

22 However, the Commonwealth claimed that the discharge lost its prima facie unlawful character by reason of s 15(4) of the Act which provides:

> "Neither paragraph (1) (b) nor (2) (c) [of s 15] renders unlawful discrimination by an employer against a person on the ground of the person's disability, if taking into account the person's past training, qualifications and experience relevant to the particular employment and, if the person is already employed by the employer, the person's performance as an employee, and all other relevant factors that it is reasonable to take into account, the person because of his or her disability:
>
> (a) would be unable to carry out the inherent requirements of the particular employment; or
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> (b) would, in order to carry out those requirements, require services or facilities that are not required by persons without the disability and the provision of which would impose an unjustifiable hardship on the employer."

The Commissioner's reasons

23 The Commissioner held that X was able to carry out the "inherent requirements of [his] employment" although he accepted evidence "that in some extreme circumstances transmission of bodily fluid might readily occur in the course of [army] service but that in others the risk was 'very low' but 'not a fanciful risk'"[14]. The Commissioner found that "in the course of training or in combat there is a risk, the measure of which will vary with the circumstances, that a soldier may be infected with HIV by another who is HIV positive"[15]. But the Commissioner held that this did not mean that X was unable to carry out the inherent requirements of his employment.

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13 *X v Department of Defence* unreported, Human Rights and Equal Opportunity Commission, 29 June 1995 at 6.

14 *X v Department of Defence* unreported, Human Rights and Equal Opportunity Commission, 29 June 1995 at 9.

15 *X v Department of Defence* unreported, Human Rights and Equal Opportunity Commission, 29 June 1995 at 9.

24 The Commissioner said[16]:

> "In my view the 'inherent requirements' of employment as a soldier for the purposes of s 15(4) is that the soldier be able to execute the tasks or skills for which he/she is specifically prepared as a soldier irrespective of where the solider is located or deployed. It is an incident of the employment that the soldier may or may not be deployed to a specific location.
>
> ... The proper construction of the section, in my view, requires that 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 disqualifies the person from being able to perform the characteristic tasks or skills required in this specific employment."

25 The reasons of the Commissioner make it clear that, in finding that the case did not come within s 15(4), he focused on X's *physical* ability to perform the "characteristic tasks or skills required in [the] specific employment". He considered that, as X was in "excellent health" and physically capable of performing all the characteristic tasks or skills required of a soldier, the requirement of the Army that a soldier be able to "bleed safely" in the sense of not having HIV, was not an inherent requirement of the employment. It was instead an "externally imposed requirement of the employer, based on policy considerations, which are designed to reduce the risk of passing on the HIV infection"[17].

26 The Commissioner's interpretation of s 15(4) was largely motivated by his view that to accept the Commonwealth's argument would be to allow discrimination against persons with HIV in any occupation and that this would be contrary to the objects of the Act. The Commissioner said[18]:

> "[T]he risk of the exchange of bodily fluids and HIV infection is not confined to the circumstances of ADF service. In a factory two process workers – one HIV positive, the other not – may be working together. The risk of an industrial accident is a real one. Physical injury may thereby occur whereby

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16 *X v Department of Defence* unreported, Human Rights and Equal Opportunity Commission, 29 June 1995 at 13.

17 *X v Department of Defence* unreported, Human Rights and Equal Opportunity Commission, 29 June 1995 at 11.

18 *X v Department of Defence* unreported, Human Rights and Equal Opportunity Commission, 29 June 1995 at 12.

the one person goes to the aid of the other. The exchange of bodily fluids whether accidental or otherwise may occur."

The Federal Court's reasoning

27 In the Federal Court, Cooper J adopted a wider interpretation of s 15(4) than the Commissioner had given to that sub-section. His Honour said[19]:

"Section 15(4) requires that, notwithstanding his or her disability, the employee or applicant for employment must be able to perform the functions and tasks required in the particular employment without exposing co-workers and others to whom [a] duty of care is owed to unreasonable risk of loss or harm before it can be said that the person is able to do the job."

However, Cooper J had earlier said[20]:

"Although I consider the Commissioner's characterisation of the inherent requirements of employment for the purposes of s 15(4) as being limited to the physical capacity to execute the tasks or skills of the particular employment as being too narrow, the wider characterisation which I have adopted would not lead to a different result in the instant case because the physical capacity of [X] to execute the tasks or skills of a soldier was in fact the only relevant requirement."

28 It is not easy to reconcile this statement with the first statement of his Honour which I have quoted. The first statement indicates that, in determining whether an employee can carry out the inherent requirements of a particular employment, the Commission must consider whether, in carrying out the tasks or skills of employment, the employee is exposing co-workers, and others to whom a duty of care is owed, to an unreasonable risk of loss or harm. This evaluation was not performed by the Commissioner at first instance because he held the risk of infection to be irrelevant to the inherent requirements of the employment. Given Cooper J's view as to what must be considered in evaluating the inherent requirements of the employment, it is not easy to see why he concluded that

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19 *Commonwealth v Human Rights and Equal Opportunity Commission* (1996) 70 FCR 76 at 91.

20 *Commonwealth v Human Rights and Equal Opportunity Commission* (1996) 70 FCR 76 at 91.

"the wider characterisation which I have adopted would not lead to a different result in the instant case"[21].

29 On appeal, all members of the Full Court of the Federal Court[22] held that the "inherent requirements" of the employment could include factors other than the employee's physical ability to perform the characteristic tasks or skills of the particular employment and that they could include factors such as the health and safety of fellow employees. Mansfield J said[23]:

> "[I]n my view, the inherent requirements of a particular employment may in appropriate circumstances involve considerations as to the physical environment in which the particular work is to be performed and as to health and safety considerations in relation to the employee, fellow employees and others."

30 In my opinion, for the reasons set out below, the learned judges of the Federal Court were right in holding that the inherent requirements of the employment of a soldier go beyond the physical capacity to perform the tasks or skills of a soldier. That being so, the Commission erred in law in construing s 15(4) and erred in law in failing to determine whether the condition of X unreasonably posed a health risk to other soldiers or employees. Although the dismissal of X was prima facie unlawful, it was open to the Commission on the facts of the case to find that the discrimination was not unlawful because the discharge of X fell within the provisions of s 15(4) of the Act. Given the findings of risk to fellow soldiers made by the Commission, it was open to the Commission to find that, without assistance, X could not carry out the "inherent requirements" of his employment and "would, in order to carry out those requirements, require services or facilities ... which would impose an unjustifiable hardship" on the Commonwealth.

The inherent requirements of the particular employment

31 Whether something is an "inherent requirement" of a particular employment for the purposes of the Act depends on whether it was an "essential element" of the particular employment[24]. However, the inherent requirements of employment

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21 *Commonwealth v Human Rights and Equal Opportunity Commission* (1996) 70 FCR 76 at 91.

22 *Commonwealth v Human Rights and Equal Opportunity Commission* (1998) 76 FCR 513 at 519-520 per Burchett J, 528, 530 per Drummond J, 549 per Mansfield J.

23 *Commonwealth v Human Rights and Equal Opportunity Commission* (1998) 76 FCR 513 at 549.

24 *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 at 295 per Gaudron J (with whom Brennan CJ agreed on this point), 305 per McHugh J, 318 per Gummow J.

embrace much more than the physical ability to carry out the physical tasks encompassed by the particular employment. Thus, implied in every contract of employment are obligations of fidelity and good faith on the part of the employee[25] with the result that an employee breaches those requirements or obligations when he or she discloses confidential information[26] or reveals secret processes[27]. Furthermore, it is an implied warranty of every contract of employment that the employee possesses and will exercise reasonable care and skill in carrying out the employment[28]. These obligations and warranties are inherent requirements of every employment. If for any reason – mental, physical or emotional – the employee is unable to carry them out, an otherwise unlawful discrimination may be protected by the provisions of s 15(4).

32 Similarly, carrying out the employment without endangering the safety of other employees is an inherent requirement of any employment. It is not merely "so obvious that it goes without saying"[29] – which is one of the tests for implying a term in a contract to give effect to the supposed intention of the parties. The term is one which, subject to agreement to the contrary, the law implies in every contract of employment[30]. It is but a particular application of the implied warranty that the employee is able to and will exercise reasonable care and skill in carrying out his or her duties[31].

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25 *Robb v Green* [1895] 2 QB 315 at 317; *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169 at 174; *Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359 at 372.

26 *Robb v Green* [1895] 2 QB 315.

27 *Amber Size and Chemical Co Ltd v Menzel* [1913] 2 Ch 239.

28 *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 at 572-573 per Viscount Simonds, 586 per Lord Radcliffe, 597 per Lord Somervell of Harrow; *Kashemije Stud Pty Ltd v Hawkes* [1978] 1 NSWLR 143.

29 *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 at 227; *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 346-347.

30 *Liverpool City Council v Irwin* [1977] AC 239 at 254-255 per Lord Wilberforce, 257-258 per Lord Cross of Chelsea; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 420 per Brennan CJ, Dawson and Toohey JJ, 447-453 per McHugh and Gummow JJ.

31 *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 at 572-573 per Viscount Simonds, 586 per Lord Radcliffe, 597 per Lord Somervell of Harrow; *Kashemije Stud Pty Ltd v Hawkes* [1978] 1 NSWLR 143.

33 It would be extremely artificial to draw a distinction between a physical capability to perform a task and the safety factors relevant to that task in determining the inherent requirements of any particular employment. That is because employment is not a mere physical activity in which the employee participates as an automaton. It takes place in a social, legal and economic context. Unstated, but legitimate, employment requirements may stem from this context. It is therefore always permissible to have regard to this context when determining the inherent requirements of a particular employment.

34 So much was recognised by this Court in *Qantas Airways Ltd v Christie*[32]. Although at age 60, Mr Christie undoubtedly still had the physical ability to fly 747's, the age limit of 60 imposed by other countries on pilots in their air space meant that, if Mr Christie were to be continued to be employed by Qantas, he could only be assigned to a restricted number of routes – a situation which would cause great disruption to, and perhaps the ultimate failure of, Qantas' roster system for assigning pilots to routes. In this context, the Court held that Mr Christie was unable to carry out an inherent requirement of his position, namely, the capacity to fly to all (or at least a reasonable number) of Qantas' international destinations. I said[33]:

> "It was plainly an 'inherent requirement' of the position of such a Captain that he or she should have the capacity (physically, mentally and legally) to fly B747-400 flights to any part of the world. That was an indispensable requirement of the position."

35 *Christie* stands for the proposition that the legal capacity to perform the employment tasks is, or at all events can be, an inherent requirement of employment. It shows that in determining what the inherent requirements of a particular employment are, it is necessary to take into account the surrounding context of the employment and not merely the physical capability of the employee to perform a task unless by statute or agreement that context is to be excluded. Far from rejecting the use of such context, s 15(4) by referring to "past training, qualifications and experience ... and all other relevant factors", confirms that the inherent requirements of a particular employment go beyond the physical capacity to perform the employment.

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32 (1998) 193 CLR 280.

33 (1998) 193 CLR 280 at 310.

The arrangement of the business

36 What is an inherent requirement of a particular employment will usually depend upon the way in which the employer has arranged its business. In *Christie*[34], Brennan CJ said:

> "The question whether a requirement is inherent in a position must be answered by reference not only to the terms of the employment contract but also by reference to the function which the employee performs as part of the employer's undertaking and, except where the employer's undertaking is organised on a basis which impermissibly discriminates against the employee, by reference to that organisation."

37 Unless the employer's undertaking has been organised so as to permit discriminatory conduct, the terms of the employment contract, the nature of the business and the manner of its organisation will be determinative of whether a requirement is inherent in the particular employment. But only those requirements that are essential in a business sense (including where appropriate public administration) or in a legal sense can be regarded as inhering in the particular employment. The Commission must give appropriate recognition to the business judgment of the employer in organising its undertaking and in regarding this or that requirement as essential to the particular employment. Thus, in *Christie*, Qantas had no obligation to restructure the roster and bidding system which it utilised for allocating flights to its pilots in order to accommodate Mr Christie. In the end, however, it is for the Commission, and not for the employer, to determine whether or not a requirement is inherent in a particular employment.

38 Nevertheless, contract or statute to the contrary, performing the duties of the employment without unreasonable risk to the safety of fellow employees is, as a matter of law, an inherent requirement of employment. Subject to s 15(4)(b), s 15(4)(a) permits discrimination against an employee who, without aid, cannot meet the requirements of the particular employment. But inability to carry out the inherent requirements of the employment without assistance does not make discrimination in employment lawful. It is a mistake to read s 15(4)(a) in isolation from s 15(4)(b). The presence of the latter paragraph shows that s 15(4)(a) is not a discrete defence which *ipso facto* prevents discrimination being unlawful.

39 Section 15(4) must be read as a whole. When it is so read, it is clear enough that the object of the sub-section is to prevent discrimination being unlawful whenever the employee is discriminated against because he or she is unable either alone or with assistance to carry out the inherent requirements of the particular employment. If the employee can carry out those requirements with services or facilities which the employer can provide without undue hardship, s 15(4) does not

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34 (1998) 193 CLR 280 at 284.

render lawful an act of discrimination by the employer that falls within s 15. For discrimination falling within s 15 to be not unlawful, therefore, the employee must have been discriminated against because he or she was:

(a) not only unable to carry out the inherent requirements of the particular employment without assistance;

but was also

(b) able to do so only with assistance that it would be unjustifiably harsh to expect the employer to provide.

40 If s 15(4)(a) provided a defence independently of s 15(4)(b), the employer could lawfully discriminate against an employee even though the employee could carry out the inherent requirements of the particular employment once he or she was provided with services or facilities the provision of which imposed no undue hardship on the employer.

Inability to carry out the "inherent requirements of the particular employment" by reason of a disability endangering others

41 In determining whether the employee poses a risk to the health or safety of other employees (or other persons or property), ordinarily it will be relevant to have regard both to the degree of the risk (in the sense of the chance of it being realised), and the consequences of it being realised (in the sense of the seriousness of the harm that will ensue if it is realised)[35]. In *School Board of Nassau County v Arline*[36], the United States Supreme Court held that regard should be had to, inter alia, the nature and duration of the risk of transmission of tuberculosis, the probability of transmission, and the severity of the consequence of transmission. Similarly, in *Canada (Human Rights Commission) v Canada (Armed Forces)*, Robertson JA said[37]:

> "There is a substantial difference between serious risk of harm (a broken arm) and a risk of serious harm (death)."

42 In determining whether the employee poses a risk to the health or safety of others because of his or her disability, the risk must be specifically referable to those persons or things affected by the particular employment. Any risk flowing from a disability cannot affect the employee's capacity to carry out the inherent

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35 cf *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48 per Mason J.

36 480 US 273 at 288 (1987).

37 [1994] 3 FC 188 at 225.

requirements of the particular employment unless the degree of the risk arising from the disability is increased, or the consequences of the risk being realised are made more serious, by reference to some essential feature or defining characteristic of the particular employment. If the particular employment requires the employee to work in close contact with others, for example, a disability of the employee may pose a real and constant risk to those other persons. In that case, the Commission may conclude that the employee cannot carry out the inherent requirements of that particular employment even with the provision of services or facilities. If, however, the employee's interaction with other employees or persons is irregular or occurs in conditions which negative the risks flowing from the disability, the Commission may rightly conclude that the presence of the disability does not impair the employee's capacity to carry out the inherent requirements of the employment.

43 In determining whether the disability prevents the employee from carrying out the inherent requirements of the employment, the following issues will ordinarily have to be addressed:

1. By reason of some essential feature or defining characteristic of the particular employment, does the disability pose a real risk to the safety or health of other persons or the preservation of the property of the employer? In determining whether there is relevantly a real risk, the Commission will have to consider:

   (a) the degree of the risk;

   (b) the consequences of the risk being realised;

   (c) the employer's legal obligations to co-employees and others, whether arising from a common law duty of care, occupational health and safety statutes, or other aspects of the employment regulatory regime;

   (d) the function which the employee performs as part of the employer's undertaking;

   (e) the organisation of the employer's undertaking.

2. If the answer to question 1 is no, then the disability does not prevent the employee carrying out any inherent requirement of the particular employment. If the answer to question 1 is yes, however, it will be necessary to determine under s 15(4)(b) whether the employee could carry out the work safely with the assistance of "services or facilities" which the employer could provide without unjustifiable hardship.

Overseas authorities

44 Courts in other jurisdictions which have considered analogous statutory provisions have also concluded that it is permissible to have regard to the risks to the health and safety of others when considering the requirements of employment. In *School Board of Nassau County v Arline*[38], the United States Supreme Court held that, whether a person with a contagious disease was an "otherwise qualified handicapped individual" for the purpose of s 504 of the *Rehabilitation Act* 1973 (US) required an inquiry as to the effect of the disability on others. The majority said[39]:

> "Such an inquiry is essential if s 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks."

The majority adopted the submission of the American Medical Association, acting as *amicus curiae*, that this inquiry should include[40]:

> "[findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm."

45 In a similar vein are several Canadian decisions. In *Ontario Human Rights Commission v Etobicoke*[41], the Supreme Court of Canada had to determine whether, for the purposes of s 4(6) of the *Ontario Human Rights Code* 1970*,* being younger than 60 could be a "*bona fide* occupational qualification and requirement" for a fireman. The Court said[42]:

> "To be a *bona fide* occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in

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38 480 US 273 (1987).

39 480 US 273 at 287 (1987).

40 480 US 273 at 288 (1987).

41 (1982) 132 DLR (3d) 14 .

42 (1982) 132 DLR (3d) 14 at 19-20.

> the interests of the adequate performance of the work involved with all reasonable dispatch, *safety* and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that *it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public*" (emphasis added).

46 In considering the magnitude of the risk sufficient to justify discrimination on the ground that the employee would be a risk to the safety of others, the Court said[43]:

> "In an occupation where, as in the case at bar, the employer seeks to justify the retirement in the interests of public safety, to decide whether a *bona fide* occupational qualification and requirement has been shown the board of inquiry and the Court must consider whether the evidence adduced justifies the conclusion that there *is sufficient risk of employee failure in those over the mandatory retirement age to warrant the early retirement in the interests of safety of the employee*, *his fellow employees and the public at large*" (emphasis added).

47 In *Canadian Pacific Ltd v Canada (Canadian Human Rights Commission)*[44], the Federal Court of Appeal held that a railway company was not guilty of discrimination in refusing to employ an insulin-dependent diabetic as a railway "trackman". The Canadian Human Rights Tribunal had found that the position of a trackman required[45]:

> "alertness, strength, and dexterity, and that any diminution of these attributes in an individual in the work environment may put an employee, co-workers, and the general public at greater risk in terms of safety".

48 After reviewing the evidence, Pratte J said[46]:

> "Once it had been found that the applicant's policy not to employ insulin dependent diabetics as trackmen was reasonably necessary to eliminate a real risk of serious damage for the applicant, its employees and the public, there was only one decision that the Tribunal could legally make, namely, that the applicant's refusal to engage the respondent Wayne Mahon was based on a

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43 (1982) 132 DLR (3d) 14 at 20-21.

44 [1988] 1 FC 209 at 221-222.

45 [1988] 1 FC 209 at 213.

46 [1988] 1 FC 209 at 221-222.

bona fide occupational requirement and, as a consequence, was not a discriminatory practice."

49 In *Canada (Human Rights Commission) v Canada (Armed Forces)*[47], the Federal Court of Appeal reaffirmed that the correct approach in "public safety" cases arising under the *Canadian Human Rights Act* 1985 was to take the "sufficient risk" approach as described in *Etobicoke*[48].

50 Despite the significant difference in statutory language between s 15(4) of the Act and the relevant US and Canadian provisions, in my opinion these cases support in principle the proposition that, in determining whether a person with a disability is able to carry out the inherent requirements of a particular employment, regard can be had to the health and safety of co-employees and others.

Are infectious diseases an exception to the ambit of "inherent requirements" under the Act ?

51 X contended that, even if the capacity to carry out an employment without risk to others is generally an inherent requirement of employment within the meaning of s 15(4), that general proposition does not apply where the risk to another employee's health or safety is caused by an infectious disease carried by the employee in question. The category of "disease" (of which "infectious disease" is a subset) is specifically made a disability under the Act[49]. Further, s 48 of the Act provides:

> "This Part does not render it unlawful for a person to discriminate against another person on the ground of the other person's disability if:
>
> (a) the person's disability is an infectious disease; and
>
> (b) the discrimination is reasonably necessary to protect public health."

52 Although it was common ground that HIV was an infectious disease for the purposes of s 48, the Commonwealth did not seek to directly rely on s 48 before the Commission or at any stage of the appellate process. However, s 48 is part of the context in which s 15 must be construed. X argued that s 48 provides an exclusive code for determining whether discrimination against a person on the ground of carriage of an infectious disease is lawful. He argued that s 48 evinces a statutory intention that any discrimination against a person with an infectious

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47 [1994] 3 FC 188.

48 [1994] 3 FC 188 at 213 per Isaac CJ.

49 Section 4(1) of the Act.

disease is to be tested against s 48 alone and not excused on some other statutory basis. He pointed out that s 48 provides the criterion which must be applied to perform the necessary balancing exercise – namely whether the discrimination is "reasonably necessary" to protect public health – while s 15(4)(a) does not provide any such criterion.

53 However, the argument overlooks the effect of s 15(4)(b) which allows a balancing exercise to occur if an employee with an infectious disease is found to be unable, because of the risk of infection of co-workers, to carry out the inherent requirements of a particular employment without special services or facilities but can carry out those requirements with the aid of services or facilities. That balancing exercise involves determining whether any precautions or aids (i.e. "services or facilities") could be provided by the employer to reduce the risk to an acceptable level, and whether the provision of those services or facilities would "impose an unjustifiable hardship on the employer".

54 Furthermore, as Burchett J pointed out in the Full Court of the Federal Court[50], courts have not regarded the reading down of one exception to avoid an overlap with another exception as a sound method of statutory construction[51]. In *Chesterman v Federal Commissioner of Taxation*[52], Lord Wrenbury, delivering the judgment of the Privy Council, commented:

> "As Lord Herschell said in *Inland Revenue Commissioners v Scott*[53], little weight is to be attached to the mere fact that specific exemptions are found which would be covered by the wider general word."

This principle was applied in this Court in *Salvation Army (Victoria) Property Trust v Fern Tree Gully Corporation*[54].

55 The argument that in the case of an infectious disease resort must be had to s 48 and not to s 15(4) must therefore be rejected. It is unnecessary to determine

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50 *Commonwealth v Human Rights and Equal Opportunity Commission* (1998) 76 FCR 513 at 524-525.

51 *Chesterman v Federal Commissioner of Taxation* [1926] AC 128 at 132. See also *Campbell College, Belfast (Governors) v Commissioner of Valuation for Northern Ireland* [1964] 1 WLR 912 at 924; [1964] 2 All ER 705 at 714; *Ashfield Municipal Council v Joyce* [1978] AC 122 at 136-137.

52 [1926] AC 128 at 132.

53 [1892] 2 QB 152 at 165.

54 (1952) 85 CLR 159.

whether co-employees of an employee suffering from an infectious disease constitute "the public" for the purposes of s 48.

Combat and combat-related activities – s 53

56 X also argued that issues of discrimination in the area of combat and combat-related activities were governed exclusively by the provisions of s 53 which relevantly provides:

> "(1) This Part does not render it unlawful for a person to discriminate against another person on the ground of the other person's disability in connection with employment, engagement or appointment in the Defence Force:
>
> (a) in a position involving the performance of combat duties, combat-related duties or peacekeeping service; or
>
> (b) in prescribed circumstances in relation to combat duties, combat-related duties or peacekeeping service; or
>
> (c) in a position involving the performance of duties as a chaplain or a medical support person in support of forces engaged or likely to be engaged in combat duties, combat-related duties or peacekeeping service.
>
> (2) In this section:
>
> **'combat duties'** means such duties as are declared by the regulations to be combat duties for the purposes of this section;
>
> **'combat-related duties'** means such duties as are declared by the regulations to be combat-related duties for the purposes of this section".

57 Section 53 is not directly relevant in this case because, at the time of X's discharge, there were no duties which had been declared by regulations to be "combat duties" or "combat-related duties". At the time of X's discharge, therefore, "combat duties" and "combat-related duties" were null sets. However, s 53 is indirectly relevant as part of the statutory context in which s 15 must be construed.

58 Since the discharge of X, regulations have been made under s 53. Those regulations[55] provide:

> **"Combat duties**
>
> 3. For the purposes of subsection 53(2) of the Act, the following duties are declared to be combat duties, namely, duties which require, or which are likely to require, a person to commit, or participate directly in the commission of, an act of violence in the event of armed conflict.
>
> **Combat-related duties**
>
> 4. For the purposes of subsection 53(2) of the Act, the following duties are declared to be combat-related duties:
>
> (a) duties which require, or which are likely to require, a person to undertake training or preparation for, or in connection with, combat duties;
>
> (b) duties which require, or which are likely to require, a person to work in support of a person performing combat duties."

59 X contended that in enacting s 53 Parliament recognised that it may be necessary for the Commonwealth to be able to lawfully discriminate on the basis of disability in relation to combat and combat-related duties and that s 53 evinced a legislative intention that regulations made under s 53 should be the sole basis on which a person with a disability may be lawfully discriminated against in relation to combat and combat-related duties. That being so, s 15(4) – a general provision – should not be construed as applying to combat and combat-related duties.

60 This argument suffers from the same difficulties as s 48 in relation to assigning an exclusive area of operation to statutory exceptions but it also faces a more fundamental difficulty. On the logic of the appellant's argument, there is no reason for assigning s 53 an exclusive area of operation in relation to combat only where the relevant disability is an infectious disease, such as HIV. If s 53 had an exclusive area of operation in relation to combat, it would have an exclusive area of operation in relation to all disabilities which affected a person's ability to engage in combat. The incongruity which flows from this construction is obvious. If no regulations had been made pursuant to s 53 (as is the case here), it would mean that a double amputee could not in any circumstances be lawfully excluded from combat duties as an infantry soldier.

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55 Disability Discrimination Regulations, Statutory Rules 1996, No 27.

61 In my opinion, s 53 simply defines an area which the Executive can remove from the jurisdiction of the Commission. The section recognises that certain exigencies apply to combat and combat-related duties that are unlikely to apply to any other area of employment. For an area of activity not contained in the regulations (either because no regulations have been made or because the activity falls outside the terms of the regulation), therefore, the Commission retains its jurisdiction to test the lawfulness of an act of discrimination according to the criteria contained in the general provisions of the Act. However, once an activity falls within the ambit of a valid regulation, all inquiry as to the lawfulness of discrimination within that activity is foreclosed.

The scope of X's employment

62 Once it is accepted that the risk which an employee poses to the safety of other employees is a relevant consideration in determining whether an employee can carry out the inherent requirements of his or her employment, the scope of X's employment, present and future, was a critical factor for determination. However, the Commissioner did not make a finding as to what were the "tasks or skills" for which a soldier "was specifically prepared as a soldier", and in particular, whether the "tasks or skills" for which a soldier was specifically prepared as a soldier included combat or combat-related duties.

63 At the time of his discharge (week 5 of the Recruit Training Program), X had not been allocated to any employment stream or trade. Allocations are made at week 8 of the Recruit Training Program and are based on the needs of the Army, performance in training and the individual soldier's preference[56]. X intended to express a preference for a position in the Signals Unit[57], but was not assured of being allocated this preference. The scope of X's employment could not be narrowed, therefore, by reference to any particular branch or unit of the Army.

64 No doubt labouring under the difficulty presented by the lack of a clear finding of fact as to the "tasks or skills" for which a soldier was "specifically prepared as a soldier", Cooper J attempted to define more fully the nature of a soldier's employment by looking to its legal context[58]. His Honour referred to ss 36, 45(1) and 50C of the *Defence Act*. He also regarded *The Commonwealth v*

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56 *X v Department of Defence* unreported, Human Rights and Equal Opportunity Commission, 29 June 1995 at 5.

57 *X v Department of Defence* unreported, Human Rights and Equal Opportunity Commission, 29 June 1995 at 5.

58 *Commonwealth v Human Rights and Equal Opportunity Commission* (1996) 70 FCR 76 at 89.

Quince[59] and *Groves v The Commonwealth*[60] as authority for the proposition that[61]:

> "The oath or affirmation [of a soldier] recognises the right of a member of the Army superior in rank to give lawful orders to a member inferior in rank and the obligation imposed on the member inferior in rank to obey those orders."

65 After considering this legal context, Cooper J said[62]:

> "The combined effect of the statutory provisions, the terms of the oath or affirmation of a solider upon enlistment and the obligation of obedience, is that a soldier in the Australian Army is required to go anywhere and to perform any lawful duties required of him or her by the Australian Army. This includes training, combat, combat-related and peace-keeping duties, as, when and where required by the Australian Army."

66 Mr Fraser QC, who appeared for X in this Court, did not seriously dispute that the ability to be deployed to combat or combat-related duties, or training for such duties, was an inherent requirement of X's particular employment as a soldier. Mr Fraser accepted that "the job is a deployable soldier in active service"[63]. This statement appears to concede that it was an "essential element" of X's employment as a soldier that he should be able to be deployed to training for combat or combat-related duties or to actual combat or combat-related duties. However, the precise content of the "particular employment" was a question for the Commission to determine.

67 As a matter of law, the Commission could not discharge its inquiry under s 79 of the Act without determining the precise content of the "particular employment" of X and whether, by reason of an essential feature or defining characteristic of that employment, X's disability posed a real risk to the safety or health of other soldiers or employees of the Commonwealth. It was also necessary to make those findings so that, if necessary, the Commission could also find whether X could carry out the inherent requirements of the particular employment

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59 (1944) 68 CLR 227 at 254-255.

60 (1982) 150 CLR 113 at 134, 137.

61 *Commonwealth v Human Rights and Equal Opportunity Commission* (1996) 70 FCR 76 at 90.

62 *Commonwealth v Human Rights and Equal Opportunity Commission* (1996) 70 FCR 76 at 90.

63 Transcript of proceedings at 12.

with the aid of services or facilities which the Commonwealth could provide without unjustifiable hardship. It follows that the failure to determine these matters also constituted errors of law.

The proceedings must be remitted to the Commission

68 In the Full Court of the Federal Court, Mansfield J, after concluding that the inherent requirements of a particular employment may in appropriate circumstances involve health and safety considerations in relation to the employee, fellow employees and others said[64]:

> "That is not to say that any risk of injury to the employee or to others per se defines one boundary of the inherent requirements of a particular employment. Unfortunately, risk of illness or injury is commonplace. *This is not the occasion to state definitively what degree, or increased degree, of risk of illness or injury either to the employee or to others is necessary for its consideration to prescribe an inherent requirement of the particular employment.* As the Court said in *Christie*[65], the identification of those requirements is a matter of objective fact to be determined in all the circumstances of a particular case. My conclusion does not provide any mandate for an employer, under the aegis of safety considerations, to impose or create inherent requirements of a particular employment where they do not truly exist" (emphasis added).

69 In these circumstances, Mansfield J thought the proper course was to remit the matter to the Commission, for further consideration and determination of the inherent requirements of the particular employment conformably with the reasons for judgment of the Full Court of the Federal Court[66], given that the Commission had failed to take the risk of infection of other soldiers into account. Drummond J agreed with this conclusion[67]. It will be apparent from what I have written that I do not accept that the issues before the Commission are those which the judgment of Mansfield J suggests.

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64 *Commonwealth v Human Rights and Equal Opportunity Commission* (1998) 76 FCR 513 at 549.

65 This is a reference to *Christie* in the Full Court of the Industrial Relations Court of Australia before the appeal to the High Court, reported at (1996) 138 ALR 19.

66 *Commonwealth v Human Rights and Equal Opportunity Commission* (1998) 76 FCR 513 at 549-550.

67 *Commonwealth v Human Rights and Equal Opportunity Commission* (1998) 76 FCR 513 at 530.

70 I do not think that it is the proper approach to ask whether the degree of risk emanating from the disease defines or can be prescribed as an inherent requirement of the employment. Rather the degree of risk is relevant in determining whether X *is able to carry out* an inherent requirement of the employment, namely, the requirement not to expose fellow soldiers and others to a real risk of harm to their health or safety.

71 It may be the case that the difference between my approach on this aspect of the case and that of Mansfield J is formal rather than substantive. It is probably right to say that the facts of most, perhaps all, breaches of a general requirement of employment may themselves be defined as a requirement of employment. Thus, during employment, an employee may not lawfully harm the employer's property, may not lawfully disclose confidential information and may not lawfully assist others to solicit business from the customers of the employer. At one level, these prohibitions may be treated as inherent requirements of the employment. But I think that it is more natural to treat them as breaches of the more general but inherent requirement that the employee must serve the employer faithfully. In many cases, it may make little or no difference which approach is adopted. But in other cases – and I think this is one – the former approach leads to a forced and unnatural construction of the inherent requirements of the employment.

72 To my mind, at least, it seems odd and artificial to say, as the Commonwealth contended, that it is an inherent requirement of the employment of a soldier that he or she should be able to "bleed safely". It seems better to regard the relevant inherent requirement as the duty not to expose others to real risks of injury and to regard the potential consequences of a HIV infected soldier bleeding as evidence which may support the conclusion that the soldier cannot carry out that inherent requirement of the employment. To my mind, this is a very simple case as to what is the relevant inherent requirement of the "particular employment". It is not a case of the employer seeking to impose a term or condition, but one where the inherent requirement arises as a matter of law. The real difficulty of the case lies in determining whether X can carry out that requirement with or without assistance. The issue of "inherent requirement" has become complicated only because, at all stages of the argument, the Commonwealth has insisted that the ability to "bleed safely" is the relevant inherent requirement.

73 More importantly, however, the reasons of Mansfield J do not deal with the fundamental issue posed by s 15(4)(b). Even if the Commission finds that, without assistance, X poses a real risk to soldiers and other persons, his dismissal will be unlawful unless the Commission also finds that the risk cannot be eliminated or appropriately nullified by the provision of services or facilities which can be provided without unjustifiable hardship. This is a matter that the Commission must determine before it upholds or rejects the complaint of X.

74 However, I agree with Mansfield J that the proceedings cannot be disposed of in the Federal Court and that they must be remitted to the Commission for

further hearing to determine the factual issues that arise upon the proper construction of s 15(4). It follows that I am unable to agree with Burchett J that, as a matter of law, s 15(4)(a) applies and that s 15(4)(b) "can have no application to those circumstances" with the result that the Full Court should have made no order referring the matter back to the Commission[68].

75 Although I agree with the learned judges of the Full Court that the Commission erred in law, I do not agree that the Commission should re-hear the matter conformably with the Full Court's reasons. For technical reasons, therefore, I would allow the appeal so that the Commission may deal with the matter conformably with my reasons.

Orders

76 I would make the following orders:

1. Appeal allowed.

2. Set aside Order 2 of the Full Court of the Federal Court dated 13 January 1998 and in lieu thereof order that the matter be remitted to the Commission for further hearing and determination conformably with these reasons for judgment.

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68 *Commonwealth v Human Rights and Equal Opportunity Commission* (1998) 76 FCR 513 at 526.

77 GUMMOW AND HAYNE JJ. The *Disability Discrimination Act* 1992 (Cth) ("the Discrimination Act") makes it unlawful for an employer to discriminate against an employee on the ground of the employee's disability by dismissing that employee[69]. "Disability" is defined as meaning (among other things) the presence in the body of organisms causing disease or illness or capable of causing disease or illness[70] and includes a disability that may exist in the future[71]. For the purposes of the Discrimination Act, the Commonwealth is taken to be the employer of all "Commonwealth employees"[72], an expression that is defined as meaning, among other things, members of the Defence Force[73].

78 The general provision in s 15(2)(c) (making it unlawful to discriminate on the ground of disability by dismissing an employee) is qualified by s 15(4). This provides that s 15(2)(c) does not render unlawful discrimination by an employer against a person on the ground of the person's disability "if taking into account [certain specified matters] and all other relevant factors that it is reasonable to take into account, the person because of his or her disability … would be unable to carry out the inherent requirements of the particular employment" or would require services or facilities not required by others and the provision of which would impose an unjustifiable hardship on the employer.

79 The issue in this appeal concerns how the expression "unable to carry out the inherent requirements of the particular employment" applies in the case of a soldier who has the human immunodeficiency virus or "HIV" infection.

The facts and the earlier proceedings

80 On 23 November 1993, the appellant signed an application for enlistment in the Australian Regular Army, an arm of the Australian Defence Force, and made the affirmation required by s 36(2) of the *Defence Act* 1903 (Cth) ("the Defence Act"). The taking and subscribing of that affirmation constituted his enlistment in the Army and bound him "to serve in the Army in accordance with the tenor of the … affirmation"[74].

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69 *Disability Discrimination Act* 1992 (Cth), s 15(2)(c).

70 s 4(1) definition of "disability" pars (c) and (d).

71 s 4(1) definition of "disability" par (j).

72 s 124.

73 s 4(1) definition of "Commonwealth employee" par (f).

74 *Defence Act* 1903 (Cth), s 36(3).

81 Before he enlisted, the appellant completed a medical history questionnaire. That questionnaire required him to acknowledge that he would be tested for HIV and Hepatitis B and C infections after he enlisted and that he would be discharged from the Army if he tested positive to HIV or if Hepatitis B or C infections were diagnosed.

82 After enlistment, the appellant was stationed at Kapooka and started recruit training in No 1 Recruit Training Battalion. He was given a blood test. On 21 December 1993 (during Week 5 of the Recruit Training Program) the appellant was told by an Army Medical Officer that the results of the blood test showed that he was HIV-positive. On 24 December 1993, he was discharged from the Army.

The complaint

83 On 8 February 1994, the appellant lodged a complaint with the Human Rights and Equal Opportunity Commission ("the Commission") alleging that his discharge from the Defence Force was unlawful discrimination contrary to ss 5 and 15 of the Discrimination Act[75]. The Commission (constituted by a single Commissioner) held an inquiry into the complaint[76] and found that the appellant's dismissal was unlawful.

84 The Commonwealth applied to the Federal Court of Australia for an order of review under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) and for writs of mandamus and certiorari[77] directed to the Commission. At first instance, Cooper J dismissed that application[78] and the Commonwealth appealed. The Full Court of the Federal Court (Burchett, Drummond and Mansfield JJ) allowed the appeal[79]. Two members of the Court (Drummond and Mansfield JJ) considered that the decision of the Commission should be set aside and the matter remitted to the Commission (differently constituted) for further consideration and determination in accordance with the reasons of the Court. An order to that effect was made. The third member of the Court, Burchett J, held that the only

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75 Section 5 describes what constitutes discrimination for the purposes of the Discrimination Act. Because argument in this matter centred upon the operation of s 15, it is unnecessary to make further reference to s 5.

76 Pursuant to the Discrimination Act, s 79.

77 Pursuant to the *Judiciary Act* 1903 (Cth), s 39B.

78 *Commonwealth v Human Rights and Equal Opportunity Commission* (1996) 70 FCR 76.

79 *Commonwealth v Human Rights and Equal Opportunity Commission* (1998) 76 FCR 513.

conclusion open to the Commissioner was that "the issue raised by s 15(4)(a) has been established"[80] and that accordingly the Commission's decision should be set aside and no order made referring the matter to the Commission for further consideration.

85 By special leave, the appellant, who has been referred to in the proceedings in the Federal Court and this Court as X, now appeals to this Court.

Discrimination conceded

86 The Commonwealth has conducted the proceedings before the Commission and in the Federal Court conceding that, by discharging the appellant from the Army, the appellant was discriminated against because of his disability but contended, both in this Court and at all other stages of the proceedings, that the discrimination was not unlawful. Until that contention has been tested and finally determined according to law, there can be no legitimate criticism levelled at those who propound it. To do so would prejudge issues that are not before us[81]. The question for the Commission was whether the discrimination was unlawful. The question for the Federal Court was whether the Commission had made an error of law in concluding that it was unlawful.

87 At the time of the appellant's discharge from the Army, s 47(3) of the Discrimination Act provided, in effect, that Pt 2 of the Act (and thus s 15) did not render unlawful "anything done by a person in direct compliance with another law"[82]. Section 47(2) provided that Pt 2 did not render unlawful "anything done by a person in direct compliance with a prescribed law". In the course of the proceedings before the Commission, the Commonwealth expressly disclaimed

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80 (1998) 76 FCR 513 at 526.

81 Nor was the Court referred to materials indicating the position in other jurisdictions with respect to issues comparable to those which are before us. However, it appears that in reviewing the validity of legislation against the requirements of the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment, the Supreme Court of the United States accords a high degree of deference to Congressional authority to raise and support the armed forces and to make rules for their governance. See *Rostker v Goldberg* 453 US 57 at 65-67, 70-71 (1981); *Weiss v United States* 510 US 163 at 176-177 (1994). See also Gussis, "The Constitution, The White House, and the Military HIV Ban: a New Threshold for Presidential Non-Defence of Statutes", (1997) 30 *University of Michigan Journal of Law Reform* 591.

82 Section 47(3) applied for three years after the commencement of s 47. Section 47 commenced on 1 March 1993.

reliance on an argument that the appellant's dismissal was an act done pursuant to statutory authority. Although the Commissioner appears to have taken this to be a disclaimer of reliance on s 47(2), it was accepted by the Commonwealth in this Court that in the proceedings before the Commission it did not seek to rely on s 47(3).

88 It is as well, however, to say something of the statutory provisions that affected whether the appellant might be discharged from the Army as he was. As we have already noted, the appellant's taking and subscribing the affirmation prescribed pursuant to s 36 of the Defence Act bound him to serve in the Army according to the tenor of that affirmation. Members of the Australian Regular Army are bound[83] to render continuous full-time military service. A person volunteering to serve as a soldier may do so for a fixed period or until attaining retiring age[84] and, subject to provisions for extension of service, the soldier is entitled to a discharge at the end of the period[85] or upon attaining retiring age[86].

89 Section 44(1) of the Defence Act provides:

> "Subject to the regulations, a soldier may at any time be discharged by the Chief of the General Staff for such reasons as are prescribed, notwithstanding:
>
> (a) that the soldier has not completed the period for which the solider is enlisted; or
>
> (b) that he has not attained the age prescribed for his compulsory retirement."

90 Section 124(1)(a) of the Defence Act permits the making of regulations in relation to the discharge of members of the Defence Force but it was not suggested that the appellant was discharged under any regulation made under that power. Rather, it was common ground that the appellant was discharged in accordance with a policy described as the *ADF Policy for the Detection, Prevention and Administrative Management of Human Immunodeficiency Virus (HIV) Infection* ("the Policy"). The Policy was an instruction of the kind known as Defence Instructions (General) issued pursuant to s 9A of the Defence Act. The Defence Act does not expressly require compliance with Defence Instructions (General) but

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83 Defence Act, s 45.

84 Defence Act, s 36(1).

85 Defence Act, s 38.

86 Defence Act, s 39.

the *Defence Force Discipline Act* 1982 (Cth) makes it an offence for certain persons (including members of the Australian Regular Army) not to comply with such orders[87].

91 The Policy (a copy of which was provided to us, without objection) dealt with the development of suitable health education programmes about HIV infection, with contact tracing, with blood testing, and with counselling services to be made available "for all groups of personnel subjected to testing and those identified through contact tracing". It provided that the Chiefs of Staff (in consultation with the Directors General of Health Services) were responsible for determining the categories of personnel in the Defence Force that were to be tested and the frequency of retesting. Various categories of personnel were identified. It also provided that "[a]ll regular entrants" were to be tested as soon as possible after arrival at the initial training establishment and that "[a]s with newly inducted entrants in whom other potentially serious diseases have been detected, personnel with HIV infection are to be discharged".

92 The submissions for the Commonwealth in this Court assumed that the discharge of the appellant pursuant to the Policy was a discharge permitted by s 44 of the Defence Act. It is, however, not necessary to examine the validity of that assumption. The Commonwealth brought no application for leave to cross-appeal seeking an order of the kind favoured by Burchett J in the Full Court. It did not seek to mount, in this Court, a case founded on s 47(2) or (3) of the Discrimination Act and the difficulties of doing so, when no such case was mounted in the courts below, seem very large. Section 47 of the Discrimination Act can be put to one side.

93 For completeness, some reference should also be made at this stage to s 53 of the Discrimination Act. That section provides that it is not unlawful to discriminate on the ground of disability in connection with employment, engagement or appointment in the Defence Force in certain positions and circumstances relating to the performance of "combat duties", "combat-related duties" or "peacekeeping service" (as that last expression is defined in the *Veterans' Entitlements Act* 1986 (Cth)). Combat duties and combat-related duties are both defined as such duties as are declared to be so by regulations made under the Discrimination Act[88]. No such regulations had been made at the time of the appellant's discharge but have since been made[89]. It was accepted that s 53 had no

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87 *Defence Force Discipline Act* 1982 (Cth), s 29(1) and s 3(1) definitions of "defence member" and "general order".

88 s 53(2).

89 Disability Discrimination Regulations (Cth), regs 3 and 4.

direct application to the present case. Nor did the Commonwealth rely, at any stage of the proceeding, on s 48 of the Discrimination Act – a section dealing with infectious diseases and discrimination "reasonably necessary to protect public health".

94 The principal focus of argument at all stages of the proceeding was on s 15(4)(a) and its reference to discrimination on the ground of disability if a person "because of his or her disability … would be unable to carry out the inherent requirements of the particular employment". Section 15(4) provides:

> "Neither paragraph (1) (b) nor (2) (c) [of s 15] renders unlawful discrimination by an employer against a person on the ground of the person's disability, if taking into account the person's past training, qualifications and experience relevant to the particular employment and, if the person is already employed by the employer, the person's performance as an employee, and all other relevant factors that it is reasonable to take into account, the person because of his or her disability:
>
> (a) would be unable to carry out the inherent requirements of the particular employment; or
>
> (b) would, in order to carry out those requirements, require services or facilities that are not required by persons without the disability and the provision of which would impose an unjustifiable hardship on the employer."

Proceedings in the Commission

95 It is necessary to say something of the Commissioner's findings about the appellant, HIV infection and the requirements of the particular employment.

96 The Commissioner found that the appellant had what the American Centre for Disease Control classifies as "Category 2" HIV infection in which the patient enjoys apparent good health and is symptom free. It was common ground in the Commission that HIV is infectious and is transmissible by the exchange of bodily fluids including blood. The HIV infection usually leads to the onset of acquired immune deficiency syndrome (AIDS) which is a fatal disease.

97 The Commissioner was satisfied that "in the course of training or in combat there is a risk, the measure of which will vary with the circumstances, that a soldier may be infected with HIV by another who is HIV positive". Avoiding this risk of infection was characterised in argument in the proceedings both in this Court and below as a requirement that a soldier be able to "bleed safely". Convenient and evocative as this shorthand may be, its use may obscure some of the issues that arise under s 15(4)(a).

98 The Commonwealth's case before the Commission was that the Defence Force's operational efficiency and effectiveness required that its members be able to be deployed in the service of the Defence Force as needed and that the appellant could not be deployed because, whether in training or in combat, he may be injured and spill blood with the risk of transmission of HIV infection to another soldier. It was submitted that the risk of infection to others means that an HIV infected soldier is not a suitable candidate for deployment and that, because of his HIV infection, the appellant would be unable to carry out an inherent requirement of his employment, namely deployment as required.

99 The Commissioner rejected the Commonwealth's contentions. Central to his conclusions was a distinction he drew between "inherent requirements" of employment and what he called the "incidents of employment". He held that deployment of a soldier to a specific location was an "incident" of employment rather than an "inherent requirement" of employment. He said:

> "In my view the 'inherent requirements' of employment as a soldier for the purposes of s 15(4) is that the soldier be able to execute the tasks or skills for which he/she is specifically prepared as a soldier irrespective of where the soldier is located or deployed. It is an incident of the employment that the soldier may or may not be deployed to a specific location."

In the Commissioner's view, the proper construction of s 15(4)(a) required:

> "that 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 disqualifies the person from being able to perform the characteristics tasks or skills required in this specific employment. Only then can the employer avoid the unlawfulness which attaches to the discrimination."

That is, applying the distinction which he drew, the Commissioner identified the "tasks or skills for which [a soldier] is specifically prepared" as the inherent requirements of the employment and all other features of the employment as mere "incidents" of it. In particular, in the Commissioner's view, deployment of a soldier to a specific location (or, presumably, deployment in particular circumstances) was merely an incident of the employment, not one of its inherent requirements.

100 Understood in that way, the distinction drawn between inherent requirements and incidents of the employment is one that s 15(4)(a) does not make. The inherent requirements of a particular employment are not confined to the performance of the tasks or use of the skills for which the employee is specifically prepared. It follows that the Commissioner made an error of law in his decision.

101 Section 15(4)(a) contains a number of elements that must be taken into account in seeking to apply it. First, the inquiry is whether "*because* of [the person's] disability" he or she would be unable to carry out the inherent requirements of the particular employment. That is, the search is for a causal relationship between disability and being unable to carry out the inherent requirements of that employment. Secondly, the provision applies only if the person would be *unable* to carry out those requirements. No doubt inability must be assessed in a practical way but it is inability, not difficulty, that must be demonstrated. Thirdly, the requirements to which reference must be made are the "*inherent* requirements of the *particular* employment".

102 The reference to "inherent" requirements invites attention to what are the characteristic or essential requirements of the employment as opposed to those requirements that might be described as peripheral[90]. Further, the reference to "inherent" requirements would deal with at least some, and probably all, cases in which a discriminatory employer seeks to contrive the result that the disabled are excluded from a job. But the requirements that are to be considered are the requirements of the *particular* employment, not the requirements of employment of some identified type or some different employment modified to meet the needs of a disabled employee or applicant for work.

103 It follows from both the reference to inherent requirements and the reference to particular employment that, in considering the application of s 15(4)(a), it is necessary to identify not only the terms and conditions which stipulate what the employee is to do or be trained for, but also those terms and conditions which identify the circumstances in which the particular employment will be carried on. Those circumstances will often include the place or places at which the employment is to be performed and may also encompass other considerations. For example, it may be necessary to consider whether the employee is to work with others in some particular way. It may also be necessary to consider the dangers to which the employee may be exposed and the dangers to which the employee may expose others.

104 As McHugh J points out, it is a mistake to read s 15(4)(a) in isolation from s 15(4)(b). It follows that while the place of employment may be important, most, if not all, cases will require consideration not only of s 15(4)(a) but also of s 15(4)(b) with its reference to provision of services or facilities not required by persons without the disability. To give but one example, if a person confined to a wheelchair could readily act as a counter clerk if a ramp were installed at one place in the office in which he or she was to be employed, it may well be open to conclude that the person could carry out the inherent requirements of the particular

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90 *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 at 295 per Gaudron J, 305 per McHugh J, 318-319 per Gummow J, 340-341 per Kirby J.

employment if that facility were provided. The question then would be whether provision of the ramp would impose an unjustifiable hardship on the employer. By contrast, however, a person would, on the face of it, be unable to carry out the inherent requirements of an employment that required the employee to work for extended periods at an isolated outstation thousands of kilometres from medical services if that person required weekly treatment from a city clinic for some disability.

105 The inquiry that was required in the present case was an inquiry about what were the requirements of the particular employment. As we have said, that would begin by identifying the terms and conditions of service which revealed what the Army required of the appellant, not only in terms of tasks and skills, but also the circumstances in which those tasks were to be done and skills used. From there the inquiry would move to identify which of those requirements were inherent requirements of the particular employment. It was at this point that the Commissioner fell into error by confining the inherent requirements of the particular employment to the performance of the "tasks or skills for which [the appellant was] specifically prepared". Only when the inherent requirements of the employment have properly been identified can one ask whether *because* of the employee's disability the employee was *unable* to carry out those requirements.

106 Confining attention to tasks and skills for which a soldier is specifically prepared was too narrow a focus in the present case. It left out of account where, when, in what circumstances, and with whom those tasks and skills were to be performed or used. It treated all of those features as incidents of the employment rather than as inherent (in the sense of characteristic or essential) requirements of the employment. But just as the capacity to travel from school to school at short notice is an inherent requirement of employment as an emergency teacher (but may not be an inherent requirement of employment as a teacher at a particular school), the places and the circumstances in which the tasks of a soldier are to be performed and skills are to be used may be important considerations in identifying inherent requirements of service in the forces. The identification of inherent requirements must begin with the terms and conditions of service.

107 If, as the Commonwealth contended in the Commission, the ability of a soldier to be deployed as needed is an inherent requirement of the particular employment, identifying whether there is the necessary causal connection between a soldier's disability and the alleged inability to carry out that requirement will require the closest attention to the reasons the Army gives for its unwillingness (or, as it would have it, inability) to deploy an HIV-positive soldier as the exigencies of the service require.

108 The reasons given by the Commissioner in the present matter may not reveal the full nature and content of the Commonwealth's argument in this respect. Much depends on what exactly was meant by saying that a soldier must be able to "bleed

safely". And given the way in which the Commissioner reasoned to his conclusion, it was not necessary for him to examine the content of that contention in any great detail, for he had determined that deployment as required was not an inherent requirement of the employment.

109 As we have said, inability to perform must be assessed practically. In particular, we consider that an employee must be able to perform the inherent requirements of a particular employment with reasonable safety to the individual concerned and to others with whom that individual will come in contact in the course of employment. If, as the expression "bleed safely" suggests, it is asserted that the appellant could not perform the inherent requirements of his employment in a way that was reasonably safe, difficult questions of fact and degree may very well arise. In particular, deciding what is a "reasonable" degree of risk to others, in a context that is said to require consideration of training for and participation in armed conflict, will present difficult questions of judgment. Much would turn on the nature and size of the risks that are said to arise. These, however, are not questions that can be resolved in the present appeal.

110 The appellant contended that ss 48 and 53 of the Discrimination Act provided exclusive codes for dealing with questions of discrimination on account of infectious disease and discrimination in relation to combat and combat related activities. For the reasons given by McHugh J we consider that both these contentions should be rejected.

111 The primary judge concluded that the Commissioner had made an error of law in construing s 15(4). Nevertheless, he dismissed the application for an order of review, saying[91]:

> "it has not been shown that any wider construction applied in respect of the second respondent's employment as an enlisted soldier in the ADF would lead to any other result than that arrived at by the Commissioner."

It seems that his Honour was of the view that applying what he considered to be the true construction of s 15(4) to the facts found by the Commissioner would have inevitably led to the dismissal of the appellant's complaint. But that conclusion is one that assumed that the Commissioner had addressed all issues of fact relevant to the application of s 15(4)(a) (as construed by the primary judge). We doubt that this was so but we need reach no conclusion about it. It is clear that the Commissioner did not address all of the issues of fact relevant to the application of s 15(4)(a) when it is construed in the way we consider it should be.

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91 (1996) 70 FCR 76 at 92.

112 Further, the primary judge's conclusion may proceed from a premise that would impose too high a burden on an applicant for an order of review. If an applicant demonstrates that the decision in question "involved an error of law"[92] the discretion conferred by s 16(1) of the *Administrative Decisions (Judicial Review) Act* is enlivened. No doubt showing that setting aside the decision would be futile because no different decision could lawfully be made would be reason enough to exercise the discretion against granting relief[93]. But that is not to say that the applicant for an order fails unless it is shown that a different result was inevitable. Showing that a different decision *might* be reached if no error of law were made may be sufficient reason (all other things being equal) to warrant making an order[94]. We agree entirely with the proposition that the courts of this country should be firm and principled in their application of the law. There is no basis for suggesting that the Federal Court did not act in this way.

113 The Full Court was right to set aside the decision of the Commission and to remit the matter for further consideration by the Commission differently constituted. The appeal to this Court should be dismissed with costs.

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92 *Administrative Decisions (Judicial Review) Act* 1977 (Cth), s 5(1)(f).

93 *Lamb v Moss* (1983) 5 ALD 446; *Young v Wicks* (1986) 13 FCR 85 at 89; *Lek v Minister for Immigration* (1993) 43 FCR 100 at 136. See also *Shell's Self Service v DCT* (1989) 98 ALR 165 at 179; *Clark v Wood* (1997) 78 FCR 356 at 362.

94 *Kioa v West* (1985) 159 CLR 550 at 603 per Wilson J; *Santa Sabina v Minister* (1985) 58 ALR 527 at 540; *McPhee v Minister for Immigration* (1988) 16 ALD 77 at 83.

114 KIRBY J. Once again, this Court has before it an appeal which concerns the operation of anti-discrimination legislation[95]. Once again, the legislation relates to the disability of a complainant[96]. Once again, the disability in question is said to arise from the complainant's status as a person living with the Human Immunodeficiency Virus (HIV) which ordinarily progresses to Acquired Immunodeficiency Syndrome (AIDS)[97]. Once again, the complainant has succeeded under the legislation, only to have victory taken away by a judicial determination that the favourable decision was flawed by error of law[98].

115 At one level, this appeal from orders of the Full Court of the Federal Court of Australia,[99] concerns the meaning of s 15(4) of the *Disability Discrimination Act* 1992 (Cth) ("the Act"). More fundamentally, it relates to the approaches respectively adopted by the primary decision-maker for the Human Rights and Equal Opportunity Commission ("the Commission") (on the one hand), and the judges of the Federal Court (on the other) as they reviewed the primary decision for error of law. In this Court, the parties contested the meaning to be given to the legislation and the errors which they respectively identified in the approaches taken below. The matter of approach being fundamental, logically, it comes first. However, it is convenient to reach it by way of an understanding of the issues which the primary decision-maker, and the judges concerned, were obliged to address.

The facts

116 The proceedings were conducted on the basis of an agreed statement of facts, together with medical evidence which was not relevantly contested. X[100] (the appellant) for some years had served without problems in the Signals Unit in the General Reserve of the Australian Army. In November 1993 he applied for

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95 *Qantas Airways Ltd v Christie* (1998) 193 CLR 280; *IW v City of Perth* (1997) 191 CLR 1; *Waters v Public Transport Corporation* (1991) 173 CLR 349; *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165.

96 *IW v City of Perth* (1997) 191 CLR 1.

97 This was the case in *IW v City of Perth* (1997) 191 CLR 1.

98 As happened in *IW v City of Perth* (1997) 191 CLR 1. See also *Qantas Airways Ltd v Christie* (1998) 193 CLR 280.

99 *Commonwealth v Human Rights and Equal Opportunity Commission* (1998) 76 FCR 513.

100 The name of the appellant was made the subject of an order under s 87 of the Act. The reference to the appellant by the pseudonym X has been continued throughout the proceedings, including in this Court.

enlistment in the Australian Defence Force (ADF) as a full-time soldier. He duly took the affirmation of service but also a blood test administered in accordance with the *ADF Policy for the Detection, Prevention and Administrative Management of Human Immunodeficiency Virus (HIV) Infection*[101] ("the Policy"). That Policy was applied to all new recruits. Unfortunately for X, the blood test proved positive to the presence of HIV. Instead of serving in the ADF for the period of his enlistment, X was discharged on Christmas Eve 1993.

117 In such circumstances many would have given up. But X was made of sterner stuff. He complained that his discharge amounted to a "dismissal" from Commonwealth employment by which his employer had discriminated against him on the ground of disability[102]. As such, he contended that the discharge was unlawful because it was contrary to the Act.

118 The medical evidence showed that X was in that phase of the typical progression of HIV infection which is symptom-free. This phase can go on for years. His own medical practitioner described X's state of health as "excellent" and this was undisputed. The concerns said to lie behind the making and application of the Policy were of the risks of transmission of HIV from persons like X to other service personnel during training or combat duties. There was a fear that the "particular employment" of ADF personnel could involve the risk that the virus, borne by bodily fluids including blood, could be transmitted by accidental contact during training, a major blood spill in circumstances of combat, or the urgent need for a blood donation for wounded personnel in a remote field of service. At the time of X's discharge in accordance with the Policy, the ADF, as this Court was informed, numbered about 58,000 persons.

119 The coincidence of circumstances that would be needed to render the stated fears realistic to the ordinary deployment of a member of the ADF are matters for evaluation and judgment. Other Armed Forces, with traditions and a role similar to our own (such as the Canadian[103]) have not found it necessary to adopt the rule contained in the ADF's Policy. On the face of the evidence recorded in these

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101 The Policy purports to be an Instruction issued pursuant to the *Defence Act* 1903 (Cth), s 9A(1) and to constitute a Defence Instruction (General) for the purposes of s 9A(2) of that Act. The Instructions were issued on 6 July 1989. See also *Defence Force Discipline Act* 1982 (Cth), ss 3 (definition of "general order") and 29(1).

102 The Act, s 15(2)(c).

103 *Canada (Attorney General) v Thwaites* [1994] 3 FC 38; *Canadian Forces, Medical Directive,* 1243-6 TD 95251 (DHPP), Draft, 1995; cf Herbold, "AIDS Policy Development Within the Department of Defense" (1986) 151 *Military Medicine* 623; Brown and Brundage, "US Army HIV Testing Program: The First Decade" (1996) 161 *Military Medicine* 117.

proceedings, that Policy appears to establish an inflexible practice inconsistent with the general objectives of the Act[104]. Indeed, from the first, the Commonwealth conceded that "by discharging [X] from the ADF, [he] was discriminated against because of his 'disability' pursuant to s 15(2)(c)" of the Act[105].

120 Common sense suggests that, consonant with the will of the Parliament expressed in the Act, it would have been possible, in such a large field of the Commonwealth's employment, to find "particular employment" for X that could have been carried out without unreasonable risk to other ADF personnel or unreasonable burdens to the ADF itself. On the face of things, therefore, X's automatic discharge in accordance with the Policy appears to be a breach of the Act. If so, it would entitle X to the redress for which the Act provides[106]. However, as past cases indicate, and this one again demonstrates, the field of anti-discrimination law is littered with the wounded who appear to present the problem of discrimination which the law was designed to prevent and redress but who, following closer judicial analysis of the legislation, fail to hold on to the relief originally granted to them.

Common ground

121 Many points were argued in the submissions of the parties, both in this Court and in the courts below. However, the essential questions to be resolved by this Court are narrowed by the high measure of common ground which marked the respective cases of the parties as the proceedings moved from the

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104 The objects of the Act in s 3 include "(a) to eliminate, as far as possible, discrimination against persons on the ground of disability in the areas of … work; (b) to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community; and (c) to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community."

105 Recorded in the reasons of Inquiry Commissioner, the Hon W J Carter QC in *X v Department of Defence* unreported, Human Rights and Equal Opportunity Commission, 29 June 1995 at 6.

106 Esp the Act, s 103.

initial decision of the Inquiry Commissioner[107], to the decisions of the Federal Court both of the single judge[108] (who confirmed the primary decision), and of the Full Court[109] (which set it aside).

122 There was no dispute that the Commonwealth was to be taken as the "employer" of X[110]. Unlike the earlier position of military personnel under the Royal Prerogative and at common law, members of the ADF now have their employment regulated by statute[111]. The case was conducted on the basis that the Commonwealth was bound by the Act, in the sense that, including in the employment and dismissal of X, it was obliged to conform to the requirements of the Act. Although it was claimed that the Policy which "informed the exercise of" the dismissal of X was made under the *Defence Act* 1903 (Cth), s 9A[112], it was not eventually submitted either that the Policy or the power of discharge afforded by the Australian Military Regulations ("the Regulations")[113] overrode the requirements of the Act or, in this case, relieved the Commonwealth of its obligation to conform to the Act.

123 During oral argument, the possibility was hinted at that the Regulations might have provided a sufficient legal foundation to justify the actions of the ADF in relation to X. Any such suggestion (if indeed it was pressed) must be rejected. It would present the possibility of procedural unfairness to X because, had the point been clearly raised earlier, evidence might have been tendered as to the real reason for his discharge[114]. There could have been substantial argument about the validity of the Policy or the Regulations, having regard to the law-making power under which each was purportedly made. It would therefore be inappropriate to explore such questions for the first time in these proceedings and in this Court. If this were

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107 The Inquiry Commissioner was appointed by the Commission to conduct an inquiry into the complaint pursuant to s 79 of the Act.

108 See *Commonwealth v Human Rights and Equal Opportunity Commission* (1996) 70 FCR 76 per Cooper J.

109 *Commonwealth v Human Rights and Equal Opportunity Commission* (1998) 76 FCR 513.

110 cf the Act, s 124.

111 See *Defence Act* 1903 (Cth).

112 *X v Commonwealth of Australia* unreported, High Court of Australia, 22 June 1999, transcript of proceedings at 72.

113 Reprinted 31 January 1993. See esp reg 176.

114 cf *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8.

done, it might be necessary to permit X to enlarge his proceedings to seek judicial review challenging the reason for the decision to dismiss him, on the footing that the Policy imposes obligations to act by reference to irrelevant or extraneous considerations. So I will say no more about any legal entitlements conferred by the Policy or the Regulations. This Court should assume that the basis of X's dismissal was, and was only, the Policy and X's failure to conform to its requirements, applicable without differentiation to all ADF recruits.

124 The parties raised no dispute concerning the nature of HIV, its modes of transmission, and that it is the cause of AIDS. Nor did they dispute that the condition of symptom-less HIV was a "disability" within the meaning of that word as defined in s 4 of the Act. In the United States of America, the analogous question under the *Americans with Disabilities Act* had been the subject of much controversy before it was settled by the Supreme Court in *Bragdon v Abbott*[115]. On the basis of the finding made by the Commissioner, it was common ground that, in the course of ADF service, there would be a risk of a transmission of bodily fluids from X to other service personnel. The circumstances for such transmission would need to be, as the Commissioner described them, "extreme". The risk of transmission in such extreme circumstances was "very low", although not "fanciful"[116]. By inference therefore, in the overwhelming majority of the circumstances in which a soldier such as X would be required to carry out the requirements of his particular employment, there would be no such risk, whether in training, or even in combat duties.

125 Given that personnel of the ADF might become infected by HIV shortly after undergoing a test which returned a negative result, it must be anticipated that in future circumstances of training and combat duties involving ADF personnel, precautions against infections carried by contact with blood or other bodily fluids would be required which were neither known nor necessary in earlier conflicts. This would be essential not only for HIV but for other more highly infectious conditions, including various strains of hepatitis. Doubtless, considerations such as these led to the Commonwealth's concession that, in dismissing X, the ADF had discriminated against him because of his disability.

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115 141 L Ed 2d 540 (1998); cf Lazzarini, "The Americans with Disabilities Act After *Bragdon v Abbott*: HIV Infection, Other Disabilities and Access to Care" (1998) 25(4) *Human Rights* 15.

116 *X v Department of Defence* unreported, Human Rights and Equal Opportunity Commission, 29 June 1995 at 9.

Under the Act, such discrimination was prima facie unlawful[117]. To escape the consequences which would entitle X to relief under the Act, the Commonwealth had to point either to an explicit exemption afforded by the Act, or to a provision of the Act limiting the unlawfulness that would otherwise exist.

126 It was ultimately agreed that most of the possible exemptions for which the Act provided did not apply in X's case. Thus, the Commonwealth did not seek to rely on the exemptions provided by s 47 of the Act for acts done "in direct compliance" with a "prescribed law" (s 47(2)) or (during a limited period) under "another law" (s 47(3)). In particular, it was not suggested that the Policy or the provisions of the Regulations permitting the discharge of a soldier fell within s 47 or attracted its relief.

127 Further, the Commonwealth did not rely on s 48 of the Act, an explicit provision excluding from unlawfulness, discrimination on the ground of a person's disability where this constitutes "an infectious disease". By inference, this section was not invoked in the present case because the ADF accepted that it could not show that its discrimination against X was "reasonably necessary to protect public health", a requirement for the exemption under that section. Any such contention would have confronted the evidence, accepted by the Commissioner, concerning the very low risk of transmission of HIV and the need for "extreme circumstances" to give rise to that risk.

128 Nor did the Commonwealth rely on s 53 of the Act , a specific provision excluding from unlawfulness, conduct in connection with employment in the ADF in combat duties and peace-keeping services. Although this provision would appear to have been incorporated into the Act precisely to relieve the ADF from the necessity to conform with the Act in respect of such duties and services as specified, the "combat duties" and "combat-related duties" mentioned in s 53 are defined by reference to regulations declaring specified duties for the purposes of the section. At the time of the discrimination against X complained of in these proceedings, no such regulations had been made. Only in 1996 was that omission repaired[118]. It was common ground that the new regulations could not avail the ADF in these proceedings.

129 A question arose during argument as to whether the very existence of the specific provisions in s 53 of the Act excluded the application to the ADF of the general provisions of s 15(4)(a) upon which the ADF ultimately relied. Correctly, in my view, X declined to embrace this argument. Section 53 cannot be viewed as an exclusive code which alone deals with discrimination against the Commonwealth's employees in the ADF. It is a particular provision, which, in any

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117 Pursuant to s 15(1)(c) of the Act.

118 Disability Discrimination Regulations, Statutory Rules 1996, No 27.

case, depended upon action of the Executive Government to provide a special exemption in defined circumstances. The general provisions of s 15(4) of the Act continued to apply, according to their terms, to employees in the ADF. Courts have warned in the past of the dangers of giving too much weight to specific exemptions when there remain for consideration general provisions of common application[119].

130 Finally, it was not suggested that the Commission, on the application of the ADF or otherwise, had granted an exemption to the ADF under s 55 of the Act excusing compliance with the obligations imposed by the Act. So the many specific exemptions provided by the Act, of potential application to the circumstances of this case, when analysed, had no relevance. There was no dispute about this.

131 It was in this way that the case, both below and in this Court, was brought to the provisions of s 15(4)(a) of the Act. That paragraph appears at the opening of Pt 2 of the Act ("Prohibition of Disability Discrimination") and within Div 1 ("Discrimination in work"). It appears in the primary provisions of the Act dealing with discrimination in employment. By s 15(1) such discrimination is made "unlawful for an employer". Specifically, by s 15(2)(c) it is unlawful for an employer to discriminate against an employee on the ground of an employee's disability "by dismissing the employee". There then appears the provision that holds the key to this appeal. Relevantly, it states:

> "15(4) Neither paragraph (1) (b) nor (2) (c) renders unlawful discrimination by an employer against a person on the ground of the person's disability, if taking into account the person's past training, qualifications and experience relevant to the particular employment and, if the person is already employed by the employer, the person's performance as an employee, and all other relevant factors that it is reasonable to take into account, the person because of his … disability:
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> (a) would be unable to carry out the inherent requirements of the particular employment; or
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> (b) would, in order to carry out those requirements, require services or facilities that are not required by persons without the disability and the provision of which would impose an unjustifiable hardship on the employer."

132 Because the Commissioner rejected the Commonwealth's submission that par (a) applied, he did not have to consider the alternative application of par (b). In the Full Court of the Federal Court, one judge (Burchett J) concluded, on the

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119 *Chesterman v Federal Commissioner of Taxation* (1925) 37 CLR 317 at 320.

evidence, that the only decision open to the Commissioner was that the issue raised by s 15(4)(a) had been established in favour of the ADF[120]. The majority judges (Drummond J and Mansfield J), each for somewhat different reasons, concluded otherwise. They concluded that the decision of the Commissioner should be set aside. They ordered that the matter be remitted to the Commission, differently constituted, for further consideration and determination in accordance with the reasons of the Court.

133 The Full Court's order might itself be subject to criticism, given the differing opinions that were expressed about the meaning and operation of s 15(4)(a) in the reasons of each of the members of the Court. Even if, for this purpose, the reasons of Burchett J were disregarded (because he was in dissent from the dispositional orders of the Court), significant difficulties would face the Commission or a new Inquiry Commissioner in giving further consideration to X's complaint because of the disparities of reasoning of the majority in the Full Court. However, the scope for such uncertainty may now be reduced by the decision of this Court. I will therefore say nothing more about this. The Commonwealth did not seek to cross-appeal from the orders of the Full Court, endeavouring to uphold the approach of Burchett J. Special leave having been granted by this Court, the ultimate legal issue is, therefore, this: given the jurisdiction which the Federal Court was exercising in review of the decision of the Commissioner, did the Full Court err in concluding that the Commissioner had erred in law in making the findings he did favourable to X, because of the construction which he gave to s 15(4)(a) of the Act? This question leads to another: did the Commissioner err in the scope which he attributed to the phrase "the inherent requirements of the particular employment" in that paragraph?

134 The proceedings in the Federal Court did not, and could not, amount to a review of the merits of the decision of the Commissioner. Under the Act, such merits and the fact-finding necessary to arrive at them, are matters exclusively for the Commission[121]. They may be exercised (relevantly) by a designated person as Inquiry Commissioner who, if he or she finds the complaint substantiated, may make a determination in accordance with the Act[122]. This is what occurred.

135 The original relief sought by the Commonwealth in the Federal Court was both an order for review under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), s 5 and the issue of writs of mandamus, certiorari and the making of declarations pursuant to the *Judiciary Act* 1903 (Cth), s 39B. The Commonwealth

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120 *Commonwealth v Human Rights and Equal Opportunity Commission* (1998) 76 FCR 513 at 526.

121 The Act, s 79(1).

122 The Act, s 103(1)(b).

applied for relief on the footing that the Commissioner had erred in law in construing s 15(4)(a) of the Act. The order ultimately made by the Federal Court appears to take its form from the *Administrative Decisions (Judicial Review) Act.* No writs were issued. No declarations were made. The Full Court's order is simply one setting aside the decision of the Commissioner and remitting the matter to the Commission for reconsideration and redetermination. Nothing turns on the omission of the Federal Court to provide relief under the *Judiciary Act.* No notice of contention was filed in this Court suggesting that such relief was available instead of, or additional to, that provided by the Full Court. The issue for decision is thus the very narrow one of whether the Commissioner's reasons sufficiently evidenced an error of law.

136 Views have been expressed in the case law, to the effect that clearly erroneous and even perverse findings of fact do not disclose an error of law warranting judicial disturbance of such findings[123]. I have never felt comfortable with that extreme position[124]. In any case, a particular finding of fact, supported by the reasons of a court or administrative decision-maker, may reveal an error of law in the form of a misunderstanding, or misapplication, of a statutory provision by which that finding was made[125]. If the reasons supporting a decision, given by an Inquiry Commissioner on behalf of the Commission, indicates a misunderstanding, or misapplication, of the Act, the decision will be affected by error of law. Unless exceptionally authorised by law to act otherwise, the role of the appellate court is to set aside the decision affected by error. It is to require that the flawed decision be redetermined in accordance with the law, as clarified. This is the relief which the Commonwealth sought from the Federal Court. It is the relief which, ultimately, it secured.

Reasons of the Commissioner

137 In some of the argument before this Court (and recorded by the courts below) there were suggestions that the fundamental error of the Commissioner, revealed by his reasons, was that he crudely confined his determination of the "inherent requirements of the particular employment" in this case to the *physical* duties which X would be required to perform as a soldier. In doing so, it is claimed that he ignored other features of the employment and the environment in which that

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123 *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 156-157.

124 *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 146-151.

125 *Hope v Bathurst City Council* (1980) 144 CLR 1 at 10; *Hayes v Federal Commissioner of Taxation* (1956) 96 CLR 47 at 51; *The Australian Gas Light Co v The Valuer-General* (1940) 40 SR (NSW) 126 at 138.

employment would, or could, take place.[126] I do not read the Commissioner's reasons as adopting so simplistic an approach.

138 The Commissioner's reference to the question of physical incapacity on the part of X arises first in the context of his reasons responding to a number of questions which he had posed for himself. These questions were designed to differentiate between the "personal inability of a particular individual" to perform requirements which inhered in the particular employment (on the one hand) and that person's inability (on the other) to perform duties "imposed externally [on the particular employment] … by the employer itself". Answering that question, the Commissioner concluded that there was no present "personal inability" in the sense of "physical inability or incapacity" which would prevent X from "undertaking deployment if it was so ordered or permitted". He had been a competent Army signaller in the past. Assuming that he was assigned to those duties (as he had sought), or to like duties, there was no reason why he should not be able to perform them. Before his enlistment in the ADF he was working "fulltime in arduous employment". His state of health was "excellent".

139 The reference which then followed, in which mention was made of physical capability, occurs, as the context makes abundantly plain, in the course of recounting the arguments advanced for the ADF[127]:

> "Rather the case for the respondent[128] is that even though the complainant may be *physically capable* and able to undertake deployment if required, there remains a risk that circumstances may (or may not) arise in which there may be the chance that others may incur infection by the exchange or transmission of bodily fluid from one to the other. This constraint upon deployment arises not because of the *physical consequences* of the disability in the particular person but because of an externally imposed requirement of the employer, based on policy considerations, which are designed to reduce the risk of passing on the HIV infection. The question of construction therefore arises: does s 15(4)(a) apply to exempt an employer in these circumstances?" (Emphasis added)

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126 *Commonwealth v Human Rights and Equal Opportunity Commission* (1996) 70 FCR 76 at 91-92 per Cooper J; *Commonwealth v Human Rights and Equal Opportunity Commission* (1998) 76 FCR 513 at 536 per Mansfield J.

127 *X v Department of Defence* unreported, Human Rights and Equal Opportunity Commission, 29 June 1995 at 11-12.

128 Formerly the respondent to X's proceedings was the Department of Defence, sued as representing the ADF. No point was taken about parties.

140 Read in this context, I regard it as a serious misrepresentation of the Commissioner's decision to suggest that he was drawing a blunt-edged distinction between the physical duties of a soldier and other "inherent requirements" of that particular employment which he would disregard. That the Commissioner addressed the correct question is shown not only by his express identification of the paragraph of the statute which had to be applied, but also by what he went on to say. And it is here that the crucial passage in his reasons is reached[129]:

> "One is left, therefore, to question whether in the circumstances of the case, deployability is in the relevant sense an 'inherent requirement' of the employment within the meaning of the section. There is in my view a distinction between the 'inherent requirements' of employment and the incidents of employment. It is an inherent requirement of employment as a carpenter that he or she must be able to do the work which is essential to the performance of that trade: it is a incident of the employment that the carpenter may be transferred by the employer from one location to another in order to exercise his or her carpentry skills.
>
> In my view the 'inherent requirements' of employment as a soldier for the purposes of s 15(4) is that the soldier be able to execute the tasks or skills for which he/she is specifically prepared as a soldier, *irrespective of where the soldier is located or deployed*. It is an incident of the employment that the soldier may or may not be deployed to a specific location.
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> … The proper construction of the section, in my view, requires that 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 disqualifies 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." (Emphasis added)

141 When the proceedings were heard at first instance in the Federal Court, Cooper J added an additional layer to the "inherent requirements of the particular employment". He held that "the general nature of the work itself will indicate what, in a functional sense, has to be done to do the work"[130]. He also held that the performance of the work had to be viewed "in the context of the common law duty of care owed by a worker to co-workers and others in a relationship of

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129 *X v Department of Defence* unreported, Human Rights and Equal Opportunity Commission, 29 June 1995 at 13.

130 *Commonwealth v Human Rights and Equal Opportunity Commission* (1996) 70 FCR 76 at 87.

proximity to the worker when the work is performed"[131]. However, in the view of Cooper J, as the application of this wider test would not have resulted in a different outcome, he dismissed the Commonwealth's application for review[132].

142 In the Full Court, this approach, and the reasoning that lay behind it, were criticised. The range of considerations that might be regarded as "inherent requirements of the particular employment" was broadened substantially. It included consideration of the interaction of X with fellow employees and contact with others which might give rise to considerations of legal liability[133]; the "social setting"[134]; the "regulatory setting"[135]; in appropriate circumstances, the physical environment[136]; considerations of health and safety[137]; and other requirements that would directly affect the employer's operations[138].

143 In order to exercise the authority to disturb the Commissioner's decision, based on the latter's appreciation and evaluation of the facts, as to what "the inherent requirements of the particular employment" constituted in the particular case, it was essential that the judges of the Federal Court should have formed a view of what that phrase required, as a matter of law. It was not sufficient that they simply disagreed with the Commissioner's fact-finding and conclusion. Either from the conclusion itself (viewed in the context of uncontested evidence) or from the Commissioner's reasoning offered in support of that conclusion, it was necessary for the judges to be able to point to an identifiable error of law. In so far as the Federal Court pointed to a suggested error of the Commissioner in resting his decision on a narrow view that the "inherent requirements of the particular employment" of a soldier were confined to the physical requirements of that employment, I consider, with respect, that the Court erred. On the face of the reasons of the Commissioner, this is not what he said. It is not the basis of his decision. To this extent, in my respectful view, the case below went off on a

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131 (1996) 70 FCR 76 at 87.

132 (1996) 70 FCR 76 at 92.

133 *Commonwealth v Human Rights and Equal Opportunity Commission* (1998) 76 FCR 513 at 520 per Burchett J.

134 (1998) 76 FCR 513 at 530 per Drummond J.

135 (1998) 76 FCR 513 at 530 per Drummond J.

136 (1998) 76 FCR 513 at 530 per Mansfield J.

137 (1998) 76 FCR 513 at 547-548 per Mansfield J.

138 (1998) 76 FCR 513 at 529 per Drummond J.

tangent commencing with nothing more than the Commissioner's repetition of part of the argument advanced for the ADF which he went on to reject.

144 Nevertheless, the question remains whether the second passage which I have quoted from the Commissioner's reasons reflects an erroneously narrow approach to the statutory question presented by the terms of s 15(4)(a). In order to answer this question, it is first necessary to restate some general propositions.

General approach

145 Some of the rules which govern the approach to ascertaining the meaning of provisions of legislation such as the Act were stated by me in the context of somewhat similar statutory provisions considered in *Qantas Airways Limited v Christie*[139]. Although I dissented from the order of the Court in that case, the general approach stated there is supported by much authority.

146 The Act must be construed according to its terms. In the case of an ambiguous provision, such as "the inherent requirements of the particular employment", it is appropriate to give it a meaning which advances, and does not frustrate, the achievement of the object or purpose of the legislation[140]. Anti-discrimination legislation, such as the Act, being remedial in character and designed to achieve high social objectives, should be construed beneficially and not narrowly[141]. Where, as here, the Act has reproduced a phrase derived from international sources[142], it is legitimate for courts, construing the provision, to have

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139 (1998) 193 CLR 280 at 332-336.

140 *Bropho v Western Australia* (1990) 171 CLR 1 at 20.

141 *IW v City of Perth* (1997) 191 CLR 1 at 57-58; *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 406-407; *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 at 196-197.

142 The Act is expressed in s 12(8) to give effect to the "Convention" in "limited application provisions" defined to include the provisions of Div 1 of Pt 2 (and thus to include s 15). "Convention" is defined in s 4(1) of the Act to mean the Discrimination (Employment and Occupation) Convention 1958 adopted by the General Conference of the International Labour Organisation on 25 June 1958, a copy of the English text of which is set out in Sched 1 of the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth). The *travaux préparatoires* indicate that a purpose of the use of the adjective "inherent" was to prevent discriminatory termination decisions being made on arbitrary or stereotyped grounds. See International Labour Conference, *Equality in Employment and Occupation: General Survey of the Reports of the Discrimination (Employment and Occupation) Convention (No 111) and Recommendation No 111, 1958,* Report III (Pt 4B) (1988), par 132.

regard to those sources in giving effect to the phrase as would be done in the international context[143].

147 There was some debate before this Court as to whether the provisions of s 15(4)(a) of the Act constituted an "exemption"[144], as distinct from a "non-application" of the provisions of the Act which render specified conduct unlawful. The primary rule as to dismissal is that laid down in s 15(2)(c). The secondary rule is that contained in s 15(4), which is thus a derogation from the primary rule. The international experts, commenting on the sources of the provision, have emphasised that such "exceptions" to the main rule must be construed in a way consistent with, and proportional to, adherence to the primary requirement. This is designed to diminish discrimination in employment on arbitrary grounds and to secure the object of equal opportunity[145]. The absence of any subjective intention to discriminate on the part of the employer will not convert conduct which is, in law, discriminatory and unlawful, into neutral policy or justifiable action[146]. The fundamental object of the Act is to achieve social change by removing stereotypes. It is assumed that its implementation will occasion significant changes to the previously untrammelled power of most employers to dismiss employees on whatever grounds appeal to them. It is also assumed that its operation might sometimes involve hardships to the employer[147] and some costs.

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143 *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 93-94, 222-223; *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338 at 349-350, 356-357; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 230-231, 239-241, 294-295; *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 at 333.

144 The first ground of the Commonwealth's application for an order of review complained that the Commissioner had erred in finding that s 15(4) should be construed "narrowly as an exemption".

145 International Labour Office, *Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organisation to examine the observance of the Discrimination (Employment and Occupation) Convention 1958 (No 111) by the Federal Republic of Germany*, Official Bulletin, Supp 1 (Series B) (1987), vol 70, pars 527-532 (esp par 531); cf *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 at 333 fn 169; *Commonwealth v Human Rights and Equal Opportunity Commission* (1998) 76 FCR 513 at 547 per Mansfield J.

146 *IW v City of Perth* (1997) 191 CLR 1 at 59; *Alexander v Choate* 469 US 287 at 295-296 (1985); *Jamal v Secretary, Department of Health* (1988) 14 NSWLR 252 at 259; *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 at 334.

147 Subject to s 15(4)(b) of the Act that such hardship cannot be imposed if "unjustifiable".

148 The relevant date for the decision as to whether the dismissal was unlawful, or was relieved from unlawfulness by the terms of s 15(4)(a), is the date of the dismissal said to be tainted by discrimination. Amongst other things, the employee will from that date begin to accumulate entitlements which could eventually give rise to the provision of damages by way of compensation[148]. This is why the subsequent making of the regulations for the purposes of s 53(2) is irrelevant in this case[149]. The consideration of the employer's operational requirements may be taken into account under the Act. But the proper place for this to be done, as such, is in consideration of the paragraph expressly enacted for that purpose, viz s 15(4)(b)[150].

Textual analysis of s 15(4)(a) of the Act

149 In the foregoing context this Court should avoid unduly narrowing the grounds of unlawful discrimination which enliven the operation of the Act. Especially where the Parliament has addressed explicit attention to relief for the employer against "unjustifiable hardship" and has afforded so many and varied opportunities for exemption, exclusion and confinement of the operation of the Act, it would be a mistake to construe the Act so as to confine the unlawful discrimination narrowly. In the context of s 15(4) of the Act, this general proposition also derives support from a number of textual considerations.

150 First, the inability to carry out the requirements mentioned must be shown to be "because of" the person's disability, ie as a result in fact. It is not "because of" some feature of the person's disability attributed to him or her on the basis of stereotyped assumptions about that disability. Secondly, it is necessary to show that, for that reason, the person would be "unable" to carry out the employment. This means more than that the person would occasionally have, or present, difficulties. Such occasional incapacities enliven s 15(4)(b). Thirdly, the "requirements" which the person for this reason is unable to carry out are only those which are "inherent" requirements. This phrase looks to the intrinsic necessities that are "permanent and inseparable elements, qualities or attributes"[151] of the particular employment. It is not enough that the "requirement" is a common or usual one. Nor is it one which is susceptible of being fixed externally, whether by the employer itself or by any other. It must actually inhere in the very requirements of the particular employment in question. As Gaudron J remarked

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148 The Act, s 103(1)(b)(iv).

149 cf *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 at 334-335.

150 cf *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 at 335; *Southeastern Community College v Davis* 442 US 397 (1979).

151 *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 at 340 citing the definition of "inherent" in the *Macquarie Encyclopaedic Dictionary of Australian English*.

in *Christie*[152], a practical test to apply is "to ask whether the position would be essentially the same if that requirement were dispensed with". It is also important to notice the repeated use of the adjective "particular", appearing twice in s 15(4), to qualify the noun "employment". The word used, "employment", is neither the "job"[153], nor is it the "position", as was the case in *Christie*[154]. These considerations pull in opposite directions. Whereas the word "particular" addresses attention to the specific "employment" of the employee in question, the word "employment" is somewhat broader than "job" or even "position"[155].

151 The use of the phrase "*inherent* requirements" and the requirement of attention on the "*particular* employment" make it plain that, in the context of the Act, it would be impermissible for an employer to lay down a "requirement", applicable across the board for every employee in that employer's "employment" which would have the effect of "requiring" the dismissal (or non-engagement) of an "employee" because of a disability. Such conduct would defy the clear purpose of the Act as expressed in its language. It would permit an employer, in effect, by its own specification of its "requirements" to walk straight out of the Act in defiance of the Act's high social purposes. That cannot be the meaning of s 15(4)(a). Content must thus be given to each of the adjectives: "inherent" and "particular".

152 Several considerations further strengthen this conclusion. The first is that the Act is expressed to apply, amongst others, to "Commonwealth employees in connection with their employment as Commonwealth employees" and "persons seeking to become Commonwealth employees"[156]. In the nature of such "employment", it will embrace, potentially, very large numbers of persons in a vast range of "particular employment" skills. The second consideration is that s 15(4)(b) contemplates "services or facilities" which, of their nature, will be specific to the particular disability of the individual "persons" concerned. They must be provided by the employer in question, to avoid the consequences of unlawfulness, unless to do so would "impose an unjustifiable hardship on the employer". Therefore, the entire context of s 15(4), especially viewed with the purposes of the legislation in mind and having regard to the confining adjectives deployed, addresses the specific case of the particular employee's disability. It

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152 *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 at 295 .

153 See *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 at 303-304 per McHugh J.

154 *Industrial Relations Act* 1988 (Cth), s 170DF(2).

155 *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 at 304 per McHugh J, 339-340 of my own reasons.

156 s 12(5).

forbids the broad brush, employment-wide approach to disability which the ADF employed in X's case by the application to him of its universal Policy.

153 This conclusion gains still further strength from the fact that the scheme of s 15 concerns itself with the conduct of an employer in discriminating "against a person". Whilst elsewhere provision is made for representative complaints[157], it is clear that, ordinarily, the Act anticipates that complaints will relate to an individual. This finds reflection in the provisions of s 15(4) in the requirement to take into account "the person's past training, qualifications and experience relevant to the particular employment" and "the person's performance as an employee". Thus, the focus is upon the "relevant factors" as they concern the particular employee's particular employment, and then only the "inherent requirements" of such particular employment.

154 The ADF Policy was not concerned with "particular employment". It applied across the board to "all regular entrants"[158]. It was not addressed to such of the "requirements of the particular employment" as could be described as "inherent". It simply assumed that in *every* case of recruitment into the ADF it was "inherent" that the new recruit be HIV free. No such universal approach was adopted in the Policy to already serving members of the ADF. The universal approach to the employment of recruits involved in this approach is inconsistent with the confined exception and particularity established by the Parliament in the terms of s 15(4)(a). If the ADF wanted a universal exemption from the application of the Act, either generally or expressed in terms of the HIV status of recruits, it had a number of options open to it. It could have sought the kind of exemption, expressed in explicit terms, that it has obtained from the application of other federal legislation[159]. It could have sought an exemption from the Commission under s 55(1) of the Act. It could have procured the earlier bringing into effect of s 53(1) of the Act, to the extent that that section might apply in certain circumstances to a person such as X. But what it could not do, by laying down a universal requirement to apply to *all* new employment of recruits to the ADF, in the form of its Policy, was to claim an exception expressed in universal terms. Universality defies particularity. The Act requires particularity. These remarks are not directed, as such, to the validity of the Policy. They concern instead the classification of the ADF's reasons for its conduct in dismissing X which was in issue in the Federal Court. So far as it applied the *universal* policy, the ADF could not invoke a statutory exemption to

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157 The Act, s 89.

158 The Policy, cl 12.

159 See eg Sched 2, pars (a) and (b) in *Administrative Decisions (Judicial Review) Act* 1977 (Cth).

the prohibition on discrimination clearly expressed in terms of the *particularity* of the employment in issue.

155 The foregoing is what I take the Commissioner to have been attempting to say when he asserted that the real constraint upon the deployment of X arose "because of an externally imposed requirement of the employer, based on policy considerations, which are designed to reduce the risk of passing on the HIV infection". Although one might cavil with the juxtaposition between "inherent requirements" and what the Commissioner described as "incidents" of the employment[160], this was simply an attempt by him to differentiate between the requirements of the particular employment which were "inherent" and those which were "non-inherent". Although I would not myself have classified the latter as "incidents of the employment", the phrase is, in the context, harmless. It involves no error of law. For the Commissioner, "incidents" were "non-inherent" features of the "particular employment".

156 This brings me once again to what I regard as the crucial passage in the Commissioner's reasons by which he described the "inherent requirements" of employment as a soldier. He said that the soldier should be able "to execute the tasks or skills for which he/she is specifically prepared as a soldier, irrespective of where the soldier is located or deployed"[161]. The recognition that the soldier may be located or deployed in various theatres of operation of the ADF is clearly correct. That, according to the evidence, was inherent in the oath or affirmation which the recruit must take. Moreover, in the case of a soldier, it is inherent both in the statutory obligations assumed[162] and in the very notion of service as a "soldier". It is thus amongst the "inherent requirements" of the "particular employment" as such. But did the Commissioner focus his attention too narrowly on those "inherent requirements" by confining the question which he asked himself to whether the soldier would be "able to execute the tasks or skills for which he/she is specifically prepared"?

157 The Commonwealth submitted that, in approaching the matter this way, the Commissioner had overlooked the "inherent requirements" of duties, both in training and in combat, which could involve bleeding and thus the risk of causing HIV infection to other soldiers. It complained that the Commissioner had confined

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160 *X v Department of Defence* unreported, Human Rights and Equal Opportunity Commission, 29 June 1995 at 13.

161 *X v Department of Defence* unreported, Human Rights and Equal Opportunity Commission, 29 June 1995 at 13.

162 See Australian Military Regulations, reg 135; *Defence Act* 1903 (Cth), s 36; see also ss 38, 39 and 45; cf *Commonwealth v Human Rights and Equal Opportunity Commission* (1998) 76 FCR 513 at 545-546 per Mansfield J.

his attention to the physical duties of soldiering. However, I have demonstrated that this is not so. That assumption arises from a misreading of the Commissioner's reasons for decision. The Commonwealth then complained that, by addressing only the "tasks or skills" for which the soldier was "specifically prepared", the Commissioner had failed to allow for the range of risky activities in the deployment of a soldier, including in training and combat. But this too is denied by the Commissioner's specific acceptance that "[i]t is an incident of the employment that the soldier may or may not be deployed to a specific location"[163]. Finally, the Commonwealth urged that in this crucial passage in his reasoning, the Commissioner failed to demonstrate that he had given attention to the risks of bleeding, of cross-infection in the field, of the need for field transfusions of blood in extreme circumstances and of the argument that these were "inherent requirements" of the position of a soldier, ie every soldier, just because of the permanent and inseparable elements of that "particular employment".

158 Once again, with respect, I cannot agree. What the Commissioner was saying was, in my view, perfectly correct. To gain the exemption from the unlawful discrimination for which s 15(2)(c) provides, a "clear and definite relationship" must be established between the disability in question and the way in which its very nature disqualifies the person from being able to perform the inherent or intrinsic characteristics of the employment in question. In essence, the Commissioner held that, in this case, the Commonwealth, as employer, had failed to avoid the unlawfulness of its admitted discrimination because it had failed to establish the requisite link. This was a conclusion that was open to the Commissioner on the facts. The Act, in effect, requires the employer to address attention to the particular disability of the person in question. However, the ADF refrained from doing so. It simply adopted and implemented its Policy, an externally imposed requirement which it defined for itself and universally applied. It was on that footing that, in this case, the employer of 58,000 federal employees failed to avoid the unlawfulness which attached to its admitted discrimination. This is an Act designed to expel stereotypes. The ADF Policy is based upon the very kind of stereotype which the Act sets out to discourage and redress.

159 Unless this narrow view of "inherent requirements" is adopted, the implications of the Full Court's decision for the effective operation of the Act will be most significant. Instead of operational needs of the employer being judged by the criterion of "unjustifiable hardship" under par (b) of s 15(4), that paragraph will be readily circumvented by the adoption by employers of policies of universal application and the assertion that such policies constitute "the inherent requirements of the particular employment". Were courts to uphold such arguments, they would completely undermine, or at least most narrowly restrict, the attainment of the stated objectives of the Act. That would be to frustrate the

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163 Primary decision at 13.

achievement of the purpose of the Parliament with this remedial statute. This is not, therefore, a construction of the Act which this Court should favour.

160 My conclusion might be unwelcome to the Commonwealth and the ADF. But they represent the Executive Government. The Act expresses the will of the Parliament. The Executive Government must conform to the law as there stated. Until the Act is amended or the ADF is lawfully brought into one of its exemptions, like other employers, it must comply with the rule of particularity which the Act mandates. Particularity not universality must govern its employment decisions in relation to its employees with disabilities. And this is precisely what I take the Commissioner to have held.

Universal discharge defied statutory particularity

161 One could raise nitpicking objections to some of the language of the reasons of the Commissioner. However, it follows from what I have said that I am of the opinion that, essentially, he approached X's complaint in the correct way. His reasons demonstrate no error of law. Legal error alone would authorise disturbance by the Federal Court of the Commissioner's decision.

162 I am conscious that the approach which I favour obviates to a very large extent consideration in this case of the phrase "inherent requirements". But this is only because of the approach which the ADF took with its Policy. As was demonstrated in *Christie*[164], the expression "inherent requirements" invites various synonyms. But the object of the Parliament, as in the use of the word "particular" to describe the "employment" in question is plain enough. It is to prevent self-definition by employers of the "requirements" of employment which, taken at face value, would permit them to escape the higher requirements of the Act.

163 In a proper case of a specific and less universal employment policy, it would be necessary to determine what the expression in s 15(4)(a) of the Act means in the circumstances of the particular employment of a person with disabilities and whether, in such circumstances, the disabled employee would be unable to carry out the inherent requirements of that employment. Certainly, those requirements are not limited to the physical necessities of the particular employment. But neither do they extend to whatever an employer declares to be necessary, convenient or efficient for its operations. The key to understanding the decisions on employee disabilities required by the Act is to be found by defining, in the case of complaint, the "particular employment" which that employee would, but for the discrimination, be expected to carry out and then by identifying the requirements of that "particular employment" that inhere in it, in the sense of being essential, permanent and intrinsic features of it. Defining those characteristics in the particular case will always involve questions of degree and judgment. Under the

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164 (1998) 193 CLR 280.

Act, decisions on such matters are committed to the primary decision-maker, having regard to all of the circumstances of the particular case. The warrant of the courts to disturb findings of the primary decision-maker for error of law is strictly limited.

164 In the case of disability (including HIV), knowledge of the causes and approaches to the reasonable adjustments envisaged by the Act progresses over time. The Act contemplates that the conduct of employers will adapt to its requirements. Particular judgments will replace universal ones. The latter, when analysed, will all too often be founded on stereotyped assumptions about a particular disability. Courts must also adapt to the significant and deliberate inroads which the Act has made into the prerogatives formerly belonging to employers generally, and to the emanations of the Crown in particular. In the circumstances of the employment to which the Act is addressed, it would be as well, in my respectful opinion, if the courts were to avoid the preconceptions that lie hidden, and not so hidden, in tales of Tuscan soldiers wallowing in blood[165] (however vivid may be the poetic image), or in descriptions of regimental life and soldierly duty in the heyday of the British Empire[166] (however evocative may be the memories).

165 The Act is a modern statute of the Australian Parliament. It is designed to secure large changes in employer thinking as well as action. The Commissioner recognised this. So, to a large extent, did Cooper J. In my view, the Full Court did not. Nor did the Commonwealth by seeking to uphold, in X's case, the universal Policy of the ADF although it was adopted in 1989, when much less was known about HIV and AIDS and years before the Act in question in this appeal was enacted by the Parliament.

Anti-discrimination laws and military practice

166 This appeal does not stand alone in the modern dialogue between the military and the courts. The military, including the ADF in Australia, have frequently enforced universal and discriminatory policies asserting that they are absolutely essential to the discharge of their mission. In many countries, there is nothing that those affected or the courts can do to question or disturb such policies[167].

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165 *Commonwealth v Human Rights and Equal Opportunity Commission* (1998) 76 FCR 513 at 516 per Burchett J citing Lord Macaulay's *Lays of Ancient Rome*.

166 Clode, *The Military Forces of the Crown* (1869), vol 2, ch 15, pars 110, 112 cited by Callinan J at par [173].

167 For the position in Argentina, see Tealdi "Responses to AIDS in Argentina: Law and Politics" in Frankowski (ed) *Legal Responses to AIDS in Comparative Perspective*

(Footnote continues on next page)

However, in other countries where the military is subject to civil power, constitutional norms or applicable principles of human rights enable and oblige the courts to scrutinise such decisions strictly and, when authorised by law, to decline to give them effect.

167 Recorded experience shows that the military usually resist such actions in the courts. However, when obliged to do so by court orders, they commonly review their discriminatory policies. They often find that they were needlessly inflexible, unnecessary and wrong-headed. Generally speaking, the courts in the United States and Canada[168] have been consistent and principled in recent years in their insistence that the civil norms of non-discrimination reach into the military and must be obeyed by them. This is certainly what happened when challenges were mounted in the courts against unjustifiable and universal exclusions expressed in terms of race[169], the exclusion of women from military institutions or from combat duties[170], and the automatic discharge of military personnel on grounds of their sexuality[171]. None of these exclusions now operates in the ADF.

168 The universal exclusion of recruits on the grounds of their HIV status[172] is simply the latest in a succession of such grounds. No right under the Australian Constitution was invoked[173]. Nor was there a human rights treaty to which direct

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(1998) 377 at 390 citing the decision of the Constitutional Court of Argentina, 17 December 1996.

168 *Canada (Attorney General) v Thwaites* [1994] 3 FC 38.

169 Decisions such as *Morgan v Virginia* 328 US 373 (1946); *Sipuel v Board of Regent* 332 US 631 (1948); and *Shelley v Kraemer* 334 US 1 (1948) heralded President Truman's Executive Order No 9981 terminating segregation in the United States military forces. They ultimately led to the overruling of *Plessy v Ferguson* 163 US 537 (1896) with its "equal, but separate" doctrine; cf Karst, "The Pursuit of Manhood and the Desegregration of the Armed Forces" (1991) 38 *UCLA Law Review* 499.

170 *Frontiero v Richardson* 411 US 677 (1973); *Rostker v Goldberg* 453 US 57 (1981); *United States v Virginia* 135 L Ed 2d 735 (1996); cf *British Columbia (Public Service Employee Relations Commission) v BCGSEU* unreported, Supreme Court of Canada, 9 September 1999 (women in the fire fighting service).

171 *Watkins v US Army* 875 F 2d 699 (1989); *Thomasson v Perry* 80 F 3d 915 (1996); Eskridge and Hunter, *Sexuality, Gender, and the Law* (1997) at 372-407.

172 *Canada (Attorney General) v Thwaites* [1994] 3 FC 38.

173 No argument was advanced on behalf of the appellant based on the views propounded by Deane and Toohey JJ as to legal equality implied in the Constitution.

(Footnote continues on next page)

effect could be given by Australian courts or tribunals[174]. But in Australia, there is anti-discrimination legislation. Decision-makers in this country should be as firm and principled in the application of such legislation as their counterparts in other civilised countries have been with their laws. In my view this was the approach taken by the Commissioner. It involved no error of law.

Orders

169 There being no error of law on the part of the Commissioner, the matter should be returned to him for the determination of the relief (if any) that should be afforded to X in the light of the Commissioner's decision. To give effect to this conclusion, the appeal should be allowed with costs. The orders of the Full Court of the Federal Court should be set aside. In lieu thereof, it should be ordered that the appeal to that Court be dismissed with costs.

See *Leeth v The Commonwealth* (1992) 174 CLR 455 at 485-490; cf *Kruger v The Commonwealth* (1997) 190 CLR 1 at 63-64, 94-97, 112-114, 153-155.

174 The European Court of Human Rights has recently held that a universal prohibition on military service on the grounds of sexuality is inconsistent with the European Convention of Human Rights: *Lustig-Prean and Beckett v United Kingdom*, unreported, European Court of Human Rights, 27 September 1999 and *Smith and Grady v United Kingdom*, unreported, European Court of Human Rights, 27 September 1999; cf *R v Ministry of Defence; Ex parte Smith* [1996] QB 517.

170 CALLINAN J. I agree with the reasons for judgment of Gummow and Hayne JJ.

171 There are some matters however which I wish to add.

172 That part of s 15(4)(b) of the *Disability Discrimination Act* 1992 (Cth) which requires that attention be paid to the services or facilities not required by others to enable a disabled person to carry out his or her duties and whether their provision would impose an unjustifiable hardship on an employer to make them available was not debated at length in argument. If a risk of contagion or infection (with any illness) exists, very careful attention in two respects may have to be given to the services or facilities that may need to be provided to enable a soldier to carry out the requirements of his or her employment as a soldier without unjustifiable hardship on the Commonwealth: first, to medical supervisory, physical and other more obvious services and facilities that may be necessary; and, secondly, to the services and facilities (measures) which may have to be introduced and maintained to enable the Commonwealth to deal appropriately with any action by an infected co-serviceperson whose infection has resulted partly or wholly from the employment or deployment of the infected (disabled) person. A serviceperson may now sue the Commonwealth for injuries caused by another serviceperson in the performance of military duties in peacetime[175]. A nice balance may have to be struck between the need to ensure the fulfilment of the object of the Act to prevent discrimination, the non imposition upon the Commonwealth of unjustifiable hardship, and the possibility of exposure of the Commonwealth to common law rights of action in negligence which might be available to an infected serviceperson.

173 Gummow and Hayne JJ have pointed out that inability to perform must be assessed practically. Having regard to the obligations of servicepeople to respond to orders generally unquestioningly, the possibility of sudden and unusual deployment, perhaps in roles for which they have had little or no training or preparation, the inherently dangerous nature of the services that they may be called upon to perform, the high incidence of accidents and disease in training or in postings in foreign or remote places, the physical propinquity between, and dependence of servicepeople upon one another, and the other exigencies of military service generally, I do not think that any narrow view of an inability to perform is possible. The conditions and obligations of servicepeople today are governed largely by statute and regulation. However the historical obligations and special nature of military service are fully described by Clode[176] and it is as well

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175 *Groves v The Commonwealth* (1982) 150 CLR 113.

176 *The Military Forces of the Crown* (1869), vol 2, ch 15, pars 110, 112.

to remember that many of them continue to find expression in the statutes and regulations governing military service today[177].

> "The end and purpose for which Soldiers are retained in arms were thus strongly put by Mr Wyndham: -
>
> > 'By an Army,' he said, 'I mean a class of men set apart from the general mass of the community, trained to particular uses, formed to peculiar notions, governed by peculiar laws, marked by particular distinctions, who live in bodies by themselves, not fixed to any certain spot, nor bound by any settled employment, who "neither toil nor spin;" whose home is their Regiment; whose sole profession and duty it is to encounter and destroy the enemies of their country wherever they are to be met with, and who in consideration of their performing that duty, and the better to enable them to perform it, receive a stipend from the State exempting them from the necessity of seeking a provision in any other mode of life.'
>
> …
>
> In the first place, he is bound to obey and to give his personal service to the Crown under the punishments imposed upon him for disobedience by the Mutiny Act and Articles of War. No other obligation must be put in competition with this; neither parental authority nor religious scruples, nor personal safety, nor pecuniary advantages from other service. All the duties of his life are, according to the theory of Military obedience, absorbed in that one duty of obeying the command of the Officers set over him."

174 I would join in the orders proposed by Gummow and Hayne JJ.

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177 See for example Australian Military Regulations regs 106, 176; *Defence Force Discipline Act* 1982 (Cth) s 29; *Defence Act* 1903 (Cth) s 13; *Occupational Health and Safety (Commonwealth Employment) Act* 1991 (Cth) s 7.