



Australian
Human Rights
Commission

TM v

Linfox Australia Pty Ltd

[2014] AusHRC 81

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TM v Linfox Australia Pty Ltd

Report into discrimination in employment
on the basis of criminal record

[2014] AusHRC 81

Australian Human Rights Commission 2014



**Australian
Human Rights
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**Australian
Human Rights
Commission**

June 2014

Senator the Hon. George Brandis QC
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

I have completed my report pursuant to section 31(b)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaint made by TM against Linfox Australia Pty Ltd (Linfox).

I have found that Linfox's acts of refusing to confirm the offer of 'conversion' of TM's employment and/or excluding him from further work with Linfox through a labour hire firm constituted an exclusion made on the basis of a criminal record. This had the effect of impairing TM's equality of opportunity or treatment in employment or occupation. This exclusion was not based on the inherent requirements of the job. I therefore recommended that Linfox pay \$11,048.00 in compensation to TM for lost earnings and entitlements and general damages for hurt, humiliation and distress. I also recommended that Linfox apologise in writing to TM.

By letter dated 26 May 2014, the Linfox National Workplace Relations Manager provided a response to my findings and recommendations. I have set out Linfox's response in Part 8 of my report.

I enclose a copy of my report.

Yours sincerely

A handwritten signature in black ink, reading "Gillian Triggs".

Gillian Triggs
President
Australian Human Rights Commission

Australian Human Rights Commission

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1 Introduction to this inquiry

1. This report sets out the findings of the Australian Human Rights Commission, and reasons for those findings, following an inquiry into a complaint of discrimination in employment on the basis of criminal record. The complaint was made to the Commission by TM against Linfox Australia Pty Ltd (Linfox).

2 Summary of findings and recommendations

2. I find that Linfox's acts of refusing to confirm the offer of 'conversion' of TM's employment, and/or to exclude him from further work with Linfox through a labour hire firm, constituted an exclusion made on the basis of a criminal record. I also find that Linfox's acts had the effect of impairing TM's equality of opportunity or treatment in employment or occupation.
3. Further, I find that Linfox's exclusion was not based on the inherent requirements of the job.
4. In light of my findings I recommend that Linfox:
 - pay financial compensation to TM in the amount of \$11,048.00 for lost earnings and entitlements and general damages for hurt, humiliation and distress; and
 - apologise, in writing, to TM.

3 Outline of complaint

5. TM made a written complaint to the Commission dated 30 July 2012. He alleges that Linfox excluded him from employment with them as a linehaul driver because of his criminal record. Linfox provided a response to the allegations, along with a copy of:
 - a Check Results Report from CRIMTRAC (the report);
 - a form entitled "Consent To Obtain Personal Information Form"; and
 - a form entitled "Personal Information".
6. Further information and documentation was requested from Linfox. They provided a 'Position Profile' for a Linehaul Driver and a document entitled 'Linfox Procedures for the provision of criminal history information by CRIMTRAC on behalf of Australian Police Services' (Linfox Procedures). Linfox was then requested to provide information and documents as to how this policy was applied to TM but declined to provide any further documents or provide the information requested.
7. On 17 December 2012, the Commission attempted without success, to resolve the complaint by conciliation.

4 Findings of fact

8. I find the following regarding the circumstances which have given rise to this complaint:

- (a) On 18 April 2011, TM was referred by OneForce, a labour hire company, to Linfox for truck driving work.
- (b) He commenced work at the Linfox/Gorgon Dampier Supply base as a linehaul driver on 26 April 2011.
- (c) In November 2011 Mr Sean Fiddes (Operations Manager – Gorgon) approached TM requesting that he convert his employment from OneForce to Linfox.
- (d) On 28 November 2011, TM signed a ‘Consent To Obtain Personal Information Form’ authorising CrimTrac Agency to get a police check and provide it to Linfox to allow it to assess his suitability for employment.
- (e) On the same date, TM also completed a ‘Personal Information’ form that seeks information about name, address, drivers licence, place of birth, permanent residential addresses over the last five years. The form also seeks information regarding “Any offence, convictions, or pecuniary penalties”.
- (f) On that form, against the following question:

Do you have any adult convictions or findings of guilt, which are OVER 10 years old (or 5 years for juvenile convictions or findings of guilt) where the sentence imposed was imprisonment?

If “Yes”, provide details:

TM ticked the ‘Yes’ box and provided the details:

“AS PER CRIMINAL HISTORY CHECK!”

- (g) In either November or December 2011, Mr Fiddes met with TM and had a discussion about his employment and his criminal record. The relevant content of that conversation is in dispute. Linfox claim that during the conversation TM gave false information about the nature of his criminal record and, in doing so, failed to provide full and accurate disclosure of his criminal convictions. Linfox claim that the details of the convictions given by TM during the conversation ‘bore no resemblance to the actual convictions’. TM disputes this.
- (h) TM claims the following in relation to the only conversation he had with Mr Fiddes regarding his criminal record:
 - (i) He told Mr Fiddes that there would be a problem with his criminal record.
 - (ii) He did not mention the detail of the convictions.
 - (iii) He does not have any grandchildren and mentioned nothing about a granddaughter, as alleged by Mr Fiddes.
 - (iv) He showed Mr Fiddes what he had written on the Personal Information form and Mr Fiddes had said it would not be a problem, as he had not lied.
 - (v) Mr Fiddes told him the details of the convictions did not concern him and that it was only one person in Melbourne who would sight the form and needed to know the results.

- (i) TM further claims that he did not write the details of the convictions on the Personal Information form because he was embarrassed to do so.
- (j) In January 2012, CrimTrac provided Linfox with a Check Results Report in relation to TM.
- (k) The report shows that on 20 December 1999 (12 years earlier), TM was convicted of two counts of indecent dealing with a child under 16 and 3 counts of sexual penetration of a child under 16. TM was sentenced to a total of 5 years imprisonment. There were no other convictions recorded.
- (l) On 6 January 2012, TM was advised by Linfox that he did not meet the Linfox selection criteria and his work with Linfox was terminated. Further, at some point after receipt of the CrimTrac report, Linfox decided not to proceed with the conversion of TM's employment from OneForce to Linfox.
- (m) Despite attempts by TM to ascertain the reason for the decision by Linfox, he was unable to do so, and was not afforded any opportunity to discuss the matter with Linfox.

5 Relevant legal framework

9. Part II, Division 4 of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act), which is comprised of sections 30-35, is concerned with the Commission's functions relating to equal opportunity in employment.
10. Section 31(b) confers on the Commission a function of inquiring into any act or practice that may constitute discrimination. Section 32(1)(b) requires the Commission to exercise this function when a complaint is made to it in writing alleging that an act or practice constitutes discrimination. Section 8(6) of the AHRC Act requires that the function of the Commission under section 31(b) be performed by the President.
11. Section 3(1) of the AHRC Act defines discrimination for the purposes of section 31(b) as:
 - (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
 - (b) any other distinction, exclusion or preference that:
 - (i) has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
 - (ii) has been declared by the regulations to constitute discrimination for the purposes of this AHRC Act;
 but does not include any distinction, exclusion or preference:
 - (c) in respect of a particular job based on the inherent requirements of the job; or
 - (d) in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed.
12. Australia has declared criminal record as a ground of discrimination for the purposes of the AHRC Act.¹

6 Assessment

6.1 Relevant questions to be considered

13. In deciding whether there has been discrimination within the terms of section 31(b) of the AHRC Act, I am required to consider the following questions:
- whether there was an act or practice within the meaning of section 30(1) of the AHRC Act;
 - whether that act or practice involved a distinction, exclusion or preference that was made on the basis of the complainant's criminal record;
 - whether that distinction, exclusion or preference had the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
 - whether that distinction, exclusion, or preference was based on the inherent requirements of the job.

6.2 Whether there is an 'act'?

14. 'Act' and 'practice' are defined at section 30(1) of the AHRC Act. 'Act' and 'practice' have their ordinary meanings. An act is a thing done.
15. I consider that, in the circumstances identified above, the refusal to confirm the offer of 'conversion' of his employment and/or the decision to exclude TM from further work with Linfox through OneForce were 'acts' within the meaning of section 30(1) of the AHRC Act.

6.3 Whether Linfox made a distinction, exclusion or preference on the basis of criminal record

16. Under the AHRC Act, to establish discrimination on the basis of criminal record, it is sufficient if a person's criminal record is 'a' reason for any distinction, exclusion or preference. It does not need to be the sole reason.²
17. As there is no direct case law to assist in the interpretation of the phrase 'on the basis of' in the AHRC Act, it is appropriate to consider how the courts have interpreted that phrase in other legislation. The phrase 'based on' is used in a similar definition of discrimination in section 9(1) of the *Racial Discrimination Act 1975* (Cth). The Federal Court has held that, in the context of the definition of discrimination, the expression 'based on' should be equated with the phrase 'by reference to' rather than the more limited 'by reason of'.³
18. There is dispute between the parties as to the basis of the exclusion of TM by Linfox. TM claims that it was on the basis of his criminal record. Linfox claim that it was on the basis of TM not providing truthful disclosure of his criminal convictions.

19. There is also a dispute between the parties as to the accuracy of TM's disclosure of his criminal record convictions during a conversation with Mr Fiddes, the Operations Manager. It appears from the material before me that TM did not mislead Linfox as to his criminal history. TM signed the 'Consent to Obtain Personal Information' form authorising CRIMTRAC to provide his police check to Linfox. TM also ticked 'yes' on the Personal Information form, in response to the question relating to his criminal history. While he did not set out the details of the convictions on that form, he did indicate that they would be disclosed in his criminal history check.
20. In these circumstances, and in light of the fact that it was shortly after Linfox's receipt of his CRIMTRAC report, that TM's work with Linfox was terminated, I find that the exclusion of TM was made by reference to his criminal record and therefore, on the basis of his criminal record.

6.4 Did that exclusion have the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation?

21. The AHRC Act was 'introduced to be the vehicle by which Australia's obligations under the ILO 111 Convention are implemented.'⁴ For this reason, it is appropriate to construe section 3(1) of the AHRC Act in accordance with the construction given in international law to Article 1 of the ILO 111 Convention.⁵
22. Further, the Governing Body of the International Labour Organisation has created a committee known as the Committee of Experts on the Application of Conventions and Recommendations. It is orthodox to rely upon the expressions of opinion of the Committee for the purposes of interpreting the ILO 111 Convention.⁶
23. Article 1(3) of the ILO 111 specifies that the terms 'employment' and 'occupation' include access to employment and to particular occupations, and terms and conditions of employment.
24. Linfox denies that its exclusion constitutes discrimination in employment. Linfox submits that its decision did not impair TM's equality of opportunity in employment or occupation because he was not an employee.
25. As outlined above, TM was providing services to Linfox for a period of 7 months as a linehaul driver when he was approached by Linfox and offered to have his position converted to direct employment by Linfox. On 6 January 2012, on receipt of TM's criminal record, Linfox advised TM he was not suitable for the position and it was made clear to him that his services were no longer required. This meant TM was unemployed from that date.
26. I therefore find that the refusal to confirm the offer of 'conversion' of his employment, and/or the decision to exclude him from further work with Linfox through OneForce, were acts by Linfox that constituted an exclusion or preference that had the effect of nullifying or impairing his equality of opportunity in employment. Both amounted to a denial by Linfox of access to employment by Linfox with the effect of impairing equality of opportunity of treatment in employment or occupation within the meaning of the definition of 'discrimination' in section 3 of the AHRC Act.

6.5 Whether that exclusion was based on the inherent requirements of TM's job as a Linehaul Driver

27. Section 3(1)(c) of the AHRC Act provides that discrimination 'does not include any distinction, exclusion or preference, in respect of a particular job, that is based on the inherent requirements of the job'.
28. Section 3(1)(c) is an 'exception' to the prohibition against discrimination. It should therefore be interpreted strictly, so as not to result in undue limitation of the protection conferred by the legislation.⁷
29. Linfox submits that its refusal to confirm the offer of conversion of TM's employment was based on the inherent requirements of TM's job of linehaul driver. Linfox also submits that the inherent requirements of TM's job of linehaul driver include integrity and trust. And that as TM did not provide truthful disclosure of his criminal convictions he was not offered the position.

(a) Identifying the 'inherent requirements'

30. Appropriate identification of the inherent requirements of the job is a pre-condition to proving that the complainant is unable to perform those inherent requirements.
31. An 'inherent requirement' is something that is 'essential to the position'⁸ and not 'peripheral'.⁹ It is an 'essential feature' or 'defining characteristic'.¹⁰
32. Further, the inherent requirements must be in respect of 'a particular job'. The term 'a particular job' in Article 1(2) of the ILO 111 Convention has been construed by reference to the preparatory work and the text of the Convention to mean 'a specific and definable job, function or task' and its 'inherent requirements' are those required by the characteristics of the particular job.¹¹
33. Linfox state that the Position Summary, in the Position Profile, for the Linehaul Driver details the inherent requirements of the role. Linfox claim they are underpinned by and incorporate the Key Behaviours, which are spelt out in the Position Profile. It is the position of Linfox that the inherent requirements and the Key Behaviours are inextricably entwined.
34. I accept that the 'Position Summary' does set out the inherent requirements of the position. These are, in effect:
- The safe and efficient transportation of goods;
 - Daily maintenance checks of vehicles and equipment;
 - Legible and proper completion of documentation; and
 - Execution of work according to Linfox or client instructions and procedures.
35. I also accept that 'Integrity and Trust', a Key Behaviour listed in the Position Profile, is an inherent requirement of the job. It is accepted that all contracts of employment in Australia contain an implied term of mutual trust and confidence.¹²
36. However, the fact that these requirements appear in the documents recording TM's position description is not sufficient to establish that they are 'inherent requirements' of his particular job. In *Qantas Airways v Christie*,¹³ Brennan J considered that the answer to the question whether a requirement is 'inherent' in a position must be answered with 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.¹⁴

37. In the same case, Gaudron J stated that an employer could not stipulate 'qualifications or skills which are disproportionately high when related to the work to be done.'¹⁵
38. The level of trust and confidence that is required as part of the inherent requirements of the position will vary depending on the nature of the employment. The level of trust and confidence that is an inherent requirement for a linehaul driver is unlikely to be the same as for a person who has full access to financial and personnel records.

(b) Was the distinction, exclusion or preference 'based on' the identified inherent requirements of the job?

39. In the context of the exception to discrimination in section 3 of the AHRC Act, the phrase 'based on', requires more than a 'logical link' between the inherent requirements of the job and the distinction, exclusion or preference. Instead, I must be satisfied that there is a 'tight' or 'close' connection between Linfox's exclusion of TM and the inherent requirements of the job that he was employed to do.¹⁶
40. In *Commonwealth v Bradley*,¹⁷ Black CJ observed that to interpret the expression 'based on' as requiring only a logical link would defeat the Act's object of promoting equality of opportunity in employment by, in effect, permitting the assessment of a person's suitability for a particular job on grounds other than their individual merit.¹⁸
41. The object of the provisions of the AHRC Act with which I am concerned is to prevent people from being stereotyped; that is, judged other than in accordance with their individual merit. The decision of the Anti-Discrimination Tribunal in *Wall v Northern Territory Police*,¹⁹ considering the application of legislation prohibiting discrimination on the basis of 'irrelevant criminal record', is instructive in this regard. In that case, the Tribunal found that the respondent had not demonstrated a 'tight correlation' between the purported inherent integrity requirement and the complainant's spent criminal record for an offence of theft. The Tribunal commented that it was 'not possible to adequately assess the integrity and honesty, or lack thereof, of a candidate without considering a whole range of factors and characteristics, [such as merit, experience, personal circumstances, references etc]... – not just criminal history (spent or otherwise)'.
42. As set out above, the content of the conversation between TM and Mr Fiddes regarding his criminal record is in dispute. Linfox allege that TM failed to provide full and accurate disclosure of his criminal record to Mr Fiddes during this conversation. If the conversation occurred as Linfox alleges, it was in the context of TM having authorised CrimTrac to provide his police check to Linfox, therefore intending that the details of his criminal record would become known to Linfox. TM had also clearly stated on the Personal Information form, that he did have a criminal record and advised Linfox to refer to his criminal history check for details.
43. Although the Personal Information Form was marked 'Staff-In-Confidence (when completed)', TM has stated that he was uncomfortable being required to spell out details of the convictions on a form which was being handed to the Operations Manager of the site. There is no evidence to suggest that Mr Fiddes was appointed by the Authorised Officer pursuant to clause 4 of the Linfox Procedures and was therefore authorised to handle the Criminal History Information. Nor was there evidence to suggest that he has signed a Deed of Confidentiality pursuant to clause 8 of the Linfox Procedure. I accept TM's explanation as to why he didn't provide full details of his criminal history on the Personal Information form.

44. In my view, any failure by TM to provide full disclosure to Mr Fiddes during the conversation must be balanced against TM's willingness to provide full disclosure of his criminal history to Linfox. In these circumstances, I do not consider that any failure to provide full disclosure to Mr Fiddes means that TM is unable to comply with the inherent requirement of 'integrity and trust'. Moreover, TM had been working on the site for almost 9 months with nothing to suggest that he could not comply with the inherent requirements of integrity and trust.
45. Turning finally to TM's criminal record, I note that it is Linfox's submission that TM could not perform the inherent requirements of the job because of his failure to accurately disclose his criminal history rather than because of the criminal history itself. TM's offences occurred 12 years ago. He has had no convictions recorded since that time and no other offences. Whilst the offences raise issues of integrity and trust there is not a sufficiently close connection between the nature of the offences and the integrity and trust required by a truck driver which focuses on the safe and efficient transportation of goods and maintenance of vehicles.
46. It appears that Linfox did not seek to explore with TM the precise details of his criminal record. Nor is it apparent that it gave him the opportunity to put forward arguments based on his personal or other circumstances in support of his being able to fulfil the inherent requirements of the job which he had by then been doing for nine months.
47. Further, although requested to do so, Linfox have declined to provide any documents indicating how they applied their own procedures regarding assessment of criminal history information.
48. I conclude that Linfox has not demonstrated a sufficiently tight and close connection between the inherent requirements of the job being undertaken by TM and its decision to refuse the offer of conversion of employment and to terminate the arrangements whereby TM undertook that job through OneForce. I therefore find that Linfox's exclusion was not based on the inherent requirements of the job.
49. For the reasons set out above, I find that Linfox's act of refusing to confirm an offer of 'conversion' of TM's employment, from indirect through OneForce to direct as an employee, and/or deciding to exclude him from further work with Linfox through OneForce, to be 'discrimination' on the basis of criminal record.

7 Findings and recommendations

7.1 Power to make recommendations

50. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent constitutes discrimination; the Commission is required to serve notice on the respondent setting out its findings and reasons for those findings.²⁰ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.²¹
51. The Commission may also recommend:
- the payment of compensation to, or in respect of, a person who has suffered loss or damage; and
 - the taking of other action to remedy or reduce the loss or damage suffered by a person.²²

7.2 Consideration of compensation

52. I am satisfied that TM suffered loss and damage and should be compensated. I consider that compensation in the sum of \$11,048.00 is appropriate. This arises from the following:

Loss of income	2 weeks @ \$1800	3,600.00
	12 weeks @ \$454	5,448.00
Hurt and Humiliation		2,000.00
		\$11,048.00

53. In assessing the sum recommended, I have taken into account the matters discussed below.

54. In considering the assessment of a recommendation for compensation in cases of this type, the Federal Court has indicated that tort principles for the assessment of damages should be applied.²³

55. I am of the view that this is the appropriate approach to take to the present matter. For this reason, so far as is possible in the case of a recommendation for compensation, the object should be to place the injured party in the same position as if the wrong had not occurred.

(a) Loss of income

56. TM has informed the Commission that he was unemployed from 6 January 2012 to 22 January 2012 and as such suffered a loss of income for that period. TM has provided material indicating he was paid \$1800 per week as a linehaul driver at Linfox. I therefore consider that the recommendation for compensation should include an amount of \$3,600 for loss of income.

57. TM has also informed the Commission that he was able to find alternate employment on 23 January 2012. The material provided by TM indicated that the net income from the new job was approximately \$454.00 less than the rate with Linfox. I am satisfied that TM suffered a loss of earnings of \$454.00 per week. TM submits that this is ongoing.

58. There is however, no information before me to suggest that TM will be forever excluded from obtaining a job equivalent to that he performed at Linfox.

59. I therefore recommend that Linfox pay \$5448.00 in compensation for TM's loss of earnings for the 3 month period following its exclusion of TM from his work with Linfox.

(b) Hurt, humiliation and distress

60. Compensation for TM's hurt, humiliation and distress would, in tort law, be characterised as 'non-economic loss'. There is no obvious monetary equivalent for such loss and courts therefore strive to achieve fair rather than full or perfect compensation.²⁴

61. I am satisfied that TM suffered hurt, humiliation and distress as a result of being discriminated against on the basis of his criminal record. I note that he worked for Linfox for a period of 9 months and found an alternative engagement quickly. I therefore consider a modest award of monetary compensation for humiliation and stress in the amount of \$2,000 is appropriate.

7.3 Apology

62. TM has also sought an apology from Linfox and, in the circumstances, I find that the provision of a written apology would be an appropriate remedy. Apologies are important remedies for discrimination. They, at least to some extent, alleviate the suffering of those who have been wronged. Given the nature of the breaches I have found in this case, I recommend that that apology be made in writing and by the Chief Executive Officer on behalf of Linfox.

8 Linfox's response to my findings and recommendations

63. On 12 May 2014, I provided a notice to Linfox under section 35(2)(a) of the AHRC Act setting out my findings and recommendations in relation to this complaint.

64. By letter dated 26 May 2014, Darren Jones, the Linfox National Workplace Relations Manager responded to my findings and recommendation:

In relation to your correspondence dated 12 May 2014 we disagree with the findings and recommendations that you have made.

TM was not offered employment on the basis of not providing full and accurate disclosure of his criminal convictions. Furthermore and during the initial stages of the conversion process TM wilfully attempted to mislead Linfox management with respect to those criminal convictions. One of Linfox's fundamental values is Integrity which requires honest and ethical dealings from all who interact with its business.

Trust and confidence goes to the heart of any employment relationship, hence the reason for not offering TM employment with Linfox.

For the reasons outlined above Linfox does not intend to make any payment of compensation to TM, either in the recommended sum of \$11,048.00 or otherwise. Additionally no apology from Linfox to TM will be forthcoming.

65. I report accordingly to the Attorney-General.



Gillian Triggs
President
Australian Human Rights Commission

June 2014

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- 1 *Australian Human Rights Commission Regulations 1989* (Cth), reg 4(a)(iii).
 - 2 *Kong v Australia Post AHRC Act Report (1997)*; *Dr Copeman v Yerrigan Health Centre AHRC Act Report (2007)*.
See: <http://hreoc.gov.au/legal/humanrightsreports/index.html> (viewed 7 March 2012).
 - 3 *Macedonian Teachers Association of Victoria Inc v Human Rights & Equal Opportunity Commission* (1998) 91 FCR 8 at 29-30.
This construction of s 9(1) of the Racial Discrimination Act was upheld on appeal: *State of Victoria v Macedonian Teachers Association of Victoria Inc* (1999) 91 FCR 47 at 5, 8.
 - 4 *Commonwealth v Bradley* (1999) 95 FCR 218, 235 [35] (Black CJ).
 - 5 *Commonwealth v Hamilton* (2000) 108 FCR 378, 385 [31] and following.
 - 6 *Commonwealth v Hamilton* (2000) 108 FCR 378, 387 [36].
 - 7 *X v Commonwealth* (1999) 200 CLR 177, 222-223, [146] (Kirby J); *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 333, [152.4] and footnotes 168-169 (Kirby J). This approach has been applied to Part II, Division 4 of the SDA in *Gardner v All Australian Netball Association Limited* (2003) 197 ALR 28, [19], [23]-[24] (Raphael FM); *Ferneley v Boxing Authority of New South Wales* (2001) 191 ALR 739, [89] (Wilcox J).
 - 8 *Qantas Airways v Christie* (1998) 193 CLR 280, 294 [34] (Gaudron J).
 - 9 *X v The Commonwealth* (1999) 200 CLR 177, 208 [102] (Gummow and Hayne JJ).
 - 10 *X v Commonwealth* (1999) 200 CLR 177, [42] (McHugh J).
 - 11 International Labour Organisation, *General Survey: Equality in Employment and Occupation*, (1988), [126]. See also *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, [72] (McHugh J).
 - 12 *Commonwealth Bank of Australia v Barker* [2013] FCAFC 83.
 - 13 *Qantas Airways v Christie* (1998) 193 CLR 280.
 - 14 *Qantas Airways v Christie* (1998) 193 CLR 280, 284 [1].
 - 15 *Qantas Airways v Christie* (1998) 193 CLR 280, 294 [34].
 - 16 *Commonwealth v Bradley* (1999) 95 FCR 218, *Commonwealth v Human Rights and Equal Opportunity Commission and Others* (1998) 158 ALR 468, 482.
 - 17 (1999) 95 FCR 218.
 - 18 (1999) 95 FCR 218, 235 [36].
 - 19 [2005] Northern Territory Anti-Discrimination Commission (Unreported, Commissioner Fitzgerald, 22 April 2005).
 - 20 *Australian Human Rights Commission Act 1986* (Cth), s 35(2)(a).
 - 21 *Australian Human Rights Commission Act 1986* (Cth), s 35(2)(b).
 - 22 *Australian Human Rights Commission Act 1986* (Cth), s 35(2)(c).
 - 23 *Peacock v Commonwealth* (2000) 104 FCR 464, 483 (Wilcox J).
 - 24 *Sharman v Evans* (1977) 138 CLR 563, 589 (Gibbs and Stephen JJ).

Further Information

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