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Our ref. 03134965

10 February 2004

Mr Paul Belin
Assistant Commissioner
DDA Inquiry
Productivity Commission
Level 28
35 Collins Street
Melbourne Victoria 3000

Dear Mr Belin

Productivity Commission's inquiry into the *Disability Discrimination Act 1992*

1. We refer to your letter dated 28 November 2003.

BACKGROUND

2. The Productivity Commission ('the Commission') is currently undertaking an inquiry ('the Inquiry') into the *Disability Discrimination Act 1992* ('DDA'). The Commission has produced a draft report on the Inquiry, 'Review of the *Disability Discrimination Act 1992*' (October 2003) ('the Draft Report'). You have sought our advice in relation to four specific issues that have arisen in this context.

Allowing disability organisations to initiate complaints

3. Under s.46P(1) of the *Human Rights and Equal Opportunity Commission Act 1986* ('HREOC Act'), a written complaint may be lodged with the Human Rights and Equal Opportunity Commission ('HREOC') alleging unlawful discrimination. Such a complaint may be lodged by, *inter alia*, 'a person aggrieved by the alleged unlawful discrimination' (s.46P(2)(a)). The HREOC Act also allows for 'representative complaints' to be made on behalf of one or more persons aggrieved by alleged unlawful discrimination.

4. You say that, in a submission to the Inquiry, HREOC noted that a 'representative complaint' can be made to HREOC on behalf of a class of aggrieved persons without the need to identify particular individuals. Your letter goes on to say that

> if the complaint cannot be conciliated, the HREOC Act only allows an 'affected person' to apply to the Federal Courts (that is, the Federal Court and the Federal Magistrates Service) for a hearing. An 'affected person' is defined as a person on whose behalf the complaint was lodged. This appears to prevent disability organisations pursuing a representative complaint to the Federal

> Courts, except to the extent that a related individual complainant can (and is willing to) be identified.

5. The Draft Report favours allowing disability organisations to initiate complaints in their own right.

6. By 'disability organisations', we understand you to mean organisations, whether incorporated or not, whose aims include the provision of assistance to, or the protection and promotion of the rights of, or the representation of, persons with disabilities.

DDA standards and State laws

7. You are interested in whether a standard made under s.31 of the DDA ('a DDA standard') would displace State legislation that imposes greater obligations on service providers than would be required under the standard (for example, a State law that required bus operators to have more spaces for wheelchairs than would be required under the DDA standard). You say HREOC has recommended that the DDA be amended to clarify that DDA standards displace the general provisions of State and Territory anti-discrimination legislation, the goal being to create 'a nationally uniform approach to disability standards'.

Enforcing conciliated agreements

8. You say that many complaints brought under the HREOC Act result in conciliation agreements setting out the parties' agreed course of action. We have not been provided with any information as to the nature, terms or subject-matter of the conciliation agreements to which you refer. However, the Draft Report contains the following (at p.65) in relation such agreements:

> Conciliated outcomes can include agreements to apologise, rectify an ongoing barrier or problem or (more rarely) pay compensation. Conciliation outcomes can take the form of a contract between the parties and become enforceable like other contracts, but the parties would need to take further legal action to address any breaches (for example, if one party did not subsequently do what they had agreed to do in conciliation).

9. We understand some Inquiry participants argued that there is a lack of appropriate enforcement mechanisms in respect of such conciliation agreements. Your understanding is that, if conciliation agreements are breached, they can be enforced like other contracts. However, you suggest that 'this might require that a Federal Court rehear the discrimination case, rather than focusing on the breach'.

10. You say that, at the State and Territory level, anti-discrimination cases can be heard by tribunals, and conciliation agreements can be made enforceable as if they were orders of the tribunal itself. However, it appears to you that the separation of administrative and judicial powers under the Constitution rules out this approach at the federal level.

11. You suggest that:

> an alternative approach would be to allow applicants to request a federal court to order that a conciliated agreement be enforced. Under this approach, the court would be asked to enforce a voluntary agreement that the parties have willingly entered into, not to ratify a determination made by a non-judicial body. The applicant would have to demonstrate only that they were a party to a valid agreement, rather than reopen the entire complaint.

Other issues

12. This advice deals with your questions on the above issues. As discussed with you, we will deal with your questions in relation to harassment and vilification of people with disabilities in a separate advice, which will be provided to you shortly.

QUESTIONS AND SHORT ANSWERS

Q1. What is the current legal ability for disability organisations to initiate discrimination complaints in their own right, both to HREOC and the Federal Courts?

A. A disability organisation can lodge a complaint of unlawful discrimination with HREOC on behalf of one or more persons aggrieved by the alleged discrimination. A disability organisation can lodge such a complaint on its own behalf if the organisation is itself a 'person aggrieved' by the alleged unlawful discrimination. It may be that, in some cases, particular disability organisations would be 'persons aggrieved', but it is unlikely that all disability organisations will meet that description in all cases.

An application to the Federal Court or the Federal Magistrates Court under s.46PO(1) of the HREOC Act can only be made by such an 'aggrieved person', and cannot be made by a disability organisation that is not itself an 'aggrieved person'.

A disability organisation can lodge a representative complaint with HREOC on behalf of persons aggrieved by an instance of alleged unlawful discrimination. Under the HREOC Act, it is possible for a representative complaint to be made without any of the persons aggrieved by the alleged unlawful discrimination being identified by name.

A representative proceeding relating to an allegation of unlawful discrimination can be brought in the Federal Court by persons who are aggrieved by the alleged unlawful discrimination. In such a proceeding, at least one of the aggrieved persons would need to be identified by name, but other persons on whose behalf the action is brought would not need to be so identified.

Q2. If, as appears to be the case, this ability is constrained, what amendments would be required to the HREOC Act (and any other Acts) to allow disability organisations to initiate complaints and pursue them in the Federal Courts?

A. It would be possible to amend the HREOC Act to enable disability organisations to lodge complaints in respect of alleged unlawful discrimination otherwise than on behalf of any particular 'aggrieved person', and to enable HREOC to inquire into and conciliate such complaints. In our view, there would also be scope to amend the HREOC Act and the federal courts legislation to enable disability organisations to pursue such actions in the Federal Court and the Federal Magistrates Court.

Q3. [In s.13 of the DDA] what does 'capable of operating concurrently' with the DDA mean?

A. A State or Territory anti-discrimination law will not be 'capable of operating concurrently' with the DDA, for the purposes of s.13, if it is impossible to obey both the State/Territory law and a provision of the DDA or a DDA standard. Where it is possible to obey both a State/Territory law and the DDA, the law may be capable of concurrent operation. However, if the State/Territory law would alter, impair or negate the operation of the DDA or a DDA standard, the law will not be one that is capable of concurrent operation.

Q4. Would a State or Territory anti-discrimination law that imposed a more onerous requirement than a DDA standard be deemed to be capable of operating concurrently with the DDA?

A. While the matter is not entirely free from doubt, we think that, if a State anti-discrimination law operates on the same matter as a DDA standard, and purports to impose a more onerous requirement than the DDA standard in respect of that matter, the State standard would probably be held not to be capable of operating concurrently with the DDA.

Q5. What if any amendments would be required to the DDA to ensure that DDA standards displace State and Territory laws that impose more onerous requirements?

A. If the Commonwealth's policy is that a DDA standard dealing with specific conduct is to displace a State law that operates on that same conduct and imposes more onerous requirements, there would be merit in amending s.13 of the DDA to make this abundantly clear.

Q6. Are there other legislative or constitutional constraints that would prevent the achievement of this goal?

A. No. However, the limits on the Commonwealth's constitutional power in the area of disability discrimination may be an obstacle to the achievement of complete uniformity between Commonwealth and State standards.

Q7. What are the constitutional constraints on the federal courts enforcing conciliated agreements made under HREOC's auspices?

A. The Constitution would not preclude the conferral of jurisdiction on a federal court to hear and determine matters relating to the enforcement of agreements made in the course of the conciliation of a complaint under the HREOC Act. However, legislation purporting to give conciliation agreements the status and effect of orders of a federal court is likely to infringe the principle of the separation of judicial power, and on that basis be invalid.

Q8. Would it be possible for the federal courts to register conciliation agreements and enforce them as orders of that court?

A. Commonwealth legislation simply providing that, upon their registration with a federal court, conciliation agreements automatically take effect as an order of that court would be invalid. It might be possible to devise a valid legislative scheme under which such agreements may be enforced as orders of a federal court, provided the court retains sufficient control over the process. However, we would not recommend this approach in view of the difficulties involved, and in view of the availability of the option for enforceable contracts discussed under question 9.

Q9. Alternatively, would it be possible for the federal courts to order that conciliated agreements (as voluntary agreements) be enforced without rehearing the discrimination case?

A. At present, the original jurisdiction of the federal courts would not extend to the enforcement of a conciliation agreement of the kind in question. However, in some instances, a party to a conciliation agreement that constitutes a common law contract may be able to obtain a remedy in a State or Territory court of competent jurisdiction in respect of a breach of the agreement. Such an action for enforcement of a conciliation agreement would not require consideration of the discrimination complaint that gave rise to the making of the agreement.

The Commonwealth could legislate to give agreements arising from the conciliation of complaints under the HREOC Act the force of a legally binding agreement, and to confer jurisdiction on a federal court to enforce such agreements. Proceedings for enforcement of such an agreement would not need to involve consideration of the particulars of the discrimination complaint.

REASONS

Question 1

Representative complaints under the HREOC Act

13. As indicated above, by virtue of s.46P(2)(a) of the HREOC Act a complaint alleging unlawful discrimination may be lodged with HREOC by 'a person aggrieved by the alleged unlawful discrimination'. In this context, 'unlawful discrimination' includes any acts, practices or omissions that are unlawful under Part 2 of the DDA (see paragraph (a) of the definition of 'unlawful discrimination' in s.3(1) of the HREOC Act). We discuss the concept of 'aggrieved person' in paragraph 25 and following.

14. A complaint alleging unlawful discrimination may also be lodged with HREOC 'by a person or trade union on behalf of one or more other persons aggrieved by the alleged unlawful discrimination', by virtue of s.46P(2)(c) of the HREOC Act. In Commonwealth Acts, the word 'person' includes a body corporate (see s.22(1)(a) of the *Acts Interpretation Act 1901*). A disability organisation that is incorporated is thus a 'person' capable of lodging a complaint with HREOC, on behalf of one or more other 'aggrieved persons', by virtue of s.46P(2)(c). Where a disability organisation is not incorporated, that organisation is not a legal person capable of lodging a complaint with HREOC. However, s.46P(2)(c) would enable an individual who is employed by or a member of such an organisation to lodge a complaint with HREOC on behalf of one or more other persons who are 'aggrieved persons'.

15. A representative complaint may be lodged under s.46P in the circumstances specified in s.46PB(1). The term 'representative complaint' is defined in s.3(1) of the HREOC Act to mean 'a complaint lodged on behalf of at least one person who is not a complainant'. The definition of 'complainant', also set out in s.3(1), is as follows:

> ***complainant***, in relation to a complaint, means a person who lodged the complaint, whether on the person's own behalf or on behalf of another person or persons.

A 'representative complaint' could thus be one that is lodged with HREOC by an incorporated disability organisation, or by an employee or member of an unincorporated disability organisation, on behalf of persons who are aggrieved by the alleged unlawful discrimination.

16. The term 'class member', in relation to a representative complaint, means (so far as is presently relevant) any of the persons on whose behalf the complaint was lodged (see the definition in s.3(1) of the HREOC Act). A representative complaint must, *inter alia*, 'describe or otherwise identify the class members' (s.46PB(2)(a)). However, in describing or otherwise identifying the class members in relation to a representative complaint, for the purposes of s.46PB(2)(a), it is not necessary to name them (s.46PB(3)).

17. The current position under the HREOC Act, then, is that a disability organisation can lodge a representative complaint on behalf of one or more persons aggrieved by an alleged act of unlawful discrimination. Where a representative complaint alleging unlawful discrimination is lodged on behalf of a number of persons aggrieved by an instance of alleged unlawful discrimination, the complaint may be made without any of those persons being identified by name.

Discrimination-related proceedings in the federal courts

18. A complaint made under s.46P of the HREOC Act must be referred to the President of HREOC (s.46PD of the HREOC Act). Upon referral of a complaint to the President under s.46PD, the President must inquire into the complaint and attempt to conciliate it (s.46PF). The President may terminate a complaint on the grounds set out in, *inter alia*, s.46PH, including on the ground that he or she is satisfied that that there is no reasonable prospect of the matter being settled by conciliation (s.46PH(1)(i)).

19. Subsection 46PO(1) of the HREOC Act relevantly provides that, if a complaint has been terminated by the President of HREOC under s.46PH:

> any person who was an affected person in relation to the complaint may make an application to the Federal Court or the Federal Magistrates Court, alleging unlawful discrimination by one or more of the respondents to the terminated complaint.

20. An 'affected person', in relation to a complaint of unlawful discrimination lodged under Division 1 of Part IIB of the HREOC Act, is 'a person on whose behalf the complaint was lodged' (see the definitions of 'affected person' and 'complaint' in s.3(1) of that Act). As already noted, a complaint alleging unlawful discrimination may be lodged under the HREOC Act by or on behalf of 'a person aggrieved by' the alleged unlawful discrimination. Thus, an application of the kind referred to in s.46PO(1) of the HREOC Act can only be made by such an 'aggrieved person', and cannot be made by a disability organisation that is not itself an 'aggrieved person'.

Federal Court of Australia

21. Part IVA of the *Federal Court of Australia Act 1976* ('Federal Court Act') enables 'representative proceedings' to be commenced where the prerequisites set out in s.33C(1) of that Act are met. Essentially, a 'representative proceeding' under the Federal Court Act is a proceeding of the kind commonly known as a 'class action'. The basic prerequisites to the commencement of such a proceeding are that 7 or more persons have claims against the same person in respect of the same or similar circumstances, and the claims give rise to a substantial common issue of law or fact.

22. In a case falling within s.33C(1) of the Federal Court Act, a person who has a sufficient interest to commence a proceeding on his or her own behalf against another person ('a respondent') has standing to bring a representative proceeding against the respondent on behalf of other persons ('group members') who have the

same or similar claims against the respondent (s.33D(1) of the Federal Court Act). An application commencing a representative proceeding must describe or otherwise identify the group members to whom the proceeding relates, but does not have to name the group members (s.33H). For a representative proceeding brought pursuant to 46PO(1) of the HREOC Act to be commenced in the Federal Court, then, at least one 'person aggrieved' by an incidence of alleged unlawful discrimination will need to be identified by name, but the other group members will not need to be so identified.

Federal Magistrates Court

23. As noted in paragraph 19 above, a proceeding relating to an allegation of unlawful discrimination may be brought in the Federal Magistrates Court by a person aggrieved by the alleged unlawful discrimination (s.46PO(1) of the HREOC Act). As already indicated, such a proceeding cannot be commenced by a disability organisation unless the organisation is a 'person aggrieved' by the discrimination.

24. The *Federal Magistrates Act 1999* does not enable representative proceedings to be brought in the Federal Magistrates Court.

Can a disability organisation be an 'aggrieved person'?

25. The HREOC Act does not define the term 'person aggrieved'. However, this is a very common statutory formula for delineating the class of persons who have standing to utilise a procedure established by statute. Ultimately, the meaning of the term must be determined in light of the particular statutory context in which it appears (see the observations of Gummow J in *Australian Institute of Marine and Power Engineers v Secretary, Department of Transport* (1986) 71 ALR 73 at 79). However, the case law on the meaning of 'person aggrieved' (and similar formulations) in various regulatory contexts, as well as the common law tests of standing, provide useful guidance on the scope of that term as it is used in the HREOC Act.

26. The case law indicates that the words 'person aggrieved' are of wide import, but do not encompass persons who are mere busybodies interfering in things which do not concern them. They do, however, encompass persons who can point to some prejudicial effect to their interests from a particular act or decision.

27. At common law, the general rule as to standing to bring proceedings for a declaration or an injunction in respect of a public right is that 'an ordinary member of the public, who has no interest other than that which any member of the public has in upholding the law, has no standing to sue to prevent the violation of a public right or to enforce the performance of a public duty' (*Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 at 526 per Gibbs J). However, a person who has a 'special interest' in the subject matter of the action over and above that of other members of the public may have standing (see, e.g., *Australian Conservation Foundation* at 528 per Gibbs J; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27;

Australian Conservation Foundation v Minister for Resources (1990) 19 ALD 70; *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 155 ALR 684). The cases on the common law tests of standing have emphasised that a belief that the law should be observed, or 'a mere intellectual or emotional concern' in the subject matter of the action is not sufficient (see *Australian Conservation Foundation* at 530-531 per Gibbs J).

28. The term 'a person who is aggrieved' is also used as the test for standing in the *Administrative Decisions (Judicial Review) Act 1977*. There is a growing body of case law in relation to this test, which follows the common law position. It is clear that this is not an open test for standing; that is, there are some limitations. Public interest groups, similar to 'disability organisations', have obtained standing under this test in some cases (*Ogle v Strickland* (1987) 13 FCR 306, 71 ALR 41; *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492, 127 ALR 617), though not in others (*Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health* (1995) 56 FCR 501, 128 ALR 238).

29. It will be apparent from the above that it is not possible to advise in the abstract as to whether or not disability organisations will be 'persons aggrieved' for the purposes of s.46P(2)(a) of the HREOC Act. In a given case, a particular disability organisation may have the kind of special interest in respect of the discriminatory conduct in question to give it the status of a 'person aggrieved' by that conduct, but this will depend on all the circumstances in the particular case.

30. We think it can confidently be said, however, that there are likely to be cases in which disability organisations would not have such an interest, and would therefore not be able to lodge discrimination complaints under the HREOC Act, or bring related proceedings in the Federal Court or the Federal Magistrates Court, on their own behalf. In this context, we note that special provision is made in s.46P of the HREOC Act for complaints to be lodged by persons, including trade unions, on behalf of one or more persons aggrieved. This might be might be taken, we think, to suggest that the term 'person aggrieved' in s.46P should be given a more limited construction than it would have in other statutory contexts.

Possible legislative amendments

31. As a matter of law, we do not think there is anything to preclude amendment of the HREOC Act to allow disability organisations generally to lodge complaints alleging unlawful discrimination (that is, other than on behalf of any person who is aggrieved by the discrimination complained of). Equally, there is no legal reason why HREOC should not be able to inquire into and conciliate a complaint made on that basis.

32. Conferral of a right on the part of disability organisations to lodge complaints in this manner could be achieved by means of relatively simple amendments to the HREOC Act. Essentially, it would involve the amendment of that Act to include an extended standing provision for disability organisations that meet specified criteria. A provision such as s.487(3) of the *Environment Protection and Biodiversity*

Conservation Act 1999 (copy attached), which effectively confers standing on conservation organisations to bring certain proceedings in respect of decisions and conduct under that Act, might provide a useful model for this purpose. Such complaints would still need to be in relation to an allegation of a specific act of unlawful discrimination.

33. In our view, it would also be open to the Commonwealth to legislate to enable disability organisations that are not 'persons aggrieved' (but do meet other specified criteria) to bring proceedings in the Federal Court or Federal Magistrates Court alleging a specific act of unlawful discrimination, and to enable those courts to grant appropriate remedies in such cases.

34. We note that such legislation would allow for the hearing and determination by a federal court of applications that are brought by persons whose interests are not in some special way prejudiced or directly affected by the alleged discrimination. However, assuming the legislation would only allow applications to be made in relation to specific instances of (allegedly) discriminatory conduct that have in fact occurred (and, as we have noted, the ability to bring such proceedings would be limited to persons who meet some specified criteria), the legislation would not purport to require federal courts to exercise jurisdiction in respect of purely hypothetical or abstract legal questions. In particular, there would not be an absence of any justiciable controversy constituting a 'matter', within the meaning of that term in ss.75-77 of the Constitution (cf. *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (1999) 200 CLR 591). (These provisions of the Constitution, which are concerned with the jurisdiction of the High Court and other federal courts, effectively require that the judicial power of the Commonwealth may only be vested in and exercised by those courts where there is such a 'matter'.)

35. Again, we think provision could be made for these matters by means of relatively straightforward amendments to the HREOC Act.

Questions 3-6

36. Section 31 of the DDA authorises the making of standards in relation to the matters set out in s.31(1)(a)-(f). By virtue of s.32 of the DDA, it is unlawful for a person to contravene a DDA standard. Section 34 of the DDA has the effect that, where a person acts in accordance with a DDA standard, the prohibitions on discrimination set out in Part 2 of the DDA do not apply to the person's act.

37. Section 13 of the DDA provides as follows:

> (1) A reference in this section to this Act is a reference to this Act as it has effect because of a provision of section 12.

(2) A reference in this section to a law of a State or Territory is a reference to a law of a State or Territory that deals with discrimination on the grounds of disability.

(3) This Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act.

(4) If:

(a) a law of a State or Territory relating to discrimination deals with a matter dealt with by this Act; and

(b) a person has made a complaint or initiated a proceeding under that law in respect of an act or omission in respect of which the person would, apart from this subsection, have been entitled to make a complaint under the *Human Rights and Equal Opportunity Commission Act 1986* alleging that the act or omission is unlawful under a provision of Part 2 of this Act;

the person is not entitled to make a complaint or institute a proceeding under the *Human Rights and Equal Opportunity Commission Act 1986* alleging that the act or omission is unlawful under a provision of Part 2 of this Act.

(5) If:

(a) a law of a State or Territory deals with a matter dealt with by this Act; and

(b) an act or omission by a person that constitutes an offence against that law also constitutes an offence against this Act;

the person may be prosecuted and convicted either under that law of the State or Territory or under this Act, but nothing in this subsection renders a person liable to be punished more than once in respect of the same act or omission.

Principles of inconsistency

38. By operation of s.109 of the Constitution, where a law of a State is inconsistent with a law of the Commonwealth, the latter prevails, and the former, to the extent of the inconsistency, is invalid. The references to a law in s.109 effectively include regulations and other instruments made under a law, such as a DDA standard (see *Colvin v Bradley Brothers Pty Ltd* (1943) 68 CLR 151; *Sankey v Whitlam* (1978) 142 CLR 1 at 91).

39. Inconsistency between a Commonwealth law and a State law can arise in either of the following ways:

— where the State law would alter, impair or negate the operation of the Commonwealth law (including where the two laws are contradictory) ('direct inconsistency'); or

— where it appears from the terms, nature or subject matter of the Commonwealth law that it was intended as a complete statement of the law governing a particular matter, and the State law purports to deal with

that matter ('covering the field inconsistency') (see *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76).

40. It is generally accepted that where a Commonwealth law sets a standard for conduct, and a State law sets a different standard for that same conduct, this is an example of direct inconsistency: *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253 at 258. This was confirmed in *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76.

Commonwealth and State disability legislation

41. Generally, Commonwealth and State anti-discrimination legislation has set the same, or similar, general standards (though with different enforcement mechanisms). In *Viskauskus v Niland* (1982) 153 CLR 280 the High Court held that there was no direct inconsistency between the New South Wales *Anti-Discrimination Act 1977* and the Commonwealth *Racial Discrimination Act 1975* ('RDA'). Nevertheless, the Court held that the RDA was intended to cover the field, and was therefore inconsistent with the State Act. The RDA was subsequently amended by the addition of s.6A to make it clear that the Commonwealth did not intend to cover the field, and thereby remove the inconsistency, at least prospectively (*University of Wollongong v Metwally* (1984) 158 CLR 447).

42. In our view, the relationship between the DDA and State anti-discrimination legislation is probably the same. That is, in so far as they set the same or similar general standards in respect of disability discrimination, there is no direct inconsistency. Generally this is the case, but without a specific legislative indication to the contrary, the DDA would be held to cover the field (and thus render the State laws invalid). However, there is a specific legislative statement in s.13(3) to the effect that the DDA is not intended to exclude or limit the operation of a law of a State or Territory 'that is capable of operating concurrently'. Indeed, s.13(4) deals with the situation where a matter can be the subject of a complaint under State law, and under Commonwealth law. Further, s.13(5) deals with the situation where an act constitutes an offence under both laws.

43. In light of this, it is clear that the general prohibition on disability discrimination in the DDA does not render inoperative general prohibitions on disability discrimination in State legislation. Both operate, and complaints can be brought under both laws, subject to s.13(4) of the DDA.

44. Having said this, however, situations could clearly arise in which, by virtue of s.109 of the Constitution, State disability laws would be inoperative. While it is difficult to advise in the abstract on this issue, some general propositions can be made.

45. If the terms of a specific State law (whether in the form of primary or subordinate legislation) were such that it would be impossible to obey both the law and a specific Commonwealth law, such as a DDA standard, this would be an instance of direct inconsistency where the State law could have no valid operation. Section 13 of the

DDA would have no application in such a case, as the State law would not be one that is capable of operating concurrently with the DDA standard (see s.13(3)).

46. The position is less clear where it is possible to obey both a DDA standard and a State law operating on the same conduct, but the provision made by the State law is different to that made by the standard. Again, it is very difficult to advise in the abstract about situations of this kind, as much may depend on the precise terms of the particular laws and standards in question. However, as a general proposition, in a case where a DDA standard sets a standard for conduct in relation to a specific matter, and a State law sets a higher or more onerous standard in respect of that same conduct, we think the State law would probably be held to be incapable of operating concurrently with the DDA standard.

47. Such a situation might arise where, for example, a DDA standard relating to access to public premises prescribed a certain width for ramps for wheelchair access, and a State law required a greater width for access ramps in the same premises. In a case of that kind, it would not be impossible to obey both laws: a person could obey both the standard and the State provision by complying with the highest standard (ie. the standard set by the State law).

48. However, where there are two distinct requirements, the courts have generally held that there is a clear inconsistency, either direct or because the Commonwealth law covers that limited field: *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253 at 258-259, 270, 272; *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 547-548; *Clyde Engineering Co. Ltd v Cowburn* (1926) 37 CLR 466; *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76. This is often the case because a law which makes unlawful actions below a minimum standard is generally seen as allowing, or making lawful, actions above that minimum standard.

49. Thus, in a case such as that referred to in paragraph 47 above, it could be argued that the legal effect of the DDA standard would be undermined if, in addition to complying with that standard, operators were still required to comply with the more onerous State provision. On this basis, we think it probable that the State law would be held to be incapable of operating concurrently with the DDA standard, for the purposes of s.13 of the DDA.

50. Having said this, however, we think the effect of s.13 in cases of this kind is less than entirely clear. In particular, we think it could be argued that the legislative intention underlying s.13 was precisely to ensure that the DDA, including standards made under s.31, would not displace State laws that give rise to no direct inconsistency, in the sense that compliance with those laws does not preclude compliance with the DDA.

51. If the Commonwealth's policy is that, where a State law operating on the same matter as a DDA standard imposes a more onerous requirement than the standard, the State law should not operate, we think there would be merit in amending the

DDA to make this abundantly clear. This could be achieved by the inclusion in s.13 of a provision to this effect. (The precise terms of any such amendment would be a matter for the Office of Parliamentary Counsel.)

52. We would not see any constitutional or other legal obstacle to the making of such an amendment. However, we note that if, as your letter indicates, the goal is to create 'a nationally uniform approach to disability standards', the limits on the Commonwealth's constitutional power in the area of disability discrimination might limit the extent to which such uniformity can be achieved.

53. Section 12 of the DDA, which limits the application of the provisions prohibiting disability discrimination, ensures that the Act is within constitutional power. To the extent that the external affairs power (s.51(xxix) of the Constitution) cannot be relied upon to support the 'limited application provisions' in the DDA, those provisions will only operate in relation to discriminatory acts done by certain specified persons, or in certain specified places or circumstances (see s.12). (The 'limited application provisions' are the provisions of Divisions 1, 2 and 3 of Part 2 other than ss.20, 29 and 30: see the definition in s.12(1).) Although the coverage of the limited application provisions will generally be broad, it is nevertheless possible that a particular DDA standard might not apply in relation to every instance of disability discrimination that is covered by a State law. Accordingly, even if s.13 of the DDA were amended so as to ensure that a DDA standard will displace a State law imposing a higher standard of conduct than that required by the DDA standard, in a particular case such a State law might still have some area of valid operation notwithstanding s.13.

Territory disability legislation

54. Where Territory laws are concerned, although the question of inconsistency with the DDA would not arise under the Constitution, it is a general principle that Territory laws cannot be repugnant to a Commonwealth Act (*Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582). Accordingly, if a law of a Territory is inconsistent with the DDA or an instrument made under it, the DDA or instrument will prevail to the extent of the inconsistency. In practical terms, then, the position in respect of the concurrent operation of Territory laws relating to matters dealt with by DDA standards will be the same as that which obtains in relation to State laws dealing with those matters (see paragraphs 41-51 above).

Questions 7-9

The decision in Brandy v Human Rights and Equal Opportunity Commission (1995) 183 CLR 245 ('Brandy')

55. It is a fundamental principle of Australian constitutional law that the judicial power of the Commonwealth is vested in the High Court, other federal courts, and other courts that the Parliament vests with federal jurisdiction ('Chapter III courts'). The judicial power of the Commonwealth cannot, generally speaking, be conferred on a

body which is not a Chapter III Court, and any attempt to do so will be unconstitutional.

56. In *Brandy*, the High Court held that certain provisions in the *Racial Discrimination Act 1975* were invalid. Briefly, the provisions there in question required a determination of HREOC to be registered with the Federal Court, whereupon the determination took effect as if it were an order of that Court, subject to the possibility of limited review by the Court within a specified period of time. The High Court found the provisions in question to be invalid on the basis that they purported to confer the judicial power of the Commonwealth on HREOC, a body that is not a Chapter III court. This was because registration of a HREOC determination had the automatic effect (subject to review) of making the determination binding upon the parties and enforceable as an order of the Federal Court. Thus, it was HREOC's determination that was enforceable, and it was irrelevant that the mechanism for enforcement was provided by the Federal Court. The fact that HREOC could not enforce its own decisions directly did not mean that it was not exercising judicial power.

Implications for enforcement of conciliation agreements

57. In light of the High Court's decision in *Brandy*, it is clear that a legislative scheme purporting to make decisions of a non-judicial body (such as HREOC) take effect as orders of a Chapter III court, and enforceable as orders of that court, is likely to infringe the principle of the separation of judicial power.

58. In our view, the same constitutional objections would arise in relation to a scheme under which registration with a federal court of a conciliation agreement arising from a conciliation process under the HREOC Act would have the automatic effect that the agreement takes effect as an order of the court. It might be possible to formulate a legislative scheme for the enforcement of conciliation agreements by federal courts that would be consistent with Chapter III of the Constitution. However, any such legislative scheme would need to be very carefully formulated so as not to fall foul of the principle of the separation of judicial power, and there are clearly limits to how far such a scheme could validly go. We would not recommend such an approach. In light of what we say below about the ability to have a scheme for enforcement of conciliation agreements as contracts, it does not seem necessary, for present purposes, to pursue this issue further.

Enforcement of conciliation agreements other than as court orders

Enforcement of conciliation agreements that are contracts

59. It is not altogether clear to us why there is thought to be a need for a mechanism by means of which a conciliation agreement can be enforced by a federal court *as an order of that court*.

60. As indicated above, we have not been provided with any information as to the nature or terms of conciliation agreements that arise from conciliation of discrimination complaints under the HREOC Act. However, it seems likely that some conciliation agreements constitute common law contracts. In at least some such cases, it should be possible for a party to obtain a court order for enforcement of a conciliation agreement, just as a court can enforce any other contract. (This does not mean that the agreement itself would have the status of a court order; rather, the court would exercise its jurisdiction to make orders in respect of the agreement as a contract.)

61. For example, a respondent to a discrimination complaint made under the HREOC Act might contract with the complainant to pay a sum of money in consideration for the complainant agreeing not to pursue any legal remedy available to him or her in respect of the conduct complained of. If the respondent subsequently failed to pay that sum in accordance with the agreement, it would be open to the complainant to bring proceedings for breach of contract and, in those proceedings, to seek an order from a court requiring payment from the respondent.

62. As noted in paragraph 9 above, your letter suggests that, in an action for enforcement of a conciliation agreement, it might be necessary for the court 'to rehear the discrimination case'. We do not think that would be so. Where a conciliation agreement constitutes a contract, the conduct or circumstances that gave rise to the making of the agreement would have no bearing on the question whether the contract had been breached. Equally, we do not think those matters would be relevant to the question of what remedy should be granted in the event of the respondent being found to have breached the contract.

Jurisdiction in contract cases

63. Your letter seems to proceed on the assumption that the Federal Court or Federal Magistrates Court would have jurisdiction in any proceeding for the enforcement of a (contractual) conciliation agreement. However, we do not think that is presently the case.

64. Subject to an exception that is not presently relevant, the original jurisdiction of the Federal Court includes any matter 'arising under any laws made by the Parliament' (s.39B(1A)(c) of the *Judiciary Act 1903*). Given that the HREOC Act makes no provision with respect to conciliation agreements (as opposed to the conciliation of discrimination complaints by HREOC), it is probable that such an agreement would not be regarded as a matter 'arising under' the HREOC Act. Nor is jurisdiction in respect of such proceedings conferred on the Federal Court by any other Act. That being so, we do not think the original jurisdiction of the Federal Court extends to proceedings for the enforcement of conciliation agreements of the kind in question.

65. Similarly, we do not think the original jurisdiction of the Federal Magistrates Court extends to matters relating to the enforcement of such conciliation agreements, as

there is no legislation that vests such jurisdiction, either expressly or by implication, in that Court (see s.10(1) of the *Federal Magistrates Act 1999*).

66. An action for breach of contract in respect of a conciliation agreement would rather be brought in the appropriate State or Territory court. (Which courts would have jurisdiction would depend on the circumstances surrounding the making of the agreement and, in particular, the place in which the agreement was entered into.)

Legislation providing for the enforcement of conciliation agreements by federal courts

67. Of course, there may be cases in which conciliation agreements do not constitute legally binding contracts. That would be so where, for example, the terms of an agreement indicate that the parties did not intend it to be legally binding. In a case of that kind, however, it would be appropriate that the agreement cannot be enforced through the courts, since this would accord with the intentions of the parties.

68. On the other hand, a situation might arise where the parties did intend to create a legally binding agreement, but failed to do so because, for example, the necessary element of consideration is absent. There may also be cases in which, notwithstanding that a conciliation agreement is a contract, it is not possible for a party to the agreement to obtain a remedy in respect of a breach. That might be so where that which the other party contracted to do is not an undertaking of a kind that is susceptible to the common law contractual remedies. For example, where a party to an agreement breaches a contractual promise to take some particular action to rectify the situation complained of, a court might not regard specific performance to be an appropriate remedy in respect of action of that kind.

69. In legal terms, we do not think there would be anything to prevent the Commonwealth from enacting legislation providing that conciliation agreements meeting specified requirements are legally binding agreements, and setting out the remedies that may be granted by federal courts in respect of a breach of such an agreement. (Such legislation would raise no judicial power issue because the agreements would not take effect as court orders. In the event of a breach of an agreement, it would still be necessary to obtain an order from a court for its enforcement.) Legislation of this kind could assist in overcoming the potential problems referred to in paragraphs 57-58 above.

70. Please let us know if you require any further assistance in relation to this matter.

Yours sincerely

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ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999

Section 487

Extended standing for judicial review

…

(3) An organisation or association (whether incorporated or not) is taken to be a person aggrieved by the decision, failure or conduct if:

(a) the organisation or association is incorporated, or was otherwise established, in Australia or an external Territory; and

(b) at any time in the 2 years immediately before the decision, failure or conduct, the organisation or association has engaged in a series of activities in Australia or an external Territory for protection or conservation of, or research into, the environment; and

(c) at the time of the decision, failure or conduct, the objects or purposes of the organisation or association included protection or conservation of, or research into, the environment.

…