

Report of inquiry into complaints of discrimination in employment and occupation

Compulsory age retirement

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Introduction

This is the first in a series of reports to the Attorney-General on inquiries by the Human Rights and Equal Opportunity Commission (the Commission) into complaints of discrimination and violations of human rights under the *Human Rights and Equal Opportunity Commission Act 1986* (the Act).

Following my appointment as Human Rights Commissioner on 14 August 1995 I commenced a review of current complaints lodged under the Act and the conciliation attempts that had been made. There were many complaints that had been active for some years. The respondents were unwilling to resolve them through conciliation and the complainants were committed to pursuing them.

Under the Act the Commission has no power to make determinations in these complaints and there is no mechanism for enforcement. It can only make a finding and recommendations and report to the Attorney General who is required to table the report in parliament. The clear intention of the legislation is that unconciliated complaints with substance should be dealt with in the political arena, not in the judicial arena. Different views can be expressed, argued and resolved in parliament rather than in the courts.

Because this process does not result in enforceable orders the Commission seeks through every possible means to achieve a negotiated settlement between the parties. However the inability to enforce hinders efforts to settle.

I do not consider prolonged handling of complaints to be in the interests of either respondents or complainants. When it becomes clear that there is no reasonable prospect of conciliation, the conciliation process should cease. If there is no substance to the complaint, it should be dismissed. If there is substance, that is, if there is an act or practice that is either discriminatory or a breach of human rights within the terms of the Act, the inquiry process should be finalised and a report should be made to the Attorney-General and tabled in parliament.

As a result of the review many longstanding complaints under the Act are now moving to completion.

This report deals with the first four of these complaints. The complaints are by four pilots who were compulsorily retired at age 60 from their employment with the former Australian Airlines, now part of Qantas Airways Limited (the respondent).

These four complaints are some of many complaints received by the Commission about compulsory retirement practices. Compulsory retirement has been abolished in a number of the states and territories. However, the practice continues in federal public sector employment and many complaints of compulsory retirement have been lodged against federal public sector agencies. The *Public Service Act 1922* and many other federal laws require retirement at age 65. Indeed, the respondent in these complaints pointed out that the *Human Rights and Equal Opportunity Commission Act 1986* itself imposes a compulsory retirement age on Commissioners.

Compulsory retirement restricts equal employment opportunity on the basis of age. I recommend the repeal of compulsory retirement provisions in the *Public Service Act 1922* and in other federal legislation.

Other complaints of age discrimination raise broader issues of discrimination in employment and occupation such as in the areas of employees' compensation, superannuation, retirement benefits, redundancy and general working arrangements and practices. Complaints on these grounds will be the subject of later reports to the Attorney-General under the Act.

A clear pattern that emerges from the complaints I am now handling is that discrimination on the ground of age falls in a gap of federal protections against discrimination. The federal protections under the *Industrial Relations Act 1988* are limited to federal awards and agreements and to the termination of employment. They do not permit individual complaints of discrimination on the basis of age except in relation to dismissal.¹ Despite the enactment of laws prohibiting discrimination on the ground of age in many states and territories the standard and scope of protection varies from state to state and there is no protection at all in relation to federal laws, programs and practices or in Tasmania. This position is unacceptable. Every Australian is entitled to adequate protection against discrimination regardless of where he or she lives or works. Differences in protection result in inequality and confusion for employees, employers and businesses alike.

Comprehensive national prohibition of discrimination on the ground of age, in all its forms, remains a matter of pressing need.

These issues have been discussed at a policy level in the federal government for several years. Each of the major political parties took policies into the last federal election that expressed commitments for action in this area. The Coalition committed itself to the enactment of measures to protect against age discrimination at least in the area of employment and occupation. The Australian Labor Party committed itself to the development of broad based legislation to prohibit discrimination on the

¹ These non-discrimination provisions were not in force at the time that the four complainants in this matter were compulsorily retired from their employment with Qantas Airways.

ground of age. These commitments reflect a national consensus that age discrimination should be eliminated.

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

Functions of the Human Rights and Equal Opportunity Commission

The Commission's functions

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

The Commission is also conferred with functions:

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

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

The Commission's jurisdiction and complaint handling functions

Part II Division 4 of the Act confers functions on the Commission in relation to equal opportunity in employment in pursuance of Australia's international obligations under ILO 111.²

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

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

Where, after the inquiry, the Commission finds discrimination the Commission is required to serve notice setting out the findings and the reasons for those findings – s.35(2)(a). The Commission may include recommendations for preventing a repetition of the act or practice and for the payment of

² Ratified by Australia in 1973.

compensation or the taking of any other action to remedy or reduce the loss or damage suffered as a result - s.35(2)(b) and (c).

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

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

Discrimination in employment and occupation

Under the Act discrimination means:

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

but does not include any distinction, exclusion or preference:

- (c) in respect of a particular job based on the inherent requirements of the job; ...³

ILO 111 prohibits discrimination on certain specified grounds.⁴ Those grounds are contained in the Act in subparagraph (a) of the definition of discrimination. ILO 111 also provides that ratifying States may address discrimination on additional grounds.⁵ The Act provides in subparagraph (b)(ii) of the definition of discrimination for the adoption of regulations to declare additional grounds in accordance with this provision in ILO 111. Under this power the *Human Rights and Equal Opportunity Commission Regulations* in 1989 declared age as a ground of discrimination for the purposes of the Act with effect from 1 January 1990.⁶ (The full text of the Regulations is set out in Attachment B.)

It is an accepted principle in domestic law that where a statute contains language that derives directly from an international instrument, such the Act does, it should be interpreted in accordance with the interpretation the language has been given at the international level.⁷ The comments of the International Labour Conference Committee of Experts on the Application of Conventions and Recommendations (the Committee of Experts) are relevant to the interpretation of the Act's definition of discrimination.

³ s.3(1)

⁴ Art 1(1)(a).

⁵ Art 1(1)(b).

⁶ SR 1989 407, notified in the Commonwealth of Australia Gazette on 21 December 1989.

⁷ *Koowarta v Bjelke-Petersen & Others* (1981) 153 CLR 168 at 265 (Brennan J); *Minister for Foreign Affairs and Trade & Ors v Magno and Another* (1992) 112 ALR 529 at 535-6 (Gummow J).

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

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

Further the Committee of Experts has expressed the view that “the adoption of impersonal standards based on forbidden grounds” and “apparently neutral regulations and practices [that] result in inequalities in respect of persons with certain characteristics” also constitute discrimination.⁸

The Committee of Experts has commented on the ILO 111 provision of “any distinction, exclusion or preference in respect of a particular job based on inherent requirements of the job”. To be an inherent requirement the condition imposed must be proportionate to the aim being pursued and must be necessary because of the very nature of the job in question. The Committee stated for example that the exception “refers to a specific and definable job, function or task. Any limitation within the context of this exception must be required by characteristics of the particular job, and be in proportion to its inherent requirements.”⁹

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

Summary of the complaints

The complaints

This report deals with four complaints relating to the compulsory retirement from employment as a pilot of Mr Bill Bone, Mr Bill Craig, Mr Peter Ivanoff and Mr Kingsley Love (the complainants) by Australian Airlines, now part of Qantas Airways Limited (the respondent).

The complainants submitted, in summary, that the decision of the respondent to terminate their employment compulsorily at age 60 pursuant to company policy constituted discrimination on the ground of age as defined in the Act.

The respondent submitted, in summary, that the age restriction established in its policy was an inherent requirement of the job based on safety and operational considerations and did not constitute discrimination within the meaning of the Act.

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

⁸ International Labour Conference, *Equality in Employment and Occupation: General Survey by the Committee of Experts on the Application of Conventions and Recommendations ILO*, Geneva, 1988, at 23.

⁹ *Ibid*, at 138.

¹⁰ *Ibid*, at 22.

Findings and recommendations

On 12 April 1996 I issued notice of my findings and recommendations in relation to the complaints under s.35(2) of the Act. I found that the acts and practices complained of by the complainants, namely their compulsory retirement upon reaching 60 years of age, constitute discrimination in employment based on age. The reasons for this decision were that:

- the termination of each complainant's employment as a pilot in the employ of the respondent was the result of attaining 60 years of age;
- the practice then engaged in by the respondent of compulsory age-based retirement is a distinction or exclusion on the basis of age;
- the exclusion has had the effect of nullifying equality of opportunity or treatment in employment for each complainant as his employment was terminated when he was nonetheless ready, willing and able to continue working as a pilot for the respondent;
- it is not an inherent requirement of the particular job of an airline pilot that he or she be under the age of 60.

I made three recommendations to the respondent:

- that, to the extent that it has not already done so, it should discontinue the practice of compulsorily retiring its pilots and other employees on the basis solely that they have attained the age of 60 years or any other particular age;
- that the respondent should pay to Mr Bone, Mr Craig, Mr Ivanoff and Mr Love compensation for loss of earnings suffered by reason of the discriminatory conduct of the respondent;
- that the respondent should make the necessary arrangements for Mr Ivanoff to undertake the Qantas "over 60" medical tests and, if these and other requirements of the Civil Aviation Authority are satisfied, re-employ Mr Ivanoff and where necessary retrain him as a pilot to fly equivalent aircraft or aircraft as near to equivalent as possible to those he was flying prior to his compulsory retirement.

The respondent's reply

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

In response to the Commission's first recommendation for the prevention of the continuation of compulsory age-based retirement, Qantas Airways has advised

Qantas has long since generally discontinued the practice of compulsorily retiring employees on the basis solely that they have attained the age of 60 years or any other particular age. An exception is made in the case of long haul pilots where operational circumstances are such that employment beyond the age of 59 is inconsistent with the inherent requirements of the job. Qantas' policy in this regard is supported by the decision of Chief Justice Wilcox of the Industrial Relations Court of Australia in *Christie v Qantas Airways Limited*.¹¹

¹¹ The Commission notes that a recent decision of the Federal Court overturned this aspect of the decision in *Christie v Qantas*.

In relation to the recommendations for compensation and other action to remedy or reduce loss or loss or damage suffered as a result of the act or practice the respondent has advised

Qantas has considered the recommendations made in respect of compensation for the individual complaints and the re-employment of Mr Ivanoff at a senior level within the company. It has given the recommendations serious consideration recognising your statutory discretion to make such recommendations where you think appropriate. Qantas has decided, however, that it is not appropriate to accept the recommendations in this case.

As you know, the pre-existing Qantas policy was based primarily upon air safety, a matter of fundamental importance both to Qantas and the public interest. The policy was in all respects lawful. The provisions of the *Human Rights and Equal Opportunity Commission Act 1986* upon which the recommendations are founded did not render the Qantas policy unlawful. Additionally, the policy resulted from determinations by successive Chief Pilots in the fulfilment of their statutory duty.

It is also relevant that Qantas made plain during the hearing, both to the Commission and to the complainants, that it would not be inclined to accept a recommendation for re-employment or compensation.

In these circumstances, Qantas respectfully declines to accept your recommendations for re-employment or compensation.

The Commission's findings, reasons and recommendations

The complaints

The nature of the complaints

On 12 June 1992 the Commission received written complaints under s.32 of the Act from Mr Bill Bone, Mr Bill Craig, Mr Peter Ivanoff and Mr Kingsley Love (the complainants). At the request of the complainants, and with consent of the respondent, the complaints were investigated jointly.

The complainants had all worked under contract as pilots on domestic B727 or A300 aircraft operated by Australian Airlines, now part of Qantas Airlines Limited, (the respondent). Mr Bone commenced his contract on 10 January 1990, Mr Craig on March 24 1990, Mr Ivanoff on 27 October 1989 and Mr Love on 24 November 1989. Each of the complainants had extensive prior service with Australian Airlines. Between August 1990 and May 1992 the respondent terminated the employment of the complainants upon their reaching 60 years of age pursuant to a compulsory age-based retirement policy.¹² The contracts under which they were employed did not include a specific clause to provide for compulsory retirement at that or any other age. Each of the complainants held a First Class Airline Transport Pilot Licence and a valid Class 1 medical certificate at the time of termination. These basic facts of the complaints are agreed by the parties.

The complainants submitted, in summary, that the decision of the respondent to terminate their employment compulsorily at age 60 pursuant to company policy constituted discrimination on the ground of age as defined in the Act.

¹² The respective dates of the complainants' compulsory retirement are: Mr Bone 12 October 1991, Mr Craig 29 August 1990, Mr Ivanoff 18 September 1990 and Mr Love 17 May 1992.

The respondent submitted, in summary, that the age restriction established in its policy was an inherent requirement of the job based on safety and operational considerations and did not constitute discrimination within the meaning of the Act.

Conciliation

In correspondence with the Commission the respondent indicated clearly that it considered the complaints unsuitable for conciliation and all attempts by the Commission to promote conciliation were unsuccessful.

In May 1995 the Industrial Relations Court delivered judgment in cases concerning the compulsory retirement of two airline pilots, *Allman v Australian Airlines* and *Christie v Qantas* (referred to jointly as “the *Allman* case”).¹³ The Court found, in the case of one of the pilots, that mandatory retirement at age 60 infringed the principle of non-discrimination on the ground of age and constituted unlawful termination under the *Industrial Relations Act 1988* (Cth). Following that decision the complainants and the respondent themselves arranged a conference to discuss the complaints generally. The Commission was subsequently informed that no settlement could be reached.

Submissions

As a result of inquiries and investigation into the compulsory age based retirement of the complainants it appeared to the former Human Rights Commissioner that the practice constituted discrimination. Upon appointment as Human Rights Commissioner on 14 August 1995 I reviewed this finding and formed the same opinion.

Accordingly, pursuant to sections 33 and 27(a) of the Act, I invited the respondent to make submissions either orally, in writing or both in relation to the practice of compulsory age-based retirement. The respondent elected to make oral submissions in addition to its written submissions made during earlier stages of the inquiry and after the preliminary finding.

On 9 November 1995 I convened the inquiry in Melbourne to take oral and written submissions from the respondent. As a matter of procedural fairness, the complainants were also invited to participate in the process. The complainants and respondent were legally represented at the submissions hearing.

The basis of the findings and recommendations

Elements of discrimination

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

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

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

¹³ *Allman v Australian Airlines Limited* and *Christie v Qantas Airlines Limited* judgement of 18 May 1995, Industrial Relations Court, since reported in [1995] AILR. 1,623 (3-134).

Employment or occupation

The complainants were engaged by the respondent under contracts of employment. The respondent did not contest the existence of an employment relationship with the complainants. Clearly all parties accepted that the complaints relate to a practice in employment or occupation. There is no need for further discussion of this matter.

Distinction on the basis of age

The complainants must establish that the treatment they experienced was a consequence of a distinction based on their age.

Each of the complainants received a letter from the respondent giving formal notice of termination of employment. The notices gave the reason for termination as the respondent's policy of compulsory retirement at age 60.

The complainants submitted that the Australian Civil Aviation Authority (CAA) does not and never did impose an age limit on licence renewal. The CAA permits pilots over the age of 60 to fly in commercial operations providing the conditions of licence are satisfied.

Under Part 47 of the *Civil Aviation Orders* pilot licence holders are required to obtain annual medical certification of fitness to hold a licence. The Civil Aviation Authority requires that a Pilot-in-Command of an aircraft must hold a First Class Airline Transport Pilot Licence and the licensee must pass an annual Class 1 medical examination in addition to proficiency checks. Pilots must also obtain specific endorsements to fly different types of aircraft.

Some special considerations apply to pilots over the age of 60. Under r.5.110 of the *Civil Aviation Regulations* a commercial pilot who is over the age of 60 may fly passenger aeroplanes fitted with fully functioning dual controls and including another qualified pilot among the operating crew, as long as a proficiency check has been completed within the last 6 to 12 months.

Each of the complainants was in possession of a First Class Airline Transport Pilot Licence and held a valid Class I medical certificate and appropriate instrument ratings at the time of compulsory retirement. Mr Bone and Mr Love had A300 aircraft endorsements and Mr Craig and Mr Ivanoff had endorsements to fly B727 aircraft. At the time of compulsory retirement Australian Airlines operated both A300 and B727 aeroplanes.

The complainants were not given an opportunity to continue at work on the basis that they met the requirements of the *Civil Aviation Regulations* or to undergo individual assessments or to demonstrate by reference to any other tests or evidence that, despite reaching the age of 60, they were fit to fly.

The respondent did not submit any other reason for the termination of the complainants' employment. If it were not for the mandatory age retirement policy and the fact that the complainants had reached the age of 60, their employment would have continued for as long as they continued to satisfy the Class 1 medical examination and other requirements of the Civil Aviation Authority or the Airline.

The respondent submitted that retirement at age 60 was an implied term of the contract of employment. I agree with the complainants' submission that this is an irrelevant consideration to the determination of discrimination in this case. Contractual term or not, age was the criterion by which the employment of the complainants was terminated. It would defeat the object of the Act if principles of equality of opportunity in employment and occupation were capable of being overridden

by discriminatory contractual clauses. In any event there was no convincing evidence that it was an implied term of the complainants' contracts.

All the evidence and submissions in this case support the conclusion that the complainants' employment was terminated because of a distinction made on the basis of their age of 60 years.

Nullification or impairment of equality of opportunity

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

The written submissions of the respondent did not contest the submission by the complainants that they each held a genuine desire and intention to continue at work at the time of his respective compulsory termination. The respondent did not dispute the submission that the complainants did not wish to retire upon reaching 60 years of age. The complainants have tendered in evidence copies of letters sent to Australian Airlines which indicate that the respondent ought to have been clearly aware that the complainants did not wish to retire.

In this case there is no issue of whether the action impaired rather than nullified equality of opportunity. There is no evidence that alternative employment was offered.

I find that the compulsory retirement on the ground of the age of the complainants nullified their equality of opportunity or treatment in employment in that they were no longer employed as pilots for the respondent.

Inherent requirements of the job

The respondent's submissions

The respondent's essential submission was that the retirement of the complainants was based on the inherent requirements of their job as airline pilots. Under the Act there is no discrimination if the distinction, exclusion or preference "in respect of a particular job [is] based on the inherent requirements for the job".

The respondent's written submission of 6 November 1995 described the inherent requirements of the job of a pilot as including:

- possession of a current Airline Transport Pilot Licence; and
- conformity with policies and procedures determined by the Chief Pilot to discharge the airline's obligation to its passengers, crew and the wider public to operate with the highest possible standard of safety and the lowest possible risk to their safety.

The respondent also submitted that a "high degree" of both physiological and psychological health is required "to ensure the capability of operating an aircraft and its systems under normal and emergency conditions in the aircraft's operating environment".¹⁴ A range of specific skills is also required.¹⁵ The criteria stipulated as inherent to the job contain no direct reference to age.

14 The applicable considerations were described as:

- threat of hypoxia in high altitude flight;
- eye-hand co-ordination;
- aerotitis and its affect on hearing;
- visual acuity, night vision and peripheral vision;

The respondent submitted that there is no discrimination under the Act if the criterion imposed is any one of a number of criteria to ensure the health and safety abilities required. The respondent submitted that the Act does not require that the criterion imposed must be the “best alternative” or “necessary” in the sense that there is no alternative.

The respondent also submitted that “conformity with policies and procedures determined by the Chief Pilot” includes an inherent requirement that a pilot be under the age of 60 years.

In commenting on the policy the respondent acknowledged that the imposition of a strict age criterion “falls unequally on individuals” and that “there may have been pilots who could continue to operate safely beyond age 59”. But it said that Australian Airlines judged that the risks “were likely to be higher” for people over the age of 60 and that an across the board policy of retirement at age 60 was judged by the Chief Pilot as appropriate and inherent to the job “in the interests of ensuring safe airline operations” within “the highest possible safety standards” and International Aviation Conventions.¹⁶

The complainants’ submissions

Counsel for the complainants accepted that the safety considerations associated with flying aircraft demand high levels of fitness. In their written submission they stated in line with the decision in the *Allman* case “a professional airline pilot who has passed the Class 1 medical for the Airline Transport Pilot Licence is fit for the job and should be permitted to fly”.¹⁷

The complainants referred to the studied and detailed treatment afforded by Wilcox CJ in the *Allman* case of the relationship between age and health and safety risks. They stated that “the age of a pilot has little to do with safety provided that the pilot can demonstrate on a regular basis that he or she has an ability to maintain the required standards both operationally and medically” and therefore “age should not be the arbitrary determinant of a pilots ability to fly”.¹⁸

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- reaction time;
 - effects of acceleration and the body’s tolerance to its effects;
 - attitude awareness due to dependence on visual sense, muscle and vestibular sense; and
 - psychological stability to support the cognitive skills necessary to operate in a dynamic environment and operate as part of or, in case of a Captain, manage the Flight Deck and Cabin Crew.

¹⁵ The skills are:

- cognitive skills to assess data to ensure the flight can be conducted safely in accordance with the laws of the air;
- resource management skills to maintain a cohesive, effective crew on board;
- an attitude of defensive assertiveness to ensure the safety of all persons on board and of the aircraft;
- manipulative skills to provide co-ordinated, harmonised control inputs to smoothly operate the aircraft on the ground and in flight, to the tolerances stipulated by Civil Aviation Regulations (CARs) and Civil Aviation Orders (CAOs) and within the performance envelope limits of the aircraft;
- ability to recognise the onset of emergency flight conditions and competently effect corrections or recovery if required;
- navigational knowledge sufficient to apply to equipment on board the aircraft to ensure the flight of the aircraft is conducted in accordance with navigation tolerances contained in CARs and CAOs;
- mechanical engineering knowledge of the aircraft, its systems and supporting operating manuals to ensure safe operation of the aircraft, and;
- meteorological knowledge to safely navigate the aircraft within the air mass and clear of conditions considered hazardous.

¹⁶ Letter of 2 June 1994 and adhered to in letter of 6 November 1995.

¹⁷ Letter of 31 October 1995.

¹⁸ Letter of 31 October 1995.

Allman v Australian Airlines and Christie v Qantas

I do not propose to examine in detail evidence about the correlation between age and the health and safety considerations of piloting commercial aircraft. Wilcox CJ in the *Allman* case undertook a detailed inquiry including evidence from witnesses from the United States of America, the Chief Pilot, the Chief Medical Officer, the Director of Aviation Medicine and highly qualified aviation medicine specialists and considered nine reports and studies in aviation accidents and medicine.

The detailed examination of the medical evidence led the Chief Justice to conclude that despite the considerable time and effort in America spent studying the age 60 rule “none of the cited studies supports any conclusion about the relationship between that rule and aircraft safety”¹⁹ and that “there is a better alternative to mandatory retirement at age 60, an alternative that need not compromise Qantas’ high safety standards”.²⁰

The respondent acknowledged the decision in the *Allman* case and did not argue that the medical evidence to support the exclusion from employment of pilots over the age of 60 is conclusive. However its submissions cannot be considered independently of the medical evidence in that case. The submissions of the complainants also relied upon the case and accepted that health and safety considerations are fundamental to a matter of this kind.

Neither party submitted any evidence significantly different from that put to Wilcox CJ on the medical and safety issues. The respondent maintained its view that pilots over the age of 60 represent a health and safety risk. However, it did not appeal from the decision of Wilcox CJ and now has 6 pilots over the age of 60 flying its aircraft on a regular basis. I am sure that, if it seriously considered this a risk to airline and passenger safety, it would have taken and exhausted every possible avenue of appeal from the Chief Justice’s decision. The fact that it did not do so speaks for itself.

The decision of Wilcox CJ in the *Allman* case is not binding on the Commission. However it is of direct relevance to the complaints before me. I consider that Wilcox CJ’s inquiry was of such scope and detail that I cannot disregard his conclusions. I find the treatment of the issues involved in the extensive inquiry highly persuasive, as is its principal conclusion that the medical evidence relied on in support of the age 60 restriction is inconclusive and at times fundamentally flawed.

For these reasons I accept the findings of Wilcox CJ. I have not undertaken an independent review of the evidence before him and I have not formed an independent view of it. Rather I respectfully adopt his findings because they were based upon essentially the same evidence as that before me, they were arrived at after the extensive examination I have described and they have not been subject to challenge or appeal.

Although I have accepted Wilcox CJ’s findings rather than independently considering the evidence before him I will summarise for the benefit of the parties my understanding of the principal features of the medical evidence he examined and on which he came to his conclusion.

The medical evidence

In the *Allman* case the airline called Dr Billings, a physician and qualified pilot with a long term involvement in aviation medicine, to provide the main evidence in support of its policy to retire its pilots at the age of 60. Dr Billings expressed the view that the age restriction “is prudent and necessary” and justified by medical and operational data in four published papers.

¹⁹ The *Allman* case, judgement of 18 May 1995, op. cit. at 57.

²⁰ Ibid at 81.

The first was a 1971 paper known as the “Kulak” report which examined the reasons for some 890 pilot career terminations. It concluded that older pilots presented a concern of increased risk of “potentially serious in-flight pilot failure”, defined as “serious disease manifestations, such as sudden coronary death or convulsive seizures” occurring with little or no prior warning to either the affected crew member or remaining crew.²¹ This risk was assessed by age cohort. However, Dr Billings was aware of only two fatal accidents involving medical incapacitation. Further evidence revealed that sudden incapacitation almost always arises out of a temporary indisposition such as gastro-enteritis, an illness that is unrelated to age.²² In addition Wilcox CJ observed from evidence that the very small accident rate resulting from sudden incapacitation could be attributed to the ability of a co-pilot or flight engineer to take over the controls.²³

The second paper, published in 1977, compared the accident rates of pilots by reference to cumulative experience and age with the accident rates of other occupations and found that pilots had less accidents. This study suggested that pilots in the 50 to 59 age range had the fewest accidents. Those in the 60 to 69 age bracket had an accident rate higher than those in the 50 to 59 age range but less than those in the 20 to 29 and 30 to 39 age ranges and comparable to those in the 40 to 49 age range.²⁴

The next study discussed was the “NIA report” examining the justification for United States legislation requiring pilots to retire at the age of 60. The panel that conducted the study concluded that “there is no convincing medical evidence to support age 60, or any other specific age, for mandatory pilot retirement”.²⁵ However it found abundant and persuasive evidence that, among pilots as well as others, disease, disability and death rates increase steeply during each half decade beyond the age of 50. While the panel recognised the “unavailability of adequate data concerning the medical status and piloting performance of air carrier pilots past the age of 60”,²⁶ the panel noted an increased risk of accident with age and concluded that the age 60 rule should be retained.²⁷

The final report was the 1990 “OTA report”. It referred to a study of pilot-caused accidents by Mr Golaszewski indicating that pilots aged between 60 and 69 have “an accident rate twice as high as similar pilots in their 50’s”.²⁸ The study also found that “virtually all pilot-caused accidents stem from judgement, communication or decision making deficiencies rather than impairment or incapacitation caused by medical disease”.²⁹ It observed that there were no current reliable methodologies for predicting the development of medical conditions that could affect pilot performance in these neurological functions. It expressed concern about increasing costs associated with the introduction of enhanced medical screening. It concluded that, based on safety

21 Ibid at 35. The stated probability, drawing on data about the incidence of heart and cardiovascular disease at various ages, was estimated to rise from 1 per 50,000 pilots aged 30-34 to 1 per 3,500 pilots aged 55-59. However, the authors noted that “such an event occurring during the cruise phase of flight has not previously resulted in a serious operational problem in a dual pilot aircraft”.

22 Ibid at 78.

23 Ibid at 78.

24 For pilots with between 1,001 and 2,000 flying hours the accident rate per 1,000 pilots was: 20-29 yrs, 26.8; 30-39 yrs, 16.8; 40-49 yrs, 10.7; 50-59 yrs, 7.7; 60-69 yrs, 4.8; 70 yrs and above 12.4. For pilots having more than 2,001 flying hours the rates were: 20-29 yrs, 24.9; 30-39 yrs, 14.0; 40-49 yrs, 12.1; 50-59 yrs, 9.7; 60-69 yrs, 12.8 and over 70, 8.3. When combined with recent flying experience of more than 201 hours over 6 months the figures were 20-29 yrs, 23.3; 30-39 yrs, 14.0; 40-49 yrs, 11.4; 50-59 yrs, 8.7; 60-69 yrs, 20.7.

25 The *Allman* case, op. cit. at 38.

26 Ibid at 38.

27 Ibid at 38-39.

28 Ibid at 41.

29 Ibid at 41.

considerations, “improved neurological measures of cognitive performance would need to be developed and validated”³⁰ if high risk pilots alone were to be retired at age 60.

Wilcox CJ observed the reliance in the OTA report on comparisons between the rates at ages 50 to 59 and those at ages 60 to 69. He found the arguments about safety unconvincing and noted that the conclusions appeared unaffected by data indicating that flying experience was a significant safety factor. He regarded the Golaszewski study from which these conclusions were drawn as “deeply flawed” on two levels, noting that it heavily influenced the OTA report and formed the foundation of Dr Billings’ thinking.³¹ First, the Golaszewski study did not classify the accidents by cause or pilot error and it included accidents by pilots whose medical certificates had lapsed. Second, the data did not take account of the presence of a significant statistical bias resulting from the comparison of accident rates of pilots over 60 years of age who flew only in general aviation with younger pilots who flew in both scheduled operations and general aviation. Scheduled operations are generally regarded as the safest form of aviation. The rate of general aviation accidents was 16 times higher for 100,000 flying hours than the rate of scheduled air transport accidents. Wilcox CJ observed that the standard of medical fitness required for general aviation was considerably lower than that required for scheduled flights.

Wilcox CJ found most persuasive evidence submitted by the plaintiffs, the 1993-94 “Hilton” report undertaken on behalf of the United States Federal Aviation Authority.³² The report analysed historical data to investigate the relationship between pilot age and accident rates. The study analysed the conclusions of the Golaszewski study and found them misleading.

The Hilton report was criticised by Dr Billings and Mr Golaszewski and Wilcox CJ agreed with criticisms of some aspects of the methodology.³³ However, he found that the Hilton report statistics seemed to provide the best guidance as to whether there was any link between increasing age and the frequency of accidents among that group of pilots whose operations were “most like scheduled commercial air services”. He observed that statistics showed “a decline in the accident rate for 100,000 hours flying after age 60”.³⁴

The applicants in the *Allman* case accepted that deterioration with age occurs in some people and that the proportion of people with cardiovascular diseases increases with age. But the applicants relied on evidence from Dr Zenter, former Manager, Medical and Safety Services for Australian Airlines, designated Aviation Medical Examiner and Lecturer at Monash University, and from Dr Liddell, Director of Aviation Medicine at the Civil Aviation Authority since 1988, to show that, whatever the position may have been in the past, tests are now available to detect with a high level of confidence incipient health problems that might affect pilot performance.

Dr Billings did not accept that health risks were accurately predictable. However, Wilcox CJ was “positively satisfied” that the evidence of Dr Zenter and Dr Liddell showed “that there is a better

30 Ibid at 42.

31 Ibid at 59.

32 Two other studies were also referred to, one undertaken in Portugal and one published in 1985 in the United States. In summary these studies discussed data about flight incapacities and deaths and post retirement health of pilots over a 38 year period to 1983. Of the 21 deaths and incapacities among the 436 people included in the studies, all 20 violent and unexpected deaths occurred in the under 60 age bracket. Of the twenty eight people in the over 60 group the 10 cases of those incapacitated for flight service it “resulted from degenerative situations which had already been formed before the age of 60”. The 1985 study indicated that of 225 pilots 42 were retired for medical grounds, all under 60 years of age (at 46-48).

33 For example, the criticism by Dr Billings and Mr Golaszewski that the study selected as a surrogate for airline pilots a group of pilots who were Class III medical certificate holders, a group most unlike airline pilots who must hold a Class I certificate (at 61).

34 The *Allman* case op. cit. at 62.

alternative to mandatory retirement at age 60, an alternative that need not compromise Qantas' high safety standards".³⁵ After extensive examination he accepted their evidence that a system of individual evaluation of pilots approaching their 60th birthday, including extensive psychological and medical testing and screening, could offer reliability and would not impose an excessive financial burden on the airline.

Wilcox CJ also received evidence that clinical assessment safety protections were supplemented by existing Qantas procedures that provide for individual cognitive and performance skills assessment through in-flight, on-line proficiency tests by a Check Captain every three months or so. He also noted that Qantas has established procedures by which staff are able to report, in confidence, observations of concern about the performance of colleagues and that this was likely to be a quite effective monitor in an environment where lives are involved. In relation to concerns about sudden incapacitation he referred to existing safeguards brought about through Qantas' standard pilot training in "early recognition of and reaction to pilot incapacitation".³⁶

In summary, I accept the findings by Wilcox CJ that compulsory retirement of pilots at age 60 is not necessary to ensure passenger safety, at least where the program of testing the Chief Justice recommended, and outlined above, is observed. I appreciate that the decision to apply the age restriction in terminating the contracts of employment of the complainants was made prior to the *Allman* case but I also note that nearly all the evidence examined in that decision was available at the time of the terminations.

The test of necessity and proportionality

The respondent made submissions on the basis of legislative interpretation. It argued that under the Act any one of a number of possible criteria related to the maintenance of high levels of safety can constitute an inherent requirement of the job of an airline pilot. The Act uses the words "based on" which do not, the respondent said, import a standard commensurate with "necessary" or "best alternative". The respondent submitted that all that is required to satisfy the exception under the Act is that the "reason" for the distinction is related to the inherent requirements rather than the distinction itself. Safety is an inherent requirement and so, it was argued, any distinction related to safety is acceptable. For this reason the respondent said that Wilcox CJ was wrong to have regard to alternatives to the imposition of the age criterion which do not compromise high safety standards. The respondent maintained that where there is medical evidence to support the relevance of age criterion to airline safety, such as that offered by Dr Billings, the age criterion is "based on" the need to maintain airline safety which is an inherent requirement of the job of pilot.

The Act and the non-discrimination provisions of the *Industrial Relations Act 1988* (Cth) are directed at eliminating discrimination in employment on specified grounds including age. Drawing broad generalisations about people with particular characteristics to deny employment equality is precisely one of the practices to which these laws are directed.

I cannot accept the respondent's interpretation of the Act. It would have the effect of depriving the Act of any real meaning or effect. It would permit any distinction, no matter how arbitrary or unreasonable, provided only that the distinction could be related somehow to a matter considered to be an inherent requirement of the job. The words of the Act do not require that and Parliament cannot have intended it. The Act cannot and does not support the imposition of a discriminatory criterion where an appropriate neutral criterion is available to serve the same purpose.

35 Ibid at 81.

36 Ibid at 78.

I accept that compulsory age retirement was imposed on the pilots in the belief that it was necessary for safety. I also accept that there is medical opinion that supports this view, such as that presented by Dr Billings and accepted by Wilcox CJ as genuinely held. But this is not enough. Excluding a person from employment on a prescribed ground, such as age, cannot be justified simply because the inherent requirements of the job could be satisfied by the imposition of the discriminatory rule. Consistent with the comments of the ILO Committee of Experts and the provisions and object of the Act to eliminate discrimination, the rule must also be necessary and proportionate to the aim it seeks to achieve.

A central consideration in applying the test of necessity and proportionality is whether there is an appropriate non-discriminatory alternative criterion. This is especially so in this case where the matter relates to public safety. The evidence presented to Wilcox CJ from the Hilton study and by Dr Zenter and Dr Liddell does not establish that age is an accurate predictor of risk or that there are no other effective predictors of risk. The evidence demonstrated that there exist a range of testing methods and other observational techniques that can promote safety and guard against risk. The Civil Aviation Authority and aviation medicine experts expressed full confidence in these alternatives. Evidence submitted in these complaints included a letter stating Dr Zenter's opinion that pilots should be able to continue to fly beyond the age of 60 provided they meet the appropriate physical and psychological standards ascertained in special testing.

Because of the evidence that the discriminatory age criterion is not an effective predictor of risk and because of the evidence of alternatives that are as good or better predictors, the imposition of the age restriction is neither necessary nor proportionate. The restriction therefore is not an inherent requirement of the job under the Act.

An objective test

The respondent submitted that a distinction applied by a decision maker satisfies the Act's exception of inherent requirement if the decision maker can show a genuine belief that the distinction was "based on" the inherent requirements. It argued that the exception should be determined by a subjective test, that is, whether the decision to impose the requirement was taken in light of the inherent requirements, rather than an objective test, that is, whether on the evidence the criterion imposed in fact constituted an inherent requirement.

The respondent submitted that the judgement of the Chief Pilot as to the inherent requirements of the job of a pilot ought to be respected without question. The Chief Pilot has responsibilities under the *Air Navigation Act* and the *Civil Aviation Orders* s.8.2.0 ss.5 for airline operational and safety issues. On this submission the respondent sought to defend the compulsory age requirement on the basis that the Chief Pilot genuinely believed it was necessary and in the best safety and operational interests of the respondent. On this argument it is for the Chief Pilot alone to determine whether departing from the age restriction would jeopardise safety.

The complainants replied that, despite the responsibility delegated to the Chief Pilot under the *Air Navigation Act* and despite his genuine belief that the age 60 rule was required, the restriction is still discriminatory under the Act.

I agree with the complainants' submission. The ILO Committee of Experts has said that "the adoption of impersonal standards based on forbidden grounds" constitutes discrimination.³⁷ It is justified only where the restriction or distinction imposed relates to the inherent requirements of the job objectively determined and is necessary for and proportionate with adherence to those

³⁷ International Labour Conference, op. cit., at 23.

requirements. Permitting an exception on the basis of a subjective belief would undermine the stated objective of anti-discrimination laws.

Decisions made under statutory authority – the role of the Chief Pilot

The respondent also argued a third matter, that the position of Chief Pilot is a statutory position with responsibility for safety standards and for that reason the decisions of the Chief Pilot cannot be questioned, whether the test is subjective or objective. However, the evidence made it clear that the Chief Pilot's responsibilities relating to health and safety can be discharged without recourse to the discriminatory age restriction and the respondent can continue to observe all standards necessary to minimise safety risks. The Act requires that these standards be administered in a manner that does not discriminate. The fact that the decision to impose the restriction was made by the Chief Pilot with delegated authority for general operational health and safety matters does not affect the fact that the compulsory retirement policy is unnecessary and discriminatory.

Indeed the Chief Pilot's position is directly affected by Australia's obligations under ILO 111. ILO 111 applies to all laws and practices affecting the employment relationship, including administrative practices. States Parties to the Convention are obliged to ensure that legislation is not enacted that provides for public or private discriminatory practices.³⁸ They are obliged "to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy" of equality of opportunity and treatment in employment and occupation.³⁹ There is therefore an obligation to ensure that the Chief Pilot avoids distinctions that infringe ILO 111.

The Chief Pilot has shown sensitivity in the past to whether a compulsory retirement age is appropriate. The respondent submitted that following reviews "based on the best information (medical and otherwise) available at the time" the retirement age for pilots has progressively been extended from age 45 in 1946, to age 50 in 1955, age 55 in 1964 and age 60 in 1971. However there was no evidence to suggest that any endeavour has been made since 1971 to review the age 60 retirement policy. In particular there was no evidence to suggest that the policy was reviewed following the making of the *Human Rights and Equal Opportunity Commission Regulations* in 1989 to prescribe age as a ground of discrimination under ILO 111.

This omission to review occurred despite significant developments both in Australia and internationally for the elimination of discrimination on the basis of age. In addition to the 1989 Regulations, legislation to prohibit discrimination on the basis of age was being developed or considered in all Australian States and Territories. Ansett Airlines changed its policy. According to evidence submitted to me by the complainants, although some major international airlines required retirement at the age of 60, Australian, New Zealand and Canadian Civil Aviation Authorities removed the age 60 restriction and the International Civil Aviation Organisation and aviation authorities in UK, USA and Europe were considering extending the retirement age to 63 or 65.

I consider that the role of the Chief Pilot does not assist the respondent's case. Clearly the Chief Pilot was obliged to keep the retirement policy under review, including in light of ILO 111, the Act and the regulations made under it, and to continue to adapt it as new medical evidence became available so as to reduce or eliminate any distinction based on age. There is no evidence that he did so.

38 Nielsen, HK "The concept of discrimination in ILO Convention No.111" *International and Comparative Law Quarterly* Vol 43 1994 pp 827-856 at 845, referring to the *German Work Ban Case*.

39 Art 3(c).

International treaty obligations

The respondent also raised Standard 2.1.10.1 of Annex 1 of the *Convention on International Civil Aviation* to which Australia is a contracting State.⁴⁰ The Standard provides a general restriction that pilots over 60 years should not be licensed for international air services. The Standard does not make any age provision for domestic pilots. The respondent submitted that this Standard raised operational considerations for the continued employment of the complainants. The respondent accepted that the complainants were pilots engaged only in the domestic air services of then Australian Airlines and that they would have remained attached to the domestic operations of Qantas which are arranged separately from its international operations.

The relevant international treaty does not require compulsory retirement of domestic pilots at age 60 and does not assist the respondent's case.

Discussion of recommendations

Having found the compulsory retirement of the complainants discriminatory under the Act I am required to consider what recommendations I should make.

The complainants submitted that I should recommend that they be paid compensation for the loss or damage they have suffered as a result of being compulsorily retired and that in each case this should be equal to one year's salary. They pointed out that they have renewed their medical certificates and instrument ratings on a continuing basis since their retirements and that Mr Ivanoff has continued to work in the aviation industry although at great inconvenience of location and at a considerably reduced salary.

Mr Ivanoff alone of the complainants sought a recommendation that the respondent reinstate him forthwith as a pilot to fly equivalent aircraft (or as near to equivalent aircraft as possible) to those he was flying prior to the compulsory retirement.

The respondent submitted that the Act does not make the compulsory retirement policy for pilots enforced by the respondent unlawful but merely enables the Commission to investigate and report on the policy under Part II Division 4. The respondent further submitted that I should make no recommendation as to compensation or other action to remedy or reduce the loss and damage suffered by the complainants and that in considering whether any recommendation should be made I should take into account the international aviation Convention. The respondent also submitted that it has abandoned its policy of compulsory retirement at age 60. Finally it said that reinstating and retraining any of the complainants would be "impractical".

I agree with the respondents that the Act does not make it unlawful to discriminate on the ground of age. That is quite clear. However, the Division of the Act is directed to the elimination of discrimination in employment and occupation on prescribed grounds. Indeed it provides specifically and envisages that, where an act or practice engaged in by a person is found to constitute discrimination, the Commission may recommend compensation for a person who has suffered loss or

⁴⁰ Standard 2.1.10.1 of Annex 1 is as follows:

- 2.1.10 Curtailment of privileges of pilots who have attained their 60th birthday.
- 2.1.10.1 A Contracting State, having issued pilot licences, shall not permit the holders thereof to act as pilot-in-command of an aircraft engaged in scheduled international air services or non-scheduled international air transport operations for remuneration or higher if the licence holders have attained the 60th birthday.
- 2.1.10.2 Recommendations – A Contracting State, having issued pilot licences, should not permit the holders thereof to act as co-pilot of an aircraft engaged in scheduled international air services or non-scheduled flights.

damage as a result of the act or practice and other action to remedy or reduce loss or damage suffered as a result.⁴¹ I consider it appropriate that I make recommendations in relation to these complaints.

So far as Mr Ivanoff is concerned I note that he has maintained his pilot's licence at the appropriate level and continued to fly aircraft since his compulsory retirement by the respondent. I recommend his reinstatement by the respondent provided that he can meet all the medical and other tests determined by Wilcox CJ in the *Allman* case as necessary for pilots over the age of 60.

I also consider it appropriate that I recommend compensation for all four complainants. I have had some difficulty in assessing the appropriate amounts of compensation to recommend. I am mindful of the fact that the respondent's actions were not unlawful but consider that matter more relevant in punitive jurisdictions where intention is an issue and important in determining a penalty. This is not a punitive jurisdiction. The relevant issue in this matter is compensation, not punishment. In determining compensation I have no power to award aggravated damages or punitive damages. I am required to focus on the actual loss or damage suffered by the complainants as a result of the respondent's actions rather than on the culpability or otherwise of the respondent's conduct.

I have surveyed awards of damages made in equivalent jurisdictions. I am aware that the amount claimed by the complainants for loss of earnings as a result of the discrimination exceeds that ordinarily awarded in matters of this kind. I am also aware that the complainants' salaries, in the range of \$150,000 a year, were far above average wage levels and that as a result their loss or damage has been greater than that sustained by most complainants in similar cases. As a general principle the appropriate approach to damages is to compare the position in which the complainant might have been expected to be in if the discrimination had not occurred and the situation in which he or she was placed by reason of the discrimination.⁴²

In assessing the appropriate level of compensation I must take into account costs that would have been incurred by the complainants had they continued in employment but were not incurred as a result of their retirement. These costs should be deducted from the compensation assessment. This is generally accepted in matters such as this. I received no evidence that assists me to quantify this amount. I consider it reasonable, however, to assess those costs as 10% of the gross salaries.

The other issue I must consider is how much longer the complainants would have continued to work had they not been compulsorily retired. Their original claim was for continuing compensation from the time of their retirement at a level equal to their finishing salaries together with interest. In the course of submissions the complainants reduced their claim to amounts equivalent to one year's salary. I am satisfied that all the complainants would have continued to work for that period of time had they not been compulsorily retired and so I am prepared to make my recommendations for compensation on that basis.

The complainants submitted that their annual incomes in the year prior to retirement were approximately for Mr Bone \$156,000, for Mr Craig \$150,000, for Mr Ivanoff \$151,270 and the figure for Mr Love \$171,334. Actual income received in any given year would vary according to the actual number of hours flown. It is therefore difficult to determine with certainty what their incomes would have been had the complainants continued working for a year after the date on which they were retired. I therefore propose to use the salaries for the year prior to retirement as the basis for my recommendations. I consider that the figures for the annual salaries are general and, as such, are sufficiently broad to cover any other claims of loss for example by way of superannuation and interest.

41 s.35(2).

42 See *Hall & Ors v A & A Sheiban Pty Ltd & Ors* (1989) EOC para 92-250.

In accordance with ordinary principles governing compensation for damages the complainants have an obligation to seek to mitigate their loss. Mr Ivanoff sought and obtained work as a pilot, albeit at a salary significantly less than that when he was retired. Mr Love also earned further income, although less than that earned by Mr Ivanoff. Mr Bone and Mr Craig gave evidence that they did not earn income after they were retired. They said that they could not find work but gave no evidence of this. I consider therefore that I should make allowance in my recommendations for income that the complainants could reasonably have been expected to have earned had they sought work and been prepared, as Mr Ivanoff was, to accept work wherever within reason it was offered. I am mindful that older workers generally find it difficult to obtain new employment and for this reason I will contain the amount deducted for mitigation to an amount commensurate with that earned by Mr Ivanoff. Mr Ivanoff earned \$19,193.00 in flying related work during the year after his retirement, approximately 12.5% of his pre-retirement salary. I propose to deduct that amount from the gross salary amount in the compensation to be recommended.

Notice of findings of the Commission

The Commission finds that the acts and practices complained of by the complainants, namely their compulsory retirement upon reaching 60 years of age, constitutes discrimination in employment based on age.

Reasons for findings

1. The termination of each complainant's employment as a pilot in the employ of the respondent was the result of attaining 60 years of age.
2. The practice then engaged in by the respondent of compulsory age-based retirement is a distinction or exclusion on the basis of age.
3. The exclusion has had the effect of nullifying equality of opportunity or treatment in employment for each complainant as his employment was terminated when he was nonetheless ready, willing and able to continue working as a pilot for the respondent.
4. It is not an inherent requirement of the particular job of an airline pilot that he or she be under the age of 60.

Recommendations for the prevention of the continuation of compulsory age-based retirement

To the extent that it has not already done so, the respondent should discontinue the practice of compulsorily retiring its pilots and other employees on the basis solely that they have attained the age of 60 years or any other particular age.

Recommendations for compensation

1. The respondent should pay to each complainant compensation for loss of earnings suffered by reason of the discriminatory conduct of the respondent as follows:
 - Mr Bone the sum of \$120,900.00;
 - Mr Craig the sum of \$116,250.00;
 - Mr Ivanoff the sum of \$117,235.00;
 - Mr Love the sum of \$132,785.00.
2. The respondent should make the necessary arrangements for Mr Ivanoff to undertake the Qantas "over 60" medical tests and, if these and other requirements of the Civil Aviation Authority are

satisfied, re-employ Mr Ivanoff and where necessary retrain him as a pilot to fly equivalent aircraft or aircraft as near to equivalent as possible to those he was flying prior to his compulsory retirement.

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

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

Article 1

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

Article 2

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

Article 3

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

- (a) to seek the co-operation of employers’ and workers’ organisations and other appropriate bodies in promoting the acceptance and observance of this policy;
- (b) to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy;

- (c) to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy;
- (d) to pursue the policy in respect of employment under the direct control of a national authority;
- (e) to ensure observance of the policy in the activities of vocational guidance, vocational training and placement services under the direction of a national authority;
- (f) to indicate in its annual reports on the application of the Convention the action taken in pursuance of the policy and the results secured by such action.

Article 4

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

Article 5

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

Article 6

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

Article 7

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

Article 8

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

Article 9

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

Article 10

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

Article 11

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

Article 12

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

Article 13

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

Article 14

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

Attachment B: Human Rights and Equal Opportunity Commission Regulations

Statutory Rules 1989 No. 407

Human Rights and Equal Opportunity Commission Regulations

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

Dated 21 December 1989.

BILL HAYDEN
Governor-General

By His Excellency's Command,

LIONEL BOWEN
Attorney-General

Citation

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

Commencement

2. The Regulations commence on 1 January 1990.

Interpretation

3. In these Regulations, unless the contrary intention appears:
 - “**Impairment**” means:
 - (a) total or partial loss of a bodily function; or
 - (b) the presence in the body of organisms causing disease; or
 - (c) total or partial loss of a part of the body; or
 - (d) malfunction of a part of the body; or
 - (e) malformation or disfigurement of a part of the body;
 - “**marital status**” has the same meaning as in the *Sex Discrimination Act 1984*;
 - “**the Act**” means the *Human Rights and Equal Opportunity Commission Act 1986*.

Other distinctions, exclusions or preferences that constitute discrimination

4. For the purposes of subparagraph (b)(ii) of the definition of “discrimination” in subsection 3 (1) of the Act, any distinction, exclusion or preference made:
 - (a) on the ground of:
 - (i) age; or
 - (ii) medical record; or
 - (iii) criminal record; or
 - (iv) impairment; or
 - (v) marital status; or
 - (vi) mental, intellectual or psychiatric disability; or
 - (vii) nationality; or
 - (viii) physical disability; or
 - (ix) sexual preference; or
 - (x) trade union activity; or
 - (xi) one or more of the grounds specified in subparagraphs (iii) to (x) (inclusive) which existed but which has ceased to exist; or
 - (b) on the basis of the imputation to a person of any ground specified in paragraph (a); is declared to constitute discrimination for the purposes of the Act.

Note

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