

Human Rights and Equal Opportunity Commission

v

Mount Isa Mines

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Competing statutory objectives, particularly when both are honourable, may pose a problem to an administrative agency or commission seeking to satisfy both. What are a commission's statutory duties, for example, if otherwise appropriate health and safety standards it wishes to implement potentially violate the *Sex Discrimination Act* 1984 (Cth) (the SDA)? How much weight must the commission give to the SDA when designing standards? How much decision-making authority may the commission delegate to a regulating body to ensure compliance with the SDA? This dilemma was faced by the Full Court of the Federal Court of Australia in the case of *Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd & Ors* (MIM case).¹

The material facts of the MIM case were essentially as follows. The National Occupational Health and Safety Commission (the Commission), in accordance with its statutory duty under s 38 of the *National Occupational Health and Safety Act* 1985 (Cth) (NOHSA), developed a set of recommended standards and codes - namely the proposed National Inorganic Lead Control Standard (the Standard), and National Code of Practice for Control and Safe Use of Inorganic Lead at Work (the Code) - to guide persons and companies engaged in the Australian lead industry in which the presence of lead poses a health risk.

For the purposes of the case, it was accepted that exposure to unsafe levels of lead poses a health risk for all individuals. Lead can have serious effects on the reproductive functions in males and females and may cause genetic damage to both ovum and sperm.

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The views expressed by the author do not necessarily reflect the views of the Commission in respect of the matters the subject of this article.

¹ *Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd & Ors* (1993) 118 ALR 80.

However, the danger is highest for foetuses and for small children, whose health is at risk at significantly lower lead-levels than adults. In addition, there was some controversy as to the relative degree of risk created by industrial exposure to lead on men as opposed to women. However, for the purpose of this case, the parties appear to have accepted the argument that the reproductive capacity of women may be damaged by exposure to lower lead-levels than is the case with males.²

As a result of the apparent additional risk to the health of women and children (both born and unborn), the Commission's early draft of the Standard and Code excluded from employment those employees in high lead-risk positions who were pregnant, breastfeeding, or who had lead blood levels above a strict measure. These criteria had the effect of excluding women and not men from certain areas of employment in the lead industry.

The Commission, in accordance with the procedures mandated by s 38 of the NOHSA to publish the Standard and Code, conducted extensive inquiries and consulted with policy experts and government agencies on the content of the drafts. The Commission received submissions which indicated that the proposed draft of the Standard and Code, which limited the employment of women and not men in high lead risk positions, violated the SDA.³

These submissions indicated that the Standard and Code potentially violated two sections of the SDA. Section 5 of the Act prohibits treating an individual differently than an individual of the opposite sex would be treated by reason of the sex (or a characteristic of the sex) of the aggrieved person, in circumstances that are the same or are not materially different. Section 7 of the SDA prohibits similar conduct done by reason of the pregnancy (or characteristic of the pregnancy) of the aggrieved person unless that conduct is reasonable in the circumstances. The consulted experts (including the Sex Discrimination Commissioner, the Attorney-General, and the members of the Lead Expert Working Group) submitted that if employers were to follow the draft of the proposed Standard and Code, they may violate the SDA by excluding women and not men from certain positions in the lead industry because of characteristics of their sex and/or because of their pregnancy or potential to become pregnant.⁴ The submissions concluded that the Commission would be violating its statutory duty if it were to promote a Standard and

2 Id at 93.

3 Id at 88-89.

4 Id at 88-89.

Code which caused employers who followed the guidelines to discriminate.⁵

In response to these submissions, the Commission amended the draft of its proposals. Section 14 of the Standard was changed to read: 'Criteria for exclusion from working in a lead risk job are: (a) personal medical condition; (b) pregnancy; (c) breastfeeding; and (d) such other basis as may be permitted under relevant anti-discrimination legislation.'

The Commission also revised the proposed Code. Under s 44 of the SDA, the Human Rights and Equal Opportunity Commission (HREOC) has the power to exempt persons or employers in the lead industry from the provisions of the Act. The Commission empowered HREOC with this responsibility by revising s 12 of the Code to include under paragraph (1)(d): 'We are advised by HREOC that employers wishing to exclude women, other than those pregnant or breastfeeding, from lead-risk jobs will need to seek an exemption from the relevant Sex Discrimination legislation.'

Litigation soon developed after Mount Isa Mines Ltd (Mount Isa), an employer in the lead industry, sought orders of review in the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and s 39(b) of the *Judiciary Act 1903* (Cth). Broadly, Mount Isa argued that the Commission should not give the issue of sex discrimination the same consideration as health and safety, and in doing so, was in breach of its statutory duty to prepare guidelines which promote the highest standards of occupational health and safety. Mount Isa argued that even though the Commission appeared to accept that the balance of scientific thought presently favoured the view that women were susceptible to ill effects from lower levels of blood lead than men, the revised Standard and Code no longer prescribed appropriately different standards. Mount Isa further submitted that the Commission inappropriately delegated part of its statutory power to HREOC in developing the appropriate occupational health and safety Standard and Code.⁶ The Commission, on the other hand, argued that, subject to the exceptions allowed under s 44 of the SDA, it would be unlawful for employers to discriminate against women in lead risk employment on the basis of sex, or any characteristic of sex. The Commission submitted that it would breach its statutory duty if it were to promote a Standard and Code which, if followed, would cause

5 Id at 90.

6 Id at 93-94.

employers to violate the SDA.⁷ HREOC intervened to support the Commission.

At first instance, the Court (Davies J) generally accepted Mount Isa's argument and declared that paragraph 14(1)(d) of the proposed Standard and paragraph 12 1(d) of the proposed Code would be invalid if they were adopted. Justice Davies based this judgment on two grounds. First, his Honour concluded that the Commission had abdicated part of its statutory duties to HREOC by accepting that HREOC could, through its exemption process, establish the safety precautions for the lead industry.

Secondly, Davies J found that the Commission was overborne in its consideration of the SDA when preparing the proposed Standard and Code and, in doing so, failed to develop proper and adequate standards and codes for the lead industry.⁸ His Honour ordered that the Commission further consider whether there were any additional provisions which were necessary from an occupational health and safety standpoint and should therefore be included in the proposed Standard and Code.⁹ Justice Davies rejected Mount Isa's argument that occupational health and safety was the Commission's sole consideration in preparing the Standard and Code. However, his Honour accepted Mount Isa's submission that it is not the task of the Commission to implement the SDA; that task is the responsibility of the Sex Discrimination Commissioner, HREOC, and the Federal Court. He ordered the Commission to reconsider whether there were additional provisions which were necessary from an occupational health and safety standpoint and which should therefore be included in the proposed Standard and Code. HREOC appealed from this decision to the Full Court of the Federal Court.

On appeal, the Full Court of the Federal Court (Black CJ, Lee J, and Lockhart J) unanimously dismissed the appeal, but did not accept the reasoning of Davies J in its entirety. The decision of the Full Court, overall, differed from that of Davies J in three significant areas: first, the appropriate weight which the Commission should give to discrimination legislation; secondly, the definition of 'by reason of' for the purpose of the SDA; and thirdly, the definition of 'materially different' for the purposes of the Act. The Full Court's departure from the reasoning of the trial Judge in these areas is significant to the development of a coherent discrimination jurisprudence and deserves close and detailed attention.

7 Id at 94.

8 Id at 86.

9 Id at 86-87.

First, the Full Court determined that, while the Commission's primary duty is to propose the Standard and Code which would achieve the highest degree of occupational health and safety, the body has a concurrent statutory duty to consider all relevant anti-discrimination legislation and the effect of that legislation on its proposals. Justice Davies had concluded that, while the Commission should consider the objectives of the SDA, it should not be limited by the implementation of the SDA when developing its occupational health and safety Standard and Code.¹⁰ While not explicitly disagreeing with the reasoning of the trial judge on this aspect, Lockhart J elaborated on the relationship between the Commission's statutory duty and the anti-discrimination legislation. Justice Lockhart affirmed the view of Davies J that the Commission's primary duty under the NOHSA is to develop guidelines which maximise occupational health and safety. Therefore, Lockhart J concluded, if the Commission determines that certain policies must be followed to ensure occupational health and safety, the Commission has a statutory duty to express those views and include the policies in its Standard and Code.¹¹ At the same time, Lockhart J also concluded that when the Commission performs its statutory functions, it has an additional obligation to examine all other relevant Commonwealth and State law. If the Commission believes that its occupational health and safety guidelines may cause an employer to violate the SDA, it is required to foreshadow this possibility. His Honour described the issue thus:

What the Commission should do ... is to declare what it regards as appropriate standards and codes, but point out clearly that the adoption of them or certain of them (and the Commission should specify which) may involve employers in the contravention of the [SDA] unless exemptions are obtained by them under s 44 of the [SDA]. The commission should not create an impression by the words it uses in its declarations of standards and codes that, if employers act pursuant to them, they will not thereby run the risk of contravening relevant laws of the Commonwealth or any State or Territory.¹²

Justice Lockhart placed greater significance on the relevance of anti-discrimination legislation than did Davies J and reconciled the goals of the two objectives.

Secondly, Lockhart J disagreed with Davies J's interpretation and application of two important phrases of the SDA. Generally, the SDA states that a person violates the SDA if he or she, 'by reason of

10 Id at 94.

11 Id at 106.

12 Ibid.

the sex of the aggrieved person, treats the aggrieved person less favourably than he or she would treat a person of the opposite sex in circumstances that are the same or not 'materially different.' Justice Davies had found that the proposed Standard and Code as designed by the Commission would not lead employers who followed the guidelines to contravene the SDA because their conduct would not be based on a woman's sex per se. Justice Davies stated as follows:¹³

If discrimination is on the basis of danger either to the health of a woman employee, by reference to the level of lead which may affect reproductive capacity, by reason of the danger of lead to an unborn foetus or by reference to the danger of lead to a child who breastfeeds, I doubt that such discrimination is discrimination on the basis of sex as defined in s 5 of the [SDA]. Rather it would be discrimination on the basis of health. Nor would I describe the position of a woman who was seeking to become pregnant or a woman who was pregnant or a woman who was breastfeeding a child as a circumstance that was the same or not materially different from that of a male employee in the lead industry.

Justice Lockhart disagreed with Davies J's conclusion and reasoning on this point. First, Davies J had stated that excluding women from certain high lead-risk positions because of the different effects of lead on women than on men was permitted under the SDA because the basis for this differential treatment was by reason of health and not because of their sex. In short, Davies J was of the view that as long as the differential treatment was manifestly grounded in a purpose other than sex, it was not unlawful within the meaning of the SDA. Justice Lockhart adopted a stricter view of the meaning of 'by reason of' for the purposes of the SDA. He concluded that, for the purposes of s 5 of the SDA, 'by reason of' meant 'because of,' 'due to,' or 'based on'; words which imply a cause and effect relationship between the sex of the aggrieved person and the less favourable treatment.¹⁴

In arriving at this conclusion, Lockhart J sought to reconcile two recent English authorities: *R v Birmingham City Council; ex parte Equal Opportunity Commission*¹⁵ and *James v Eastleigh Borough Council*.¹⁶ These two authorities differed on the significance given to the intention of the discriminator to discriminate against the aggrieved person by reason of the sex of that person. *Eastleigh* requires a causative link between the defendant's behaviour and the detriment to the complainant. It focuses on the operative effect of

13 *Id.*, cited by Lockhart J at 94.

14 *Id.* at 99.

15 *R v Birmingham City Council; ex parte Equal Opportunity Commission* [1989] AC 1155.

16 *James v Eastleigh Borough Council* [1990] 2 AC 751.

the behaviour and is not concerned with the intent of the discriminator to discriminate on the basis of sex. *Birmingham*, on the other hand, applies an objective test, examining the defendant's intent in treating the aggrieved person differently and not merely looking at the causative effect of that conduct. Justice Lockhart reconciled the two alternative positions, declaring that all the circumstances surrounding the alleged discriminatory conduct are relevant to determine if the conduct contravenes s 5 of the SDA. According to Lockhart J, a decision-maker must examine the intent of the alleged discriminator to determine if the conduct in question violates the SDA. He or she should not, however, be limited to that examination alone.¹⁷ In some cases - for example, when an employer refuses to hire a woman because he does not like women - the intention of the discriminator is the significant factor. In other circumstances, a 'facially neutral' criterion may produce a result so essentially discriminatory in nature that evidence of intent, motive, or purpose is not an essential factor, nor even necessary. This latter situation occurred in *Eastleigh*, which examined whether a facially neutral standard was, in fact, discriminatory.

In *Eastleigh*, the Eastleigh Borough was challenged for a policy which charged persons below pensionable age a small fee to enter a municipal swimming pool, while admitting pensioners for free. Pensionable age for women was sixty, for men, it was sixty-five. The plaintiff, a man, sued the city on the grounds that the policy discriminated against him by making him pay an admission price while his wife, who was the same age, could enter the pool for free. Justice Lockhart indicated that, while evidence of intention or motive is relevant, in *Eastleigh*, the *MIM* case, and similar cases, it is not necessarily the determinative factor. His Honour concluded:

The search for the proper test to determine if a defendant's conduct is discriminatory is not advanced by the formulation of tests of objective or causative on the one hand and subjective on the other as if they were irreconcilable or postulated diametrically opposed concepts. The inquiry necessarily assumes causation because the question is whether the alleged discrimination occurs because of the conduct of the alleged discriminator; and the inquiry is objective because its aim is to determine on an examination of all the relevant facts of the case whether discrimination occurred. This task may involve the consideration of subjective material such as the intention or even motive, purpose or reason of the alleged discriminator; but its significance will vary from case to case and generally would be expected to diminish in cases such as *Eastleigh* where the policy of an official body has been formulated and is faithfully applied by the decision-maker and where generally there

17 *HREOC v Mount Isa Mines* at 102.

will be little room for questions of intent, motive or purpose or reason save that the intent of the decision-maker doubtless is to give effect to the policy.¹⁸

Justice Lockhart disagreed with Davies J's conclusion that the lack of discriminatory intent on the part of employers who follow the Commission's proposed Standard and Code would excuse that conduct from the provisions of the SDA. In certain circumstances, according to Lockhart J, the operative effect of a facially neutral standard may be equally significant as the presence or lack of presence of discriminatory intent in determining the question of whether or not the SDA has been violated.

Finally, Lockhart J disagreed with Davies J's definition of 'materially different' as that phrase is used in s 5 of the SDA. Davies J had stated that the fact that men and women were affected at different levels of exposure to lead constituted a material difference for the purpose of the SDA. Employers who were to exclude women from these positions based on this reason, his Honour concluded, would, therefore, not violate the SDA.¹⁹

Justice Lockhart did not support Davies J's reasoning on this point. He relied instead on the view of HREOC in *Sullivan v Department of Defence*²⁰ and *Proudfoot v Australian Capital Territory Board of Health*.²¹ These cases had held that a material difference for the purpose of s 5 of the SDA could not include the prohibited basis for less favourable treatment, namely sex. In other words, an employer could not justify unequal treatment on the grounds of susceptibility to a particular health risk if that susceptibility is itself gender based. His Honour stated:

The words in s 5 ... are not, in my opinion directed to the differences between men and women. If differences between men and women are capable of being material for the purposes of s 5 then the effect of those words would remove from the ambit of discrimination many cases of less favourable treatment occurring by reason of sex.²²

Chief Justice Black generally concurred with the judgment of Lockhart J²³ and further clarified the appropriate relationship

¹⁸ Id at 102.

¹⁹ Id at 93.

²⁰ *Sullivan v Dept of Defence* (1992) EOC 92-421.

²¹ *Proudfoot v Australian Capital Territory Board of Health* (1992) EOC 92-417.

²² *HREOC v Mount Isa Mines* at 105.

²³ Id at 81.

between the Commission's statutory duty under the NOHSA and the SDA. The Chief Justice expressly acknowledged the relevance of discrimination law to the Commission's task of establishing workable and appropriate occupational health and safety guidelines. His Honour concluded:

In my view the interaction between the SDA and the NOHSA is such that the Commission may declare standards and codes that fully recognise the impact of the SDA both in so far as it prohibits discrimination in employment and in so far as the SDA provides for the grant of exemptions by HREOC ... The Commission may thus declare standards and codes of practice which are set in such a way as not to involve and discrimination. At the same time, the Commission may also declare other standards and codes as being applicable if, but only if, by reason of an exemption from the SDA or equivalent legislation, differences in the application of the standards or codes that turn on a person's sex do not involve unlawful discrimination.²⁴

Chief Justice Black's solution allowed for two situations. First, if an employer applied for an exemption under s 44 of the SDA and the HREOC granted this request, the Commission's Standard and Code would apply. On the other hand, if HREOC did not consider it appropriate to grant an exemption, the Commission would have designed an appropriate alternative Standard and Code which reflected relevant occupational health and safety considerations, but still allowed employers following the guidelines to operate within the SDA.²⁵

Justice Lee also substantially concurred with the judgement and the reasoning of Lockhart J.²⁶ In one respect, however, Lee J disagreed with Lockhart J and Black CJ in holding that employers in the lead industry who followed the Commission's proposed Standard and Code would not necessarily contravene the SDA.²⁷ Justice Lee argued that to have violated s 5 of the SDA a discriminator must have manifested discriminatory intent.

Before it could be said that discrimination had occurred under ss 5(1) of the [SDA], it would be necessary to show that the actions of the employer arose out of ill-disposition or lack of partiality or even-handedness towards an employee or applicant for

²⁴ Id at 85.

²⁵ Id at 85.

²⁶ Id at 108.

²⁷ Id at 111.

employment, such an attitude being grounded upon the sex of that person or upon a characteristic appertaining or imputed thereof.²⁸

Justice Lee's interpretation of the elements required to find that an individual had violated the SDA was different than that of Lockhart J and Black CJ, who argued that conduct may violate the SDA as a result of the operative discriminatory effect of that conduct, irrespective of the lack of any discriminatory intent on the part of the employer. In the facts of this case, Lee J found that the proposed Standard and Code would not necessarily cause employers who followed the guidelines to violate the SDA. According to Lee J, employers who followed the Standard and Code would exclude women and not men from certain high risk positions as a result of the duty of care the employer had to the female employees and to their children. His Honour described his view as follows:

Provided the employer took into account all relevant matters in respect of the employee or applicant and the circumstances of the employment in addition to the employer's duty to take all reasonable steps to protect the health of that person in the workplace and of others who may be injured by that exposure, it would be arguable that in so acting an employer would not be treating that person less favourably than a person of the opposite sex and arguable that no question of discrimination on the ground of sex, or a characteristic appertaining or imputed thereto, would arise.²⁹

Justice Lee concluded that a decision maker must determine whether the true basis of the employer's conduct was, in fact, a response to an actual duty of care, or the result of discrimination based on the sex of the employee. Insofar as Lee J's views are inconsistent with those of Lockhart J and Black CJ on this matter, the position of Lee J constitutes a minority.

The significance of the *MIM* case extends beyond the effect of the SDA on industrial occupational health and safety standards in the lead industry. This case is an important advance and progression in the area of discrimination law. The reasoning of the Full Court of the Federal Court establishes core principles underlying all discrimination law and provides a thoughtful and helpful analysis of the relevant legislation and cases. In the final analysis, the *MIM* case establishes the appropriate relationship and interaction between the statutory duties of the Commission and federal anti-discrimination legislation and clarifies the proper interpretation of language applicable to all discrimination law. Although the appeal was

²⁸ Ibid.

²⁹ Ibid.

dismissed, the decision of the Full Court of the Federal Court nevertheless demonstrates that anti-discrimination laws may co-exist sensibly and practically alongside laws aimed at the regulation of a widely differing subject matter, without hampering the proper functioning of business and industry.