JACOMB v AUSTRALIAN MUNICIPAL ADMINISTRATIVE CLERICAL AND SERVICES UNION V477 of 2003, 2004 FCA 1250 BC200406283

FEDERAL COURT UNREPORTED JUDGMENTS

JACOMB v AUSTRALIAN MUNICIPAL ADMINISTRATIVE CLERICAL AND SERVICES UNION

V477 of 2003, 2004 FCA 1250

Federal Court of Australia -- Victoria District Registry

BC200406283

8 April 2004, heard

24 September 2004, delivered

CATCHWORDS: ADMINISTRATIVE APPEALS - Union rules imposing inflexible quotas for election of **women** representatives to executive positions of union - Whether unlawful sex **discrimination** against male members of union under s 19 of the Sex **Discrimination** Act 1984 (Cth) - Meaning of "special measures" under s 7D of the Act - Whether union rules constitute special measures within the meaning of s 7D of the Act.

HEADNOTES: (CTH) Sex **Discrimination** Act 1984 ss 3, 5, 7D, 19 and 44

(CTH) Sex **Discrimination** Amendment Act 1995

(CTH) Human Rights and Equal Opportunity Commission Act 1985 ss 46PO, 46PH and 46PV and s 11(1)(g)

(CTH) Racial **Discrimination** Act 1975 s 8

(CTH) Workplace Relations Act 1996 s 4A and s 142 of Sch 1B-Ch 5, Div 1

(CTH) Federal Court Rules O 81 r 5

Applicant A v Minister for Immigration and Multicultural and Indigenous Affairs (1997) 142 ALR 331, followed

Australian Textiles Pty Ltd v The Commonwealth (1945) 71 CLR 161

Koowarta v Bejelke-Petersen (1982) 153 CLR 168

Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273

Ministry of Defence v Jeremiah (1980) ICR 13

Proudfoot v Australian Capital Territory Board of Health and Ors (1992) EOC 92-417

Gerhardy v Brown [1984 - 1985] 195 CLR 70

Secretary of the Department of Foreign Affairs and Trade v Helen Styles and Anor (1989 - 1990) 23 FCR 251

Western Australia v Commonwealth (Native Title Act case) (1994-1995) 183 CLR 373

Re Australian Journalists Assn (1988) EOC 92-224; (1988) 27 IR 207

The Municipal Officers' Assn of Australia and Australian Transport Officers Federation v The Technical Service Guild of Australia [1991] 93 IR Comm A., referred

Convention on the Elimination of All Forms of **Discrimination** Against **Women** Opened for signature New York, 18 December 1979. 1249 UNTS 13 Art 4 para 1 (entered into force 3 September 1981) Art 4 para 1

International **Convention on the Elimination** of All Forms of Racial **Discrimination** Opened for signature New York, 7 March 1966. 660 UNTS 195 Art 1 para 4 (entered into force 4 January 1969)

Vienna **Convention** on the Law of Treaties Opened for signature Vienna, 23 May 1969. 1155 UNTS 331 Art 31 (entered into force 27 January 1980)

JUDGES: Crennan

Crennan J.

[1] The applicant, William Robert Jacomb, has applied under O 81 r 5 of the Federal Court Rules to the Federal Court of Australia pursuant to the provisions of s 46PO of the Human Rights and Equal Opportunity Commission Act 1986 (Cth) ("HREOC Act"), as amended, for an apology from the respondent, a declaration that rules complained about are "unlawfully sexually discriminatory'' and other relief. The applicant alleges unlawful **discrimination** by the Australian Municipal Administrative Clerical and Services Union ("the union"), which was also the respondent to a complaint brought by the applicant before the Human Rights and Equal Opportunity Commission. This complaint was terminated under s 46PH of the HREOC Act on 30 May 2003. The termination of that complaint triggered the application to this Court under s 46PO(1) of the HREOC Act. In particular, the applicant claims that two of the rules of the Victorian Authorities and Services Branch of the Union (which rules were certified by Deputy Industrial Registrar Nassios, of the Australian Industrial Relations Commission, on 8 January 2003), constitute unlawful sexual **discrimination** contrary to s 19 of the Sex **Discrimination** Act 1984 (Cth) ('SDA'), as amended.

[2] The applicant has essentially litigated the same issue, inter alia, before Senior Deputy President Lacy of the Australian Industrial Relations Commission, in the context of an appeal against a decision of Deputy Industrial Registrar Nassios, who refused to grant the applicant an extension of time within which to lodge an objection to the alteration of the respondent's rules. It was not suggested by either party that the Federal Court was in any way precluded from considering the same issue, albeit on different evidence, via the conferral of jurisdiction on it under s 46PO

of the HREOC Act. The proceedings before Senior Deputy President Lacy in the Australian Industrial Relations Commission occurred at about the same time as a separate challenge to the validity of the rules was brought to the Human Rights and Equal Opportunity Commission as a complaint under the provisions of the HREOC Act. The applicant filed material and submissions relevant to both those proceedings, some of which was not relevant to this proceeding, but I have been guided in this proceeding by the submissions made by his counsel and the material relied upon by counsel.

Background

[3] To understand the applicant's case it is necessary to understand something of the history of the respondent union. The respondent is an amalgamated union registered under the Workplace Relations Act 1996 (Cth) ("WRA"). The relevant amalgamation occurred on 1 July 1993 between the Federated Clerks Union, the Municipal Employees Union and the former Australian Services Union, all of which had branches in more than one State. The Federated Clerks Union and the Australian Services Union also had industry branches with members in most States and Territories. The rules which govern the respondent's operations and the election of the respondent's officials must be registered by the Australian Industrial Registry. To be registered, the rules must be in accordance with the WRA and must not be otherwise contrary to law: s 142 of Sch 1B -- Ch 5, Div 1: see also s 4A of the WRA.

[4] The altered rules of the respondent, two of which are the subject of this proceeding, provide for the reconfiguration of branches in Victoria, which resulted in two branches, the Victorian Authorities and Services Branch and the Victorian Private Sector Branch.

[5] The Victorian Authorities and Services Branch ("the VASB"), which is the relevant branch for present purposes, is composed of members who, after joining the union, are allocated to industry divisions. The VASB has five divisions: the Energy Information Technology Division; the Local Authorities Division; the Social and Community Services Division; the Transport Shipping and Travel Division; and the Water Division. The applicant has been allocated to the Energy and Information Technology Division. For the purposes of the proceeding, it is agreed between the parties that **women** constitute 11.88% of the membership of the applicant's division and **women** comprise approximately 48.85% of the membership overall in the VASB.

[6] The two VASB rules, which are the subject matter of the applicant's complaint, are VASB rules numbered 5 and 7. Rule 5 deals with the Branch Executive and provides as follows:

5 -- BRANCH EXECUTIVE

a. The Branch Executive shall manage the affairs of the Branch and shall be the Committee of Management of the Branch within the meaning of the Workplace Relations Act 1996.

b. The Branch Executive shall consist of the Branch President, Branch Vice-President, Branch Executive President, Branch

Secretary, three Assistant Branch Secretaries, 1 Branch Executive Member (Youth) and Branch Executive members from the following Industry Divisions:

Local Authorities -- 8 (four of whom shall be **women)**

Social and Community Services -- 3 (one of whom shall be a woman)

Energy and Information Technologies -- 3 (one of whom shall be a woman)

Transport, Shipping & Travel -- 1

Water -- 2 (one of whom shall be a woman)

c. All officers and other members of the Branch Executive shall be elected each 4 years.

d. Only members below the age of 30 years on the day on which nominations close shall be eligible to be nominated for the office of Branch Executive Member (Youth).

e. The Branch shall have autonomy in matters affecting members of the Branch only.

[7] Rule 9 provides for the State Conference including the election of delegates. The State Conference is the governing body of the branch. Rule 9 provides as follows:

9 -- STATE CONFERENCE

a. Subject to these Rules the supreme government of the Branch shall be vested in the State Conference.

b. State Conference shall be composed of the following persons each of whom shall be entitled to attend on the basis of one person one vote:

(i) The members of the Branch Executive;

(ii) State Conference delegates elected by and from financial members of each Industry Division as follows:

Local Authorities -- 32 (sixteen of whom shall be **women)**

Social and Community Services -- 12 (six of whom shall be **women)**

Energy and Information Technologies -- 12 (six of whom shall be **women)**

Transport, Shipping & Travel -- 4 (two of whom shall be **women)**

Water -- 8 (four of whom shall be **women)**

c. The Branch Secretary shall notify all State Conference Delegates of the decision to hold a State Conference within 14 days of the decision and shall request State Conference Delegates to consider forwarding agenda items for the consideration of State Conference, no later than 21 days prior to the Conference.

d. The Branch Secretary shall notify all Industry Division Committees, Standing Committees established by the Branch Executive, shop stewards and workplace representatives of the decision to hold a State Conference and shall request them to consider forwarding agenda items for consideration by State Conference, no later than 21 days prior to the Conference.

e. The Branch Executive shall endorse the agenda for State Conference.

f. The business of Conference shall include:

i. Agenda items submitted in accordance with Subrules c. and d. hereof;

ii. Consideration of the Auditors Report;

iii. Consideration of National Conference Agenda Items.

g. A copy of the agenda for State Conference shall be forwarded to Conference Delegates by the Branch Secretary at least 14 days prior to Conference.

h. The business of Conference shall be limited to the matters appearing on the agenda. Provided that additional items may be considered if supported by a two-thirds majority of Conference Delegates eligible to attend.

[8] Rule 9 ensures that of the 68 elected delegates for the State Conference, half that number will be reserved for **women** and a proportional number of National Conference Delegate positions are also reserved for **women** under r 5. The quotas imposed by the rules are inflexible as no discretion is reserved for the consideration of particularly worthy and/or popular male candidates.

[9] In essence, it was argued on behalf of the applicant that rr 5 and 9 discriminate against men and they therefore offend against s 19 of the SDA. Section 19 prohibits sex **discrimination** in the workplace by organisations such as unions. It was further argued that the rules are unlawful in the absence of a specific exemption under s 44 of the SDA. The respondent's counsel argued (and the applicant's counsel disclaimed) that the rules constitute a "special measure" within the meaning of s 7D of the SDA and they are accordingly lawful.

The legislation

[10] It is convenient to set out the legislation before considering the evidence and submissions. Section 7D, a new "special measures" provision, was inserted into the SDA in December 1995 by the Sex **Discrimination** Amendment Act 1995 (Cth) ('the amending Act'). It repealed s 33, which exempted certain acts that would otherwise be discriminatory. Section 7D operates quite differently in that acts which are special measures are not discriminatory and thus do not require any exemption. The new special measures provision was transferred from that part of the SDA dealing with exemptions and relocated in the definitions section of the SDA.

[11] The Sex **Discrimination** Commissioner sought leave to appear, as amicus curiae by virtue of s 46PV of the HREOC Act, particularly as the new special measures provisions had not been the subject of litigation in this Court. The Commissioner wished to assist the Court by putting before it materials relevant to the legislative history of s 7D. There was no objection to this course and leave was granted, which is the subject of a separate ruling. Submissions, made on behalf of the Commissioner, were of considerable assistance to the Court, and representatives of both parties acknowledged that assistance.

[12] Sections 3, 5 and 7D all occur in Pt 1 of the SDA, which covers preliminary matters including definitions, whereas s 19 occurs in Pt II, Div 1, which contains prohibitions against specific **discrimination** in the workplace. The relevant provisions of ss 3, 5, 7D and 19 of the SDA are:

Objects

3. The objects of the Act are:

(a) to give effect to certain provisions of the **Convention on the Elimination** of All Forms of **Discrimination** Against **Women;** and

(b) ...

(c) ...

(d) to promote recognition and acceptance within the community of the principle of the equality of men and **women.**

5. Sex **Discrimination:**

(1) For the purposes of this Act, a person (in this subsection referred to as the discriminator) discriminates against another person (in this subsection referred to as the aggrieved person) on the ground of the sex of the aggrieved person if, by reason of:

(a) the sex of the aggrieved person;

(b) a characteristic that appertains generally to persons

of the sex of the aggrieved person; or

(c) a characteristic that is generally imputed to persons of the sex of the aggrieved person;

(c) the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex.

(1A) ...

(2) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of the sex of the aggrieved person if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person.

(3) This section has effect subject to sections 7B and 7D.

7D. Special measures intended to achieve equality:

(1) A person may take special measures for the purpose of achieving substantive equality between:

(a) men and **women;** or

(b) people of different marital status; or

(c) **women** who are pregnant and people who are not pregnant; or

(d) **women** who are potentially pregnant and people who are not potentially pregnant.

(2) A person does not discriminate against another person under section 5, 6 or 7 by taking special measures authorised by subsection (1).

(3) A measure is to be treated as being taken for a purpose referred to in subsection (1) if it is taken:

(a) solely for that purpose; or

(b) for that purpose as well as other purposes, whether or not that purpose is the dominant or substantial one.

(4) This section does not authorise the taking, or further taking, of special measures for a purpose referred to in subsection (1) that is achieved.

19. Registered organisations under Schedule 1B to the Workplace Relations Act 1996:

(1) ... ;

(2) It is unlawful for a registered organization, the committee of management of a registered organization or a member of the committee of management of a registered organization to discriminate against a person who is a member of the registered organization, on the ground of the member's sex, marital status, pregnancy or potential pregnancy:

(a) by denying the member access, or limiting the member's access, to any benefit provided by the organization;

(b) by depriving the member of membership or varying the terms of membership; or

(c) by subjecting the member to any other detriment.

Applicant's evidence

[13] The applicant has sworn a number of affidavits in the proceeding. The affidavits have exhibited to them a large number of exhibits and contain some material, which is not evidence of facts, but is opinion evidence or submissions. It appeared that the applicant briefed counsel to appear on his behalf only shortly before the hearing. Those parts of the applicant's affidavits which offend against the well-known principles governing admissible evidence were the subject of objection. When the matter came on for hearing, the respondent had over 150 objections to the applicant's material; some of it was said to be submissions, opinion or speculation rather than evidence; parts were characterised as scandalous and oppressive and/or not relevant. The applicant had well over 100 objections to the respondent's material. The parties agreed between themselves that the affidavits could all be read (subject to the excision of two paragraphs by the applicant) and I was invited to give such weight to any individual piece of evidence as seemed appropriate, after taking into account any objection to it.

[14] The applicant gave evidence that he had consistently objected to these new rules. A number of these objections have been dealt with by Senior Deputy President Lacy and do not form part of this proceeding. A repeated objection to the rules from the applicant has been that they discriminate against men because they do not reflect the proportion of female and male membership of the divisions, particularly the applicant's division. The applicant also put into evidence, without objection, material relevant to the history of the amalgamation and the background of the making of the new rules and a number of Reports, minutes of meetings, submissions and similar material. This material included:

. Reports of the National **Women's** Consultative Committee to the National Executive from 1994.

. Resolutions/Outcomes of the National **Women's** Conferences since 1994.

. Current National Conference policies relating to **Women's** issues including:

  . 1994 ASU Policy -- Proportional Representation of **Women** in ASU Structures; and

  . 1998 Policy -- Proportional Representation of **Women** in ASU Structures.

Applicant's submissions

[15] The applicant objects to the new rr 5 and 9 on these bases:

(i) they are discriminatory under s 19 of the SDA;

(ii) they do not constitute a 'special measure' within s 7D of the SDA; and

(iii) they required, but did not have, an exemption under s 44 of the SDA.

[16] Counsel for the applicant indicated that none of his submissions was intended to criticise the aim of the union, which was 'to promote **women** to the high echelons of the union'. It was submitted that the union policy of ensuring 50% representation of **women** in the governance of the union, which was the basis of the quotas for **women** referred to in rr 5 and 9, exceeded the proportional representation of **women** in the various divisions. Accordingly, the quotas discriminated against men where men represented more than 50% of the membership.

[17] It was submitted that the operation of affirmative action rules in favour of **women** prevented the applicant from competing for elected positions in proportion to the male membership of his division. It is fair to describe this as the central argument advanced by, or on behalf of, the applicant. The applicant's evidence, itemised above, showed the union had under consideration, a policy in favour of proportional representation of **women** for a considerable period. The applicant's counsel stressed more than once in argument on behalf of the applicant that the representation of **women** under the rules was not proportional to their membership of the different divisions. The applicant's counsel used an example to demonstrate his main argument. The Water Division had two positions for the Branch Executive, one of which was reserved for a woman under r 5, and the applicant's main argument was illustrated as follows:

Candidate A, a male, gets 1,000 votes. Candidate B, a male, gets 800 votes, Candidate C, a female, gets 60 votes. By the provisions of these rules, Candidate C will be declared elected over Candidate B, despite an overwhelming lack of support from the rank and file, and their democratic will expressed through the Ballot Box.

The respondent's counsel pointed out that the example did not accurately reflect the actual process in which positions reserved for **women** were positions for which only **women** could stand. Candidate B in the applicant's example would not be able to

stand. This was the real complaint. However, in the context of that submission, and analogous submissions, the applicant's counsel relied on an observation of Lord Denning in *Ministry of Defence v Jeremiah* (1980) ICR 13 at 24, in respect of the provisions of the Sex **Discrimination** Act 1975 (UK) as follows:

Before I consider the law, I would ask this simple question: suppose the position were reversed: suppose that the **women** (who volunteer for overtime) were required to work in the colour bursting shop -- and that men were not resulting in **discrimination** against **women.** Now if that be the case, the Sex **Discrimination** Act 1975 comes in like a lion. It commands us to treat men and **women** just the same. It says that wherever "woman" is used in the Ac we are to read "man" -- and vice versa; see section 2 of the Act. Equality is the order of the day. In both directions. For both sexes.

Suffice it to say that such a general observation, however succinct and apposite to the legislation and problem with which Lord Denning was dealing, does not assist in resolving the issues here. While Lord Denning was considering a provision (not unlike s 19 of the SDA) prohibiting a detriment based on sex, he was not considering any section of the (UK) Act, which was like s 7D of the SDA.

[18] Next, it was submitted that rr 5 and 9 could not be found to be a special measure under s 7D of the SDA, because special measures should reflect "attainable levels of representation" (this meant quotas should not exceed proportional representation) and they should be temporary. It was submitted that the evidence proffered by the union, to justify the rules as a special measure, was haphazard and did not show any need for "discriminatory'' quotas; nor did it show that the rules were likely to be effective. It was also submitted that six of the twelve current branches of the union had not implemented any affirmative action policies by imposing 50% representation, but that two of those branches in Queensland returned the greatest proportion of female representatives. However, it turned out that those branches had a preponderance of female membership in any event. It was also submitted that the union's aim had already been met because three of the seven positions that are elected in the union are occupied by **women;** this, it was submitted, was fair bearing in mind the 48.85% overall female membership of the union.

[19] The applicant's counsel relied on a number of authorities which included two cases relevant to the precursor of s 7D, s 33 of the SDA: *Re Australian Journalists Assn* [1992] EOC 92-417; The Municipal Officers' Assn of Australia and Australian Transport Officers Federation v The Technical Service Guild of Australia [1991] 93 IR Comm A. In the former, earlier case before the Australian Conciliation and Arbitration Commission, Deputy President Boulton J found s 33 only applied "to measures which are intended to achieve equality of opportunity." He then went on to find that since **women** had the opportunity to stand for election equally with men, measures reserving positions for them on the governing body of journalists were not saved by the exemption provisions of s 33. In the later case, Deputy President Moore J. found that reserving positions for **women** on a governing body of an amalgamated union was an act that was exempted, by a liberal construction of s 33, when such measures were intended to ameliorate past **discrimination**

[20] Finally, it was submitted for the applicant that, to the extent that the rules

were not rendered lawful by the operation of s 7D, they were unlawful in the absence of an exemption under s 44. It was common ground that no exemption had been sought or obtained.

Respondent's evidence

[21] The respondent's witness, Mr Michael O'Sullivan, was the National Executive President of the respondent. He gave evidence that prior to the abovementioned amalgamation of the unions he had the primary responsibility for the drafting of the rules in question. He was involved throughout the process of developing the rules; he was not cross-examined or challenged in respect of his description of the process.

[22] He described a process in which negotiations about the rules were carried on by appointed committees for a period of 18 months prior to the decisions of the governing bodies. He also gave evidence that the dissolution of the old branches and the reconstruction of new branches was carried out pursuant to a rule requiring 'the agreement of the supreme governing body of the branch, carried by resolution in favour with not less than seventy percent of that body voting in favour'.

[23] He gave evidence of the process of approval of the rules as follows:

On 6 September 2002 the Branch Council of the Victorian Services and Energy Branch approved the dissolution of the Branch and the new rules of the reconstructed Branches in Victoria. The Branch Council is a body of approximately 61 members and only one vote was recorded against the proposals.

On 8 October the Branch Executive of the Victorian Services and Energy Branch, a body consisting of 22 members, unanimously approved the dissolution of the Branch and the new rules of the two reconstructed Branches.

On 5 September 2002, the Branch conference, a body of 37 members of the MEU/Private Sector Branch approved the dissolution of the Branch and approved the rules of the two reconstructed Branches in Victoria.

On 22 November 2002, the National Executive approved the dissolution of the two Branches in Victoria, and the Airlines Branch (whose Branch Council had given its approval with more than the requisite 70% majority on 15 November 2002) and approved the rules of the reconstructed Victorian Branches.

Both of the reconstructed Branches in Victoria have rules, arising from their long and detailed discussion of this issue, which provide for reserved positions for **women** on Branch Executive and Branch Conference.

[24] He also gave evidence to support the characterisation of the rules as a special measure within the definition under s 7D. He identified factors which he said were identified at the time of the amalgamation as follows:

. **Women** were segregated into traditional "**women's"** employment areas within the ASU membership areas;

. **Women** were under-represented in elected positions within the

Union at both Branch and National level;

- **Women** were fundamental to the future survival and growth of the ASU; and

- **Women's** average weekly earnings were significantly less than men' s weekly earnings.

Various reports exhibited to his affidavit evidence contained statistics and other evidence demonstrating those factors he identified.

[25] The amalgamating unions included in a Memorandum of Understanding for amalgamation, commitments to ensure substantive equality for **women.** The evidence was that the union decided upon a plan which included measures as follows:

- Ensure **women** have equal access to all areas of employment within ASU membership areas;

- Ensure **women** have equal access to all areas of education and training within and outside the union;

- Ensure the wages and working conditions of **women** are targeted for improvement through enterprise bargaining;

- Ensure issues of particular significance to **women** are addressed by the Union;

- Ensure **women** are recruited to the Union;

- Ensure **women** will hold at least a proportionate number of all elected and appointed positions within the Union;

- Ensure the employment practices of the Union actively encourage the employment of **women.**

[26] Specific measures adopted by the union at this time included:

- The establishment of a **Women's** Officer at National level.

- Establishment of a National **Women's** Consultative Committee and the direction of resources to support this.

- Review of ASU policy and the supplementation of this policy to reflect the priorities of **women** members.

- The investigation of affirmative action strategies.

[27] As mentioned, various reports were generated and those tendered in evidence supporting Mr O'Sullivan's statements included:

- Facing the challenge: **Women** in Victorian Unions' VTHC 1991.

- Strength in Numbers: Increasing **Women's** Representation in Unions, ACTU, 1994.

- 'The Slow Road to Fairer Unionism: Changers in Gender Representation in South Australian Unions 1991-1998', Sonya Mezinic, Centre for Labour Research, Research Paper Series No 10 October 1999.

- 'Gender Representation in Australian Union 1998' Sonya Mezinic Centre for Labour Research, Research Paper Series No 11 October 1999.

[28] Against that background, he stated that at the time the rules in question were drafted they were drafted deliberately to ensure that under-representation of females in the governance of the union should be addressed and **women** should be present in leadership positions, including on the Branch Executive and the Branch State Conference. It was clear from the evidence that part of the purpose of the rules was to attract female members to the union, but this does not disqualify the rules from qualifying as special measures under s 7D (subs 7D(3)).

[29] Finally, he gave evidence that it was the VASB's assessment that substantive equality for **women** had still not been achieved. In dealing with the applicant's submission that **women** should only be represented in union governance according to the proportion of their membership he gave evidence that:

- In establishing its rules framework the ASU is also attempting to encourage non-union members to join and be active in the union;

- Substantive equality requires a critical mass of **women** to be represented throughout all of the decision making structures of the union;

- The scheme of the rules at Branch and National level requires **women** to be represented at all levels in order to ensure substantive equality at all levels;

- The union's approach to substantive equality involves the operation of a number of factors and therefore there are a number of indicators of the success or other wise of these strategies. These indicators include the position of **women** across the country with respect to involvement in the union's structures, the extent to which senior positions are held by **women,** the nature of the union's structures and processes and whether they have changed in order to better accommodate the participation of **women,** and whether the direction of the resources of the union and its priority areas of action reflect the priorities of both men and **women** members adequately

His account of the union's motives and collective views was supported by documents exhibited to his affidavit.

Respondent's submissions

[30] The respondent submitted rr 5 and 9 were a "special measure" within the meaning of s 7D of the SDA and that a "special measure" was not discriminatory (subs 7D(2)). Thus, it was submitted, no exemption under s 44 was necessary. The respondent's counsel noted that the relevant rules have been found to be a "special measure" on two occasions.

[31] A delegate of the President of the Human Rights and Equal Opportunities Commission determined the rules were a special measure and accordingly terminated the complaint under s 46PH(1)(a) of the HREOC Act. The delegate also found that the subject matter of the complaint was more appropriately dealt with by the Australian Industrial Relations Commission. Accordingly the complaint was terminated also by reference to and reliance upon s 46PH(1)(g) of the HREOC Act. Senior Deputy President Lacy of the Australian Industrial Relations Commission also found the rules were a special measure as follows:

... s 7D [of the SDA] will shield [the rules] from the effect of s 19 if the purpose of the rules is substantive equality between, in this case, men and **women.** The answer to that question lies in a determination of whether an election by the constituents of the branches constituted under the rules will, in the absence of the preferential treatment of **women** there to be found, achieve substantive equality. I am not satisfied that the result would be one of substantive equality in the absence of the rule.

The material before me does not suggest that the steps that have been taken by the ASU to redress the systemic **discrimination** against **women** in the organisation since its inception generally, has resulted in substantive equality. In the circumstances, I dismiss the appeal in so far as it is contended that the rules discriminate against males and, in particular, Mr Jacomb. The rules, by virtue of s 7D of the SDA, do not contravene s 19 of that Act.

[32] It was submitted that it was permissible under the SDA for the respondent to introduce measures to accelerate or advance equality and go beyond equal or proportionate treatment. It was submitted that the rules were part of an affirmative action strategy, the purpose of which was to increase **women's** involvement in the governance of the Union. It was also submitted that the union acted reasonably in concluding **women** suffered inequality in the decision-making and governance of the union, which problem could only be addressed by the rules in question. It was suggested that the applicant have bore the onus in respect of assertions that the rules were not made in good faith and also bore the onus in respect of the argument that substantive equality which was one of the purposes of the rules had already been achieved.

Applicant's submissions responding to evidence that the rules were a "special measure".

[33] As mentioned above, the applicant's counsel criticised the union's Reports as "haphazard" research material incapable of proving that **women** lacked substantive equality in the union.

[34] It needs to be observed that the type of evidence proffered by the respondent (which was similar in nature to some of the evidence relied on by the applicant) is

not the same as evidence on ordinary questions of fact which arise between parties. The evidence is information, which the Court needs, and may rely upon, to answer the question of whether or not union rr 5 and 9 are special measures within the meaning of s 7D of the SDA. That involves determining whether the union's purpose in proposing the special measure was to achieve substantive equality. Such evidence also enables the Court to assess whether it was reasonable for the union to conclude the measure would further that purpose: see *Gerhardy v Brown* (1984-1985) 159 CLR 70 ("Gerhardy v Brown") at 87/88 per Gibbs CJ and at 105 per Mason J. See also *Proudfoot v Australian Capital Territory Board of Health* [1992] EOC 92-417 ("Proudfoot v ACT") and *Western Australia v Commonwealth (Native Title Act case)* (1994-1995) 183 CLR 373 ("WA v Commonwealth")

[35] The applicant also submitted substantive equality had been achieved by reference to the number of **women** who now form part of the union's governance. However, so far the new rules have been used only once.

[36] The issue for determination in the proceeding can be crystallised thus:

Does s 7D of the SDA operate so as to render lawful rules 5 and 9 of the union which impose inflexible 'affirmative action' quotas for **women,** for positions on the Branch Executive or as delegates of the State Conference?

Legislative context and statutory history

[37] There was no attack in the proceeding on the validity of any relevant section of the SDA. Nor was it argued that s 7D had no application to the prohibition in s 19. It is appropriate to deal in some detail with the legislative context and statutory history of the SDA in general and s 7D in particular, especially as the new section has not been considered before by this Court. The SDA, inter alia, prohibits as far as possible, **discrimination** against people on the grounds of sex, in the area of work. The objects of the Act include relevantly giving 'effect to certain provisions of the **Convention on the Elimination** of All Forms of **Discrimination** Against **Women**': s 3(a).

[38] The Explanatory Memorandum for the amending Act provides:

This provision [s 7D] replaces section 33 of the Act which currently provides that an act which would otherwise be discriminatory for the purposes of the Act is not unlawful if a purpose of the act is to ensure equal opportunity. Section 33 therefore operates to provide an exemption from the anti **discrimination** provisions of the Act.

...

This provision seeks to achieve equality of outcomes and is based on Australia's international obligations to achieve equality, as required by international instruments such as the **Convention on the Elimination** of All Forms of **Discrimination** Against **Women**.

[39] In the Second Reading speech for the Sex **Discrimination** Amendment Bill 1995 (Cth), House of Representatives, Debates (Hansard), 28 June 1995 at p 2456, the Attorney-General described the origin of the proposed change in respect of special measures in some detail as follows:

An issue raised by both the Half way to equal committee and by the Australian Law Reform Commission under its reference 'Equality before the law' is whether the 'special measures' provision in the act as presently worded is achieving its purpose. The legislation currently provides that an act which would otherwise be discriminatory for the purposes of the act is not unlawful if a purpose of that act is to ensure equal opportunity. The legislation currently treats special measures as discriminatory, but lawful -- an approach which reflects the fact that the legislation is structured on an 'equal treatment' model under which any difference in treatment is prima facie discriminatory.

The amendment proposed in the bill makes two significant changes. First, it provides that special measures are not treated as a form of **discrimination;** instead, they would be considered as part of the threshold question of whether there is **discrimination** at all. Consequently, the 'special measures' provision will be moved from that part of the act which provides exemptions. Special measures should be presented and understood as an expression of equality rather than an exception to it.

Second, the special measures provision currently focuses on the attainment of equal opportunities. This focus ignores the historical and structural barriers which impede **women's** utilisation of formal equal opportunities. The **Convention** for the **Elimination** of All Forms of **Discrimination** Against **Women** refers to measures 'aimed at accelerating de facto equality', and our emphasis should be on measures to achieve real or substantive equality.

To attain substantive equality, it is necessary to look at the end result of a practice that purports to treat people equally. In this way structural barriers that prevent a disadvantaged group from attaining real equality can be taken into account. A narrow and formalistic interpretation of equality will not produce equality in fact and may entrench existing **discrimination** or create new discriminatory situations.

[40] The **Convention on the Elimination** of All Forms of **Discrimination** Against **Women** (entered into force 3 September 1981) (the "**Convention"**) referred to by the Attorney-General in his Second Reading speech and in s 3(a) of the SDA is a schedule to the SDA. Article 4, para 1 of the **Convention** provides:

> 1. Adoption by State Parties of temporary special measures aimed at accelerating de facto equality between men and **women** shall not be considered **discrimination** as defined in the present **Convention,** but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

Article 7(c) of the **Convention** provides that State Parties should ensure **women** have equal capacity to participate in 'non-governmental organisations and

associations concerned with the public and political life of the country', which would include an organisation such as the respondent, which is in any event expressly covered by s 19 of the SDA. It is clear that in adopting and implementing Art 4 para 1 of the **Convention,** Parliament chose to use some of the same words in s 7D as used in the **Convention** itself.

[41] In the absence of any expression of intention to the contrary in the statute, s 7D of the SDA should be construed in conformity with the **Convention:** see the Vienna **Convention** on the Law of Treaties ("Vienna **Convention"**) Art 31; see also Koowarta v Bjelke-Petersen (1982) 153 CLR ("Koowarta") 168 at 265 per Brennan J; *Applicant A v The Minister* (1997) 142 ALR 331 ("Applicant A") at 339-340 per Dawson J and at 349-352 per McHugh J; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287/288 per Mason CJ and Deane J. Moreover, it has been recognised by McHugh J in Applicant A that:

... international treaties often fail to exhibit the precision of domestic legislation. This is sometimes the price paid for international political comity ... in my opinion, Art 31 of the Vienna **Convention** requires the courts of this country when faced with a question of treaty interpretation to examine both the 'ordinary meaning' [of a word] and the 'context ... object and purpose' of a treaty.

[42] The phrase "special measures", and the provision that a "special measure" is not discriminatory (subs 7D(2)), cannot be understood without recognising that the SDA is implementing the express wording of the **Convention** in this regard or without recognising the context, object and purpose of the **Convention.** "Special measure", as a phrase construed according to its plain or ordinary meaning means a measure which is exceptional, out of the ordinary or unusual. Where the word "special" qualifies laws, as in the races power, s 51(xxvi) of the Constitution, it denotes laws which are special to, or for, a particular group, or special because they address special needs: Koowarta at 210, per Stephen J. Equally, laws may be special because they operate differentially: see WA v Commonwealth at 461 per Mason CJ and Brennan, Deane, Toohey, Gaudron and McHugh JJ:

A special quality appears when the law confers a right or benefit or imposes an obligation or disadvantage especially on the people of a particular race. The law may be special even when it confers a benefit generally, provided the benefit is of particular significance or importance to the people of a particular race.

[43] While recommendations made by the Committees on the **Elimination of Discrimination** Against **Women** under the abovementioned **Convention** are not binding they explain the **Convention's** context, object and purpose. In the General Recommendation No 25, Thirtieth Session, 30 January 2004 it is observed:

State parties often equate "special measures" in its corrective compensatory and promotional sense with the terms "affirmative action"; "positive action"; "positive measures"; "reverse **discrimination"**; and "positive **discrimination"**. These terms emerge from the discussions and varied practices found in different national contexts

(at p 5) ... The term "special" though being in conformity with human rights discourse ... needs to be carefully explained ... the real meaning of "special:" in the formulation of Article 4, paragraph 1, is that the measures are designed to serve a specific goal (at p 6).

Article 4 para 1 of the **Convention** contains its own explication of "temporary special measures" as measures 'aimed at accelerating de facto equality between men and **women'.** It is that factual basis which dictates a special measure is 'not [to] be considered **discrimination.**'

[44] A "special measure" as referred to in s 7D, and as construed by reference not only to the ordinary meaning of words repeated from the **Convention,** but also by reference to the context, object and purpose of the **Convention** is one which has as at least one of its purposes, achieving genuine equality between men and **women.** The phrase "special measure" is wide enough to include, what is known as, affirmative action. A special measure may on the face of it be discriminatory but to the extent that it has, as one of its purposes, overcoming **discrimination,** it is to be characterised as non-discriminatory. Without reference to the legislative history and the **Convention,** it would not necessarily be easy to appreciate the characterisation of a "special measure" as non-discriminatory when s 19 contains explicit prohibitions against **discrimination** in the workplace. That difficulty lies at the heart of this proceeding and explains the applicant's efforts in various forums to have rr 5 and 9 declared invalid, because they ostensibly discriminate against men, which of course includes him. This emphasises the importance of the Human Rights Commission's function specified in s 11(1)(g) of the HREOC Act 'to promote an understanding and acceptance, and the public discussion of human rights in Australia'.

Authorities

[45] There is no binding authority construing or applying s 7D of the SDA. However, the International **Convention on the Elimination** of All Forms of Racial **Discrimination** ("the Racial **Discrimination Convention"**) also contains the phrase "special measure" which occurs in s 8 of the Racial **Discrimination** Act 1975 (Cth) ("the RDA"). This has been the subject of judicial consideration in Gerhardy v Brown The question for consideration there was whether s 19 of the Pitjantjatjara Land Rights Act 1981 (SA) was a "special measure" within Art 1 para 4 of the Racial **Discrimination Convention** (the cognate of Art 4 para 1 of the **Convention)** and s 8 of the RDA (the cognate of s 7D of the SDA). It must be noted that the wording of s 8 of the RDA and s 7D of the SDA is not identical. To qualify for exemption under s 8 of the RDA, a "special measure" was required to have as its sole purpose the securing of adequate advancement of certain racial or ethnic groups. Also it needs to be noted that s 8 of the RDA was (like the precursor of s 7D, s 33 of the SDA) an exemption provision, not a provision like s 7D, which deems a special measure non-discriminatory.

[46] In concluding that s 19 of the Pitjantjatjara Land Rights Act 1981 (SA) was a special measure (without which characterisation it would have been discriminatory) the High Court considered a Report of a Land Rights Working Party, which indicated the legislation had as its object the advancement of a certain racial group which required protection. The High Court recognised that formal equality before the law was not necessarily sufficient to eliminate all forms of racial **discrimination.** At 128 and following, Brennan J. noted the need for equality in fact as well as in law, and observed that special measures were those intended to achieve effective and

genuine equality. He did so by reference to observations made by a number of Courts around the world:

In its Advisory Opinion on Minority Schools in Albania, the Permanent Court of International Justice noted the need for equality in fact as well as in law, saying:

Equality in law precludes **discrimination** of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations

It is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situation and requirements are different, would result in inequality in fact ... '

As Mathew J said in the Supreme Court of India in Kerala v Thomas, quoting from a joint judgment of Chandrachud J and himself:

It is obvious that equality in law precludes **discrimination** of any kind; whereas equality in fact may involve the necessity of differential treatment in order to attain a result which establishes an equilibrium between different situations.

In the same case, Ray CJ pithily observed:

Equality of opportunity for unequals can only mean aggravation of inequality ...

In an opinion which dissented on a point that is not material here, Judge Tanaka wrote in the South West Africa Cases (Second Phase):

We can say accordingly that the principle of equality before the law does not mean the absolute equality, namely equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal.

The question is, in what case equal treatment or different treatment should exist.

...

Formal equality must yield on occasions to achieve what the Permanent Court in the Minority Schools of Albania Opinion called 'effective, genuine equality.'

A means by which the injustice or unreasonableness of formal equality can be dismissed or avoided is the taking of special measures. A special measure is, ex hypothesis, discriminatory in character; it denies formal equality before the law in

order to achieve effective and genuine equality. ...

[In] University of California Regents v BakkeBlackmun J said:

In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.

...

[47] The various quotations illustrate that "special measures" in the context of race are recognised, in human rights discourse, as measures designed to achieve equality in fact described by epithets such as "actual", "genuine", "effective", "de facto", or "substantive". The phrase "equality in fact" is contradistinguished from "equality in law" or "legal" or "formal" equality. Such measures may be ostensibly discriminatory but a person taking a special measure is not discriminating against others because such measures are designed to ensure genuine equality. Thus, it is the intention and purpose of the person taking a special measure, which governs the characterisation of such a measure as non-discriminatory, not the necessary effect of the measure in disadvantaging any group. Special measures in respect of sex **discrimination** cannot be any different in this regard.

Other jurisdictions and special measures including affirmative action measures

[48] Because special measures are referred to in the **Convention** and are part of human rights discourse beyond Australia it is worth considering briefly, affirmative action measures permitted or considered elsewhere.

United Kingdom

[49] The Sex **Discrimination** Act 1975 (UK) contains provisions which allow some affirmative action in favour of **women** or men in limited and defined circumstances. Section 49, which applies to trade unions and elective bodies, allows provisions which ensure 'that a minimum number of persons of one sex are members of the body ... where ... the provision is in the circumstances needed to secure a reasonable lower limit to the number of members of that sex serving on the body'. Reserving positions for persons of that sex is permissible under the legislation.

European Community

[50] The Council of European Communities Equal Treatment Directive 76/207/EEC dated 9 February 1976, deals with the implementation of the principle of equal treatment for men and **women** as regards access to employment, vocational training and promotion and working conditions. Article 2(1) provides the "principle of equal treatment shall mean that there shall be no **discrimination** whatsoever on grounds of sex either directly or indirectly in particular to marital or family status". Article 2(4) allows the taking of special measures being measures to "promote equal opportunity for men and **women,** in particular by removing existing inequalities which affect **women's** opportunities."

[51] In Kalanke v Freie Hansestadt Bremen (C-450/93) [1995] ECR I-30651, the

European Union Court disallowed a law which gave **women** automatic priority for employment in public service sectors where **women** were under-represented. The Court found such a law involved **discrimination** and went beyond the limits of Art 2(4) of the Directive. In a later decision, Marschall v Land Nordrhein -- Westfalen (C-409/95) [1997] ECR I-6363 by reference to Art 2(4) of the Directive the Court upheld a rule, which allowed priority to be given to female job applicants (where there were fewer **women** than men at a certain level in the public service), but importantly also allowed that priority to female applicants to be overridden, where one or more job criteria tilted the balance in favour of an exceptional male applicant.

[52] The Court also upheld as valid a "flexible quota system" (ie. quotas in favour or **women** which were not automatic and unconditional) in Badeck v Hessischer Ministerprasident (C-158/97) [2000] ECR I-1875. It appears Art 2(4) of the Directive protects special measures taken to remove inequality where such special measures do not automatically or inflexibly exclude other candidates from objective consideration.

United States of America

[53] The Supreme Court of the United States of America has also had occasion to consider quotas, particularly in the context of admissions policies of Universities where quota systems have been tried as a mechanism to ensure equality in the context of race or sex. The Civil Rights Act 1964 ("Civil Rights Act") Title IV, provides for Desegregation of Public Education, Title VI provides for Nondiscrimination in Federally Assisted Programs and Title VII provides for Equal Employment Opportunity.

[54] A number of cases have occurred in which the Supreme Court has been asked to consider whether affirmative action policies implemented under the Civil Rights Act offend against the Fourteenth Amendment of the Constitution guaranteeing 'equal protection of the law' to all citizens of the United States (the "Equal Protection Clause"). In Regents of the University of California v Bakke 428 US 265 (1978), it was held by a majority that the reservation of 16 places for disadvantaged minority students (the "special admissions program") out of 100 places, for medical school, was unconstitutional in that it reserved places for persons of particular race or ethnic origins. However, the Court considered the Equal Protection Clause did not prohibit a university from taking race into account in admission decisions.

[55] By way of contrast, there are examples of decisions where conspicuously narrow affirmative action measures have been upheld as not offending the Equal Protection Clause: see Local 28 of the Sheet Metal Workers International Assn et al v Equal Employment Opportunity Commission et al 178 US 421 (1986) (a case concerning an affirmative action quota in favour of non-white labourers); Johnson v Transportation Agency, Santa Clara County, California et al 480 US 616 (1987) (a case concerning an affirmative action plan for hiring **women** and persons from minority groups).

[56] The strict scrutiny which the Supreme Court applies to affirmative action measures, particularly quotas, focuses upon whether the measures in question are "narrowly tailored". In Gratz v Bollinger 123 SCt 2411 (23 June 2003) an admissions policy of the University of Michigan (which gave minority students 20 points towards a necessary 100 points score) was found to violate, inter alia, both the Equal Protection Clause and Title VI of the Civil Rights Act because its use of race was not

sufficiently narrowly tailored to achieve the respondent's legitimate interest in diversity; it did not allow "individualized consideration" of non-racial distinctions among applicants. The case was distinguished from Gruther v Bollinger 123 SCt 2325 (a decision brought down on the same day) in which the Supreme Court held that a "race-conscious" admissions policy did not offend against the Equal Protection Clause because it was "narrowly tailored", in that while the law school concerned could treat race as a "plus factor", it could also consider all elements of diversity and could select non-minority applicants who had greater potential to enhance student diversity over under-represented minority applicants.

Canada

[57] Clause 15 of the Canadian Charter of Rights and Freedoms guarantees equal protection of the law but permits 'any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethic origin, colour, religion, sex, age or mental or physical disability.' In *Law v Minister of Human Resources Development* [1999] 1 SCR 497, the Supreme Court made it clear that laws permitting differential treatment need to be scrutinised against the guarantee of equality in cl 15(1). That approach was also taken in *Lovelace v Ontario* [2000] 1 SCR 950. There the Court recognised that to the extent that cl 15(1) guarantees substantive equality (in contradistinction to formal equality) the amelioration of the conditions of disadvantaged persons will not necessarily offend cl 15(1).

New Zealand

[58] The Human Rights Act 1993 (NZ) excuses from its prohibitions on **discrimination,** acts which would otherwise breach its provisions to ensure equality. Subsections 73(1)(a) and (b) (like s 7D of the SDA) permit acts done 'in good faith for the purpose of assisting or advancing persons or groups of persons ... against whom **discrimination** is unlawful [when] those persons or groups need or may reasonably be supposed to need assistance or advancement in order to achieve an equal place with other members of the community.'

[59] The greatest possible caution is appropriate when considering jurisprudence from other places. However, this short excursus indicates that "special measures" are widely recognised in differing legal systems as a method of redressing inequalities arising from race or sex. While it would be unhelpful and imprudent to treat any of the approaches to special affirmative action measures referred to above as providing a rigid template for the correct method of construing and applying s 7D of the SDA, it is worth observing that automatic or inflexible quotas, even in differing legal systems, seem to run a greater risk of falling foul of general prohibitions on discriminatory acts and can prove more difficult to justify as "special measures" than more flexible measures with a similar aim.

Construction of s 7D

[60] By reference to the plain and ordinary meaning of the words used, the legislative history of s 7D, the express words of the **Convention** which are copied into s 7D, and the context, object and purpose of the **Convention,** s 7D can be construed as follows: subs 7D(1)(a) authorises the taking of "special measures'' for the purpose of achieving substantive equality between men and **women.** The phrase "substantive equality" means equality in substance or de facto equality, in

contradistinction to notional equality or formal equality. Subsection 7D(2) provides that "special measures" authorised by subs 7D(1) do not give rise to **discrimination** under s 5. The phrase "special measures" includes affirmative action measures which confer a benefit on a group for the purpose of achieving substantive equality. Under subs 7D(4) authorised special measures only remain authorised for so long as they are needed to achieve their purpose. Prohibitions in the SDA such as the prohibition in s 19 are specific prohibitions against sex **discrimination,** as defined generally in s 5. However, by the operation of subs 7D(2), a person taking a special measure does not discriminate against another person within the meaning of the SDA. Accordingly, a special measure authorised temporarily by subs 7D(1)(a) cannot fall within the prohibition in s 19.

Application of Section 7D

[61] As amicus curiae the Commissioner's counsel submitted that any application of s 7D requires an assessment of whether the measure in question was taken for the purpose of achieving substantive equality noting that such purpose was not required to be the only or even primary purpose (subs 7D(3)). This test was said to be a subjective test and neither party demurred from this analysis.

[62] Next it was submitted on behalf of the Commissioner, that the Court needs to objectively test first whether the entity propounding a special measure acted reasonably in assessing the need for the special measure, and secondly the capacity of the special measure to achieve the purpose of substantive equality. It was also submitted that appropriate factors to be considered included the field of activity in which the special measure was taken, the correct comparator in relation to substantive inequality, the causes of inequality, the proportionality of the special measure and whether the special measure was still required. Again, neither party demurred from these propositions.

Findings of fact and application of s 7D

[63] There can be no doubt that in the absence of s 7D of the SDA, rr 5 and 9 could operate in a discriminatory way against men. However, as stated in para [60] above, s 7D read as a whole can render the rules lawful for so long as the rules are required to achieve substantive equality for **women.**

[64] On the evidence from the union I am satisfied that before the passing of the rules, it held a view that substantive equality between men and **women** members of the respondent had not been achieved. The evidence it relied on in forming this view was substantial and included a good deal of statistical evidence. I am also satisfied, on the evidence, that the respondent believed solving this problem required having **women** represented in the governance and high echelons of the union so as to achieve genuine power sharing between men and **women.** The evidence also demonstrates that whilst the respondent espoused proportional representation for **women,** at least in the period 1994 to 1998, it subsequently adopted a 50% policy for representation of **women** at Branch and State Conference level, in order to accelerate substantive equality between its male and female members.

[65] The same evidence is also relied upon by me as the basis for finding that the rules are a reasonable "special measure" when tested objectively. While the rules sanction inflexible quotas in favour of **women,** it is noted that there was evidence of union rules, which enabled the discontinuance of the two rules in question, if they

were no longer needed. Having regard to the inflexibility of the quotas and the express provisions of subs 7D(4), monitoring is important to ensure the limited impact of such measures on persons in the applicant's position. The rules have only been utilised once and there was evidence that elections to the relevant positions were for four-year terms. Accordingly, it is too soon to find that the special measure is no longer needed or that rules 5 and 9 are deprived of their character as a special measure because they have been utilised once. However, rr 5 and 9 cannot remain valid as special measures beyond the "exigency" (namely the need for substantive equality between men and **women** in the governance of the union) which called them forth: subs 7D(4); see also *Australian Textiles Pty Ltd v The Commonwealth* (1945) 71 CLR 161 at 180-181 per Dixon J.

Conclusion

[66] Rules 5 and 9 are "special measures" within the meaning of s 7D of the SDA. Section 19 of the SDA has no operation in those circumstances. The application will be dismissed. Submissions may be made by both parties on the question of costs.

The application be dismissed.

Counsel for the applicant: R A R Lewis

Counsel for the Human Rights and Equal Opportunity Commissioner: R Doyle (amicus curiae)

Solicitors for the applicant: Brian F Jacomb Associates

Solicitors for the respondent: Australian Services Union National Office

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