CASE NOTES

QANTAS AIRWAYS LTD v CHRISTIE*

I INTRODUCTION

The High Court's decision in *Qantas Airways Ltd v Christie*[1] brings to a conclusion the long-running litigation pursued by Mr Christie against his former employer, Qantas Airways Ltd ('Qantas'). Mr Christie had been a senior pilot employed by Qantas, ultimately reaching the position of a B747-400 captain on international flights. On 21 September 1994, Mr Christie turned 60 years of age, an event which prompted Qantas to end its employment relationship with him. Qantas had a policy in place which required that pilots retire at 60 years of age, a practice Qantas sought to defend on the grounds of aircraft safety and what it described as 'operational considerations'.

Mr Christie claimed that his forced retirement from Qantas amounted to a contravention of the unlawful termination provisions which had, at the time of his application, been recently inserted into the *Industrial Relations Act 1988* (Cth).[2] Section 170DF(1)(f) of these new provisions prohibited termination of employment on a number of grounds, including age. It was, in effect, conceded by Qantas that turning 60 years of age was the reason for the cessation of Mr Christie's employment.[3] Qantas sought to defend its actions on two grounds. First, Qantas asserted that the ending of Mr Christie's employment did not amount to a termination at the initiative of the employer (as was a prerequisite to the prohibition on discriminatory dismissal contained in the *Industrial Relations Act*). Second, it was argued on behalf of the company that the ending of the

* (1998) 152 ALR 365 (Brennan CJ, Gaudron, McHugh, Gummow and Kirby JJ) ('*Christie*').

1 Ibid.

2 The provisions prohibiting dismissal for a discriminatory reason were inserted into the *Industrial Relations Act 1988* (Cth) ('*Industrial Relations Act*') by the *Industrial Relations Reform Act 1993* (Cth), which took effect from 30 March 1994. Section 170CA of the *Industrial Relations Act* stated that their purpose was to give effect to the International Labour Organisation's ('ILO') *Termination of Employment Convention 1982 (No 158)* (which Australia had ratified), and accompanying Recommendation: *Termination of Employment Convention 1982 (No 158)*, opened for signature 22 June 1982, [1994] ATS No 4 (entered into force 3 November 1985), Recommendation concerning Termination of Employment at the Initiative of the Employer 1982 (No 166), reprinted in ILO, *International Labour Conventions and Recommendations 1977–1995* (1996) vol 2, 172.

3 In the High Court, Gaudron J suggested that Qantas may have been able to argue that age was 'the occasion and not the reason for the termination' of Christie's employment. In Gaudron J's view, Qantas could have argued that the reason for ending the employment contract was the operational requirements of Qantas' undertaking (and that such would be a valid reason under s 170DE(1) of the *Industrial Relations Act*): *Christie* (1998) 152 ALR 365, 369–70. There is no directly analogous valid reason provision in the *Workplace Relations Act 1996* (Cth). Rather, the idea of valid reason has been incorporated into the harsh, unjust or unreasonable test in s 170CG(3) of the *Workplace Relations Act 1996* (Cth).

employment relationship did not amount to a contravention of the Act because Mr Christie was no longer able to perform the 'inherent requirements of the particular position'.[4] In the result, the High Court found in favour of Qantas (Kirby J dissenting). Qantas was unsuccessful on its first argument but successful on its second. The structure of this case note follows Qantas' two main contentions.

Christie is a case of considerable interest. There are few court decisions on the unlawful termination provisions in federal industrial legislation and, as the first High Court decision on this issue, *Christie* provides authoritative guidance on the meaning and approach to be taken in interpreting these particular rules (which continue today in substantively identical terms in the *Workplace Relations Act 1996* (Cth)).[5] In addition, the different approaches and views expressed in the High Court judgments appear likely to have an impact beyond the *Workplace Relations Act*, potentially shaping the approach and interpretation taken in relation to similar concepts and wording in State anti-discrimination legislation, and possibly federal anti-discrimination statutes such as the *Disability Discrimination Act 1992* (Cth).[6] These wider implications are examined later in this case note.

II TERMINATION BY QANTAS OR EXPIRY THROUGH EFFLUXION OF TIME?

Qantas argued that Mr Christie's contract was not 'terminated at the initiative of the employer' as was required by the unlawful termination provisions in the *Industrial Relations Act*,[7] but rather that it expired through the effluxion of time

[4] Section 170DF(2) of the *Industrial Relations Act* provided that 'subsection (1) does not prevent a matter referred to in paragraph (1)(f) from being a reason for terminating employment if the reason is based on the inherent requirements of the particular position.'

[5] See ss 170CK(2)(f), (3) of the *Workplace Relations Act 1996* (Cth) ('*Workplace Relations Act*'). Although s 170CK(3) contains an additional word ('particular position *concerned*' (emphasis added)), this does not appear to be of any substance: *Christie* (1998) 152 ALR 365, 408 (Kirby J); Ronald McCallum, 'Labour Law and the Inherent Requirements of the Job: *Qantas Airlines Ltd v Christie* — Destination: the High Court of Australia — Boarding at Gate Seven' (1997) 19 *Sydney Law Review* 211, 212. Note, though, that the new legislative direction in the *Workplace Relations Act* of ensuring a 'fair go all round' appears to apply, at least on its face, to the discriminatory dismissal protections: s 170CA(2). It is difficult to know what (if any) impact this legislative direction of 'fair go all round' will have on the jurisdiction: Anna Chapman, 'Termination of Employment under the *Workplace Relations Act 1996* (Cth)' (1997) 10 *Australian Journal of Labour Law* 89, 95.

[6] It is noted, however, that in *Commonwealth v Human Rights and Equal Opportunity Commission* (1998) 152 ALR 182, the Full Court of the Federal Court did draw a distinction between the inherent requirements of the position exemption in the *Disability Discrimination Act 1992* (Cth) and the inherent requirements provision in the *Workplace Relations Act*. This is discussed further below.

[7] Section 170CB of the *Industrial Relations Act* provided that an expression used in Part VIA Div 3 of the Act, which contained s 170DF, has the same meaning as in the *Termination of Employment Convention 1982*, above n 2. Article 3 of this convention defines 'termination' to be 'termination of employment at the initiative of the employer.' See the analogous provision in *Workplace Relations Act* s 170CD(2).

(in other words, in accordance with the contract terms).[8] This argument proposed that a term in Mr Christie's contract of employment established that the contract would be at an end once he reached the age of 60. Mr Christie disputed the existence of such a provision. It was clear that the contract formed between Mr Christie and Qantas when Mr Christie was hired in 1964 contained no such term. Indeed, in 1964 the expected age for the retirement of pilots was 55 years.[9] Consequently, the issue at hand was whether Mr Christie's contract had been varied to include such a term.

Several documents, including registered and unregistered collective agreements made between Qantas and the Airline Pilots' Association, were tendered in evidence. One such agreement made in 1991 was of particular importance. It provided that a pilot might 'elect to extend his employment beyond the normal retirement date on a year by year basis up to but not beyond the date of his sixtieth birthday'. This document was not certified under the *Industrial Relations Act*, and so did not have status (and legal enforceability) as an award. Qantas argued that Mr Christie's agreement to be bound by the contents of the 1991 document was implied by his conduct, subsequent to his 55th birthday, of notifying Qantas on a yearly basis of his decision to extend his employment for another year. This notification took the form of Mr Christie signing a standard single-sentence document presented to him by Qantas each year: 'I elect to extend my employment to [a specified date] being my [number inserted] birthday'. Qantas argued that this course of conduct indicated Mr Christie's agreement to a contractual term that he retire at age 60.

The majority of the High Court found against Qantas on this issue.[10] Brennan CJ, Gaudron and Kirby JJ all held that Mr Christie's contract of employment had been terminated by Qantas rather than simply having expired through the effluxion of time. McHugh J disagreed, and Gummow J declined to make a finding on this issue, expressing the view that Qantas' appeal ought to be allowed on the second argument raised by Qantas — that Mr Christie could not perform the 'inherent requirements' of the position.[11]

Gaudron J expressed the view that even if the 1991 agreement was binding on Mr Christie (and her Honour found that it was unnecessary to decide this), it did not, as a matter of construction, vary the terms of Mr Christie's contract of employment. This argument was based upon the premise that the document did not contain provisions varying the circumstances in which employment could be brought to an end without notice. It made no reference to existing appointments or the usual age of retirement.[12] Brennan CJ agreed with Gaudron J on this

[8] It is clear that when a contract of employment comes to an end because its term has expired, this is not a termination at the initiative of the employer: *Victoria v Commonwealth* (1996) 187 CLR 416, 520.

[9] *Christie* (1998) 152 ALR 365, 396 (Kirby J).

[10] At the hearing, Wilcox CJ, and, on appeal in the Full Court of the Industrial Relations Court, Gray and Marshall JJ (Spender J dissenting) also found against Qantas on this point. See *Christie v Qantas Airways Ltd* (1995) 60 IR 17, *Christie v Qantas Airways Ltd* (1996) 138 ALR 19 respectively.

[11] *Christie* (1998) 152 ALR 365, 390–1

[12] Ibid 371–2.

point.[13] At the hearing, Wilcox CJ similarly interpreted the 1991 agreement as not affecting Mr Christie's situation, as he was never contractually bound to the 'normal date of retirement'.[14]

Kirby J concluded that no term as to a compulsory retirement age had been brought into Mr Christie's contract of employment. As to Mr Christie's yearly elections after his 55th birthday, Kirby J found similarly to Gray J in the Full Court of the Industrial Relations Court,[15] that this conduct was not sufficient to indicate Mr Christie's agreement to include a term prescribing a retirement age into his contract of employment. According to Kirby J:

> [T]he so called 'elections' were legally unnecessary because Captain Christie's initial agreement was for employment until terminated. The 'elections' might have been administratively convenient to Qantas. But they could not alter, without Captain Christie's consent, the terms of his initial engagement. The 'elections' fall short of indicating such consent.[16]

Kirby J indicated that, even had a term requiring compulsory retirement at a certain age been incorporated into Mr Christie's contract, there would still have been a termination by Qantas within the meaning of the *Industrial Relations Act*. This was because in his Honour's view,

> [a] term specifying that the contract is to end when the employee attains a specified age is ... analogous to one which requires that the contract will end upon the employee becoming pregnant. It falls within the protective provisions of the Act.[17]

Earlier, Kirby J stated that:

> It must ... be assumed that, by the inclusion of the reference to age [in s 170DF(1)(f)] the parliament intended to afford effective protection. It should not be assumed that it was intended that para (f) could so easily be circumvented by the simple expedient of [including a contract term providing for termination of employment at a certain age.][18]

A similar conclusion was reached by Gray J in the Full Court of the Industrial Relations Court.[19]

McHugh J held that Qantas did not terminate Mr Christie's contract of employment. Rather, his contract expired through the effluxion of time. His Honour's view centred around a paragraph in Mr Christie's 1964 letter of appointment, which provided that the conditions specified in that document were 'supplementary to the terms of any enactment industrial agreement or award specifically covering your employment with this Company'. His Honour held that

13 Ibid 366
14 *Christie v Qantas Airways Ltd* (1995) 60 IR 17, 22.
15 *Christie v Qantas Airways Ltd* (1996) 138 ALR 19, 30.
16 *Christie* (1998) 152 ALR 365, 410.
17 Ibid
18 Ibid 406.
19 *Christie v Qantas Airways Ltd* (1996) 138 ALR 19, 30. For this reason, Gray J did not find it necessary to determine whether the content of the 1991 agreement became a term in Mr Christie's contract of employment.

this provision took effect to incorporate into Mr Christie's contract of employment all the collective agreements registered under the relevant federal legislation, as well as the 1991 agreement, because '[a]lthough the 1991 letter was never certified by the Commission, it was clearly an "industrial agreement ... specifically covering [Mr Christie's] employment".[20] The other members of the High Court did not explicitly examine paragraph 19, presumably interpreting it to refer to registered industrial agreements only.

A *Comment*

It is clear from the differing interpretations of the factual material made by the members of the High Court (and the courts below), that the task of identifying (and construing) terms in a contract of employment can give rise to much uncertainty. Although the relevant legal principles in Australia are now relatively settled, applying these rules to the circumstances of any particular case commonly gives rise to ambiguity. As is clear from *Christie*, actions and matters, particularly in dynamic and long-term contractual relationships, are capable of different interpretations.

The scope for different interpretations that is apparent in *Christie*, and which would seem likely to characterise many employment contracts is particularly noteworthy given the continued centrality of the individual contract of employment in the regulation of paid work relationships in Australia. Since European settlement, the contract of employment has played an important role in the regulation of rights and obligations between employers and employees.[21] The *Workplace Relations Act* has not displaced, and does not seem likely to displace the common law contract of employment.[22]

A further matter is worthy of note here. That is, the relationship between a contract term specifying that the contract cease on a predetermined event, such as the employee reaching a certain age, becoming pregnant, or developing a disability, and the unlawful termination provisions in the *Workplace Relations Act*. This issue was explicitly addressed by Kirby J, and by Gray J in the Full Court of the Industrial Relations Court. Both Kirby J and Gray J formed the view that, in effect, the unlawful termination provisions in the federal industrial legislation cannot be ousted, for example, by a contract term that the employee retire at a certain age, or, to use the example given by Kirby J, by a contract term that the contract come to an end if and when an employee becomes pregnant. This view must be correct. As both their Honours noted, the legislative protections in the Act could be too easily circumvented if this were not so. Such a conclusion accords with the position under both the unfair dismissal provisions in federal industrial legislation and the anti-discrimination statutes. Notably,

20 *Christie* (1998) 152 ALR 365, 381

21 Breen Creighton and Richard Mitchell, 'The Contract of Employment in Australian Labour Law' in Lammy Betten (ed), *The Employment Contract in Transforming Labour Relations* (1995) 129.

22 See especially Ronald McCallum, 'Australian Workplace Agreements — An Analysis' (1997) 10 *Australian Journal of Labour Law* 50, 60

however, there are passages in the judgment of McHugh J to suggest that, had his Honour addressed this question directly, he might have disagreed with the view expressed by Kirby J and Gray J.[23] In his discussion of the 'inherent requirements' aspects of the case, McHugh J stated that '[t]here is nothing in the Act equivalent to Pt IVA of the *Income Tax Assessment Act 1936* (Cth), nothing that invalidates a contract or arrangement whose purpose or effect is to avoid the operation of s 170DF(1)' of the *Industrial Relations Act*.[24] It is regrettable that this issue was not addressed explicitly by all members of the High Court, particularly given that *Christie* is the first High Court decision on the unlawful termination provisions in the *Industrial Relations Act* (and the *Workplace Relations Act*).

III Inherent Requirements of the Position or Administrative Convenience of Qantas?

The second aspect of Qantas' response to Mr Christie's application was the argument that after his 60th birthday Mr Christie could no longer perform the 'inherent requirements of the particular position', and so, Qantas was not liable due to the operation of s 170DF(2) of the *Industrial Relations Act*. This question of 'inherent requirements' is probably the most interesting aspect of this case. At the hearing, Qantas relied on arguments about aircraft safety and pilot age, and also about what it described as 'operational considerations'. Before the High Court, Qantas relied solely on the operational considerations point. The issue regarding pilot age and safety is nonetheless examined here, the reason being that assumptions about the reduced capacity of older workers, workers with a disability and pregnant workers, for example, still appear to be a common occurrence in Australian workplaces.[25] The approach of Wilcox CJ in the Industrial Relations Court to employer policies and practices based on such assumptions is instructive.

A *Aircraft Safety*

Most of the hearing before Wilcox CJ was concerned with the question of whether pilots over 60 years of age pose an increased safety risk and are, on that basis, unable to satisfy the inherent requirements of being a pilot. After hearing expert evidence on the question and reviewing the extensive literature tendered in evidence, Wilcox CJ concluded that none of the evidence supports any conclu-

23 *Christie* (1998) 152 ALR 365, 381, 385–6.

24 Ibid.

25 See, eg, Lynne Bennington, 'Older Workers: Myths, Evidence and Implications for Australian Managers' (1996) 34 *Asia Pacific Journal of Human Resources* 63; NSW Anti-Discrimination Board, *Why Don't You Ever See a Pregnant Waitress? Report of the Inquiry into Pregnancy Related Discrimination* (1993); Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993).

sion about the relationship between age and aircraft safety.[26] According to Wilcox CJ, the compulsory retirement of pilots at age 60 is therefore

> not defensible on medical or safety grounds. Having regard to recent improvements in diagnostic techniques [to individually assess each pilot to ascertain that person's ability to meet the rigorous health standards required of pilots], it is outmoded as a method of weeding out high-risk pilots.[27]

Wilcox CJ's findings on the medical and safety arguments were not challenged on appeal (in either the Full Court of the Industrial Relations Court or the High Court). The approach and conclusion of Wilcox CJ is uncontroversial in that it accords with the key principle underlying decisions in relation to other anti-discrimination legislative rules — employers ought not to make decisions about hiring, promotion and dismissal etc based on (stereotypical) assumptions about people due to, for example, their age, disability or because they are pregnant. Employers are required to assess the suitability of the particular person before them in relation to the specifics of the position in question.

B *Operational Considerations*

The second (and ultimately successful) basis on which Qantas argued that Mr Christie could not, after his 60th birthday, perform the 'inherent requirements' of his particular position related to the effect of an international convention, described as the 'Rule of 60',[28] and the roster system through which Qantas allocated flights to pilots.

The Rule of 60 prohibited anyone aged 60 and over from captaining an international flight in or through the airspace of a country enforcing the convention provisions.[29] As most of the countries on Qantas' international routes enforced this Rule of 60, Mr Christie was unable, once he reached 60 years of age, to captain the bulk of Qantas' international flights. Indeed, the only Qantas international flights he could now captain were those to and from Denpasar (Indonesia), New Zealand, internal flights within Australia flown as part of Qantas' international service, and some flights to and from Fiji (those that did not proceed to the United States).[30]

26 *Christie v Qantas Airways Ltd* (1995) 60 IR 17, 42.

27 Ibid 56.

28 Rule of 60 is used in the judgments as a short hand reference to Standard 2.1.10.1 in Annex 1 and arts 39(b) and 40 of the *Convention on International Civil Aviation*, opened for signature 7 December 1944, 15 UNTS 295 (entered into force 4 April 1947).

29 Interestingly, the hearing of Christie's application before Wilcox CJ was joined with an action brought by another pilot, Allman, who, until his 60th birthday, was employed to fly domestic routes within Australia by Australian Airlines Ltd (at that time a wholly owned subsidiary of Qantas). Wilcox CJ found in favour of Allman, and ordered that he be reinstated in his position of employment: *Allman v Australian Airlines Ltd* (1995) 60 IR 17. That order was not challenged. The point of distinction between Allman's case and Christie's case is obvious — the Rule of 60 did not apply to Allman's employment as a captain on domestic flights within Australia.

30 Note that prior to the cessation of his employment, Mr Christie offered to work as a First Officer on international flights, as a captain on Qantas domestic flights, or alternatively part-time on Qantas' international services. These offers by Mr Christie to enter into a new contract of employment were rejected by Qantas. This rejection was clearly lawful under the *Industrial Rela-*

A question arose as to whether Qantas could accommodate the reduced flight patterns able to be captained by Mr Christie. The Qantas roster system through which flights were allocated to pilots was examined. The system operated on a preferential bidding basis. Every eight weeks pilots would submit bids for their preferred slip patterns (flights), with bids being accepted or rejected on the basis of seniority of service. Each pilot was required to reach a certain level of minimum flight hours for each eight week period, and no pilot was permitted to bid for more than two one-day flights in any such period. The rationale for this latter rule was that, as short flights were used by pilots to round up their flight hours to the required minimum, they needed to be available to be shared between all pilots. Importantly, flights to and from Denpasar, New Zealand, Fiji and international air services within Australia all involved slip patterns of shorter duration.

At the hearing, Wilcox CJ formed the view that if Mr Christie had continued in his employment after his 60th birthday, this 'would have occasioned Qantas serious practical difficulties' with the roster system.[31] According to his Honour, the rostering system went 'to the heart of the system of aircrew scheduling', and was not 'merely a matter of administrative convenience'. Given this, Wilcox CJ concluded that 'being under 60 years of age was an inherent requirement' of Mr Christie's position and so s 170DF(2) meant that Qantas was not liable.[32]

The decision of Wilcox CJ on the applicability of s 170DF(2) was reversed by the Full Court of the Industrial Relations Court. The court held by a majority (Gray and Marshall JJ, Spender J dissenting) that s 170DF(2) did not exempt Qantas from liability. Qantas' appeal to the High Court was successful on this point, with the majority (Brennan CJ, McHugh and Gummow JJ) finding that, after his 60th birthday, Mr Christie could no longer satisfy the inherent requirements of his position.

Each judge in the High Court delivered a separate judgment. Although the five members of the bench used similar language to describe the scope of s 170DF(2) in the abstract, their Honours parted company at the point of applying s 170DF(2) to the evidential material at hand. Points of general similarity are examined first.

All judges in the High Court identified that the 'particular position' referred to in s 170DF(2) was that occupied by Mr Christie immediately prior to the cessation of his employment with Qantas. All agreed that this position was that of

tions Act (as it would also be under the *Workplace Relations Act*), which covers the ending of employment contracts, not their commencement: *Christie v Qantas Airways Ltd* (1995) 60 IR 17, 56; *Christie* (1998) 152 ALR 365, 407 (Kirby J); see also at 382 (McHugh J). Note that federal legislation does not render age discrimination in hiring unlawful. Some State anti-discrimination statutes do, however, prohibit age discrimination in recruitment. See, eg, *Equal Opportunity Act 1995* (Vic) ss 6(a), 13(a)–(c); *Anti-Discrimination Act 1991* (Qld) ss 7(1)(f), 14(1)(a)–(d); *Anti-Discrimination Act 1977* (NSW) ss 49ZYA, 49ZYB. For a successful application under the NSW Act in relation to age discrimination in Qantas' hiring practices, see *Blatchford v Qantas Airways Ltd* (1997) EOC [92-888].

31 *Christie v Qantas Airways Ltd* (1995) 60 IR 17, 56. There was clearly an appreciation at the hearing that, if successful, Mr Christie may have been the first of many Qantas pilots (employed on international routes) to opt to continue flying beyond their 60th birthday.

32 Ibid

a captain of B747-400 aircraft on Qantas' international routes.[33] In the Industrial Relations Court, Wilcox CJ, and on appeal, Spender and Gray JJ, similarly identified the position.[34] Marshall J, on the other hand, appeared to identify the position as the broader one of being a pilot (without reference to the international character of Mr Christie's position).[35] In the High Court, Gaudron and Kirby JJ expressed the view that such an approach would be incorrect as the international nature of Mr Christie's position was clearly fundamental.[36]

In terms of the meaning of the phrase 'inherent requirements' in s 170DF(2), the word 'essential' was the synonym most often used by the judges.[37] Gaudron J referred to, for example, the 'essential features or defining characteristics' of the position in question.[38] McHugh J spoke of 'inherent' as meaning 'existing in something as a permanent attribute or quality; forming an element, especially an essential element of something; intrinsic, essential'.[39] In the view of Kirby J, 'inherent requirements' refers to criteria 'which can be regarded as permanent and integral'.[40] Inherent requirements are 'features of the requirements for the particular position as are essential to its very nature'.[41] In contrast, according to Kirby J, inherent requirements 'are not those which are transient, subject to change, geographically limited or otherwise temporary'.[42] Most members of the High Court appeared to agree, in addition, with the principle that contract terms do not necessarily equate with the inherent requirements of the position, so that terms in the contract of employment are not necessarily 'inherent requirements' and 'inherent requirements' are not necessarily found in contract terms.[43]

All members of the bench appeared to agree then, at least in the abstract, that the inquiry was whether Mr Christie could, after his 60th birthday, perform the 'essential' requirements of his position as a B747-400 captain on international flights. The members of the High Court disagreed, however, at the point of

33 *Christie* (1998) 152 ALR 365, 366 (Brennan CJ), 374 (Gaudron J), 383 (McHugh J), 393–4 (Gummow J, as discussed below, took a slightly different approach to that adopted by the other judges in identifying Mr Christie's position), 411–12 (Kirby J).

34 *Christie v Qantas Airways Ltd* (1995) 60 IR 17, 29; *Christie v Qantas Airways Ltd* (1996) 138 ALR 19, 26 (Spender J), 31–2 (Gray J, who appeared to assume that the identification of the particular position by Wilcox CJ was correct).

35 *Christie v Qantas Airways Ltd* (1996) 138 ALR 19, 40.

36 *Christie* (1998) 152 ALR 365, 374–5 (Gaudron J), 411 (Kirby J).

37 Ibid 367 (Brennan CJ), 375 (Gaudron J), 383 (McHugh J), 394 (Gummow J), 411–12 (Kirby J). Similar language was also used by Wilcox CJ and Gray J in the Industrial Relations Court: *Christie v Qantas Airways Ltd* (1995) 60 IR 17, 28; *Christie v Qantas Airways Ltd* (1996) 138 ALR 19, 32.

38 *Christie* (1998) 152 ALR 365, 375.

39 Ibid 383. McHugh J adopted this interpretation of 'inherent' from the following document: *Report of the Commission of Inquiry Appointed under Article 26 of the Constitution of the International Labour Organisation to Examine the Observance of the Discrimination (Employment and Occupation) Convention, 1958 (No 111) by the Federal Republic of Germany* (1987) [531], 70 *ILO Official Bulletin* (ser B), Supp 1.

40 *Christie* (1998) 152 ALR 365, 412.

41 Ibid.

42 Ibid.

43 Ibid 366 (Brennan CJ), 375 (Gaudron J), 387 (McHugh J), 412 (Kirby J). It could be argued that Gummow J did, in effect, equate contract terms (to be available to fly anywhere in the world) with inherent requirements

applying these broad understandings to the material before them. The members of the bench took quite distinctly different approaches to each other. The five judgments are, for this reason, examined separately and then commented on as a whole.

1 *Brennan CJ*

After noting that there was a need to 'guard against too final a definition' of the criteria in s 170DF(2), Brennan CJ expressed the view that the inherent requirements of a position are to be identified by reference to the terms of the employment contract

> and also by reference to the function which the employee performs as part of the employer's undertaking and, except where the employer's undertaking is organised on a basis which impermissibly discriminates against the employee, by reference to that organisation.[44]

For Brennan CJ, the roster system was 'an integral part of the Qantas administrative machinery by which it organised its services.'[45] It was, according to his Honour, 'an equitable, efficient and non-discriminatory method of selecting pilots for duty'.[46] Given this, Brennan CJ formed the view that being able to 'participate effectively in the bidding process [roster system] equally with other Qantas international pilots'[47] of similar seniority was an inherent (his Honour used the word 'essential') requirement of Mr Christie's position.[48] Mr Christie could not, according to Brennan CJ, satisfy this inherent requirement. Even if he could, after his 60th birthday, take part in the roster system and secure, by virtue of his seniority, a sufficient number of slip patterns of shorter duration to reach the required minimum number of hours, he would not, in his Honour's view, be participating 'equally' with other pilots. Mr Christie's inability to captain some flights would mean that younger pilots would be selected for those flights more frequently, and, according to Brennan CJ, this 'skews the equitable operation of the system'.[49]

2 *Gaudron J*

Gaudron J suggested that a useful way of determining whether a stipulation is an inherent requirement is to ask whether the position would be essentially the same if that stipulation were dispensed with.[50] Here, if Mr Christie could, after reaching 60 years of age, still comply with the Qantas roster system, despite the limits on the routes he could fly, then his position after his 60th birthday would be

[44] Brennan CJ did explicitly agree, however, that a stipulation in a contract of employment is not necessarily an inherent requirement: ibid.

[45] Ibid 367

[46] Ibid. Note that Wilcox CJ similarly described the roster system as 'the only way of ensuring fairness between employees': *Christie v Qantas Airways Ltd* (1995) 60 IR 17, 56. In McHugh J's view, the bidding system 'allocates flights in a fair and just manner': *Christie* (1998) 152 ALR 365, 387.

[47] *Christie* (1998) 152 ALR 365, 367

[48] Ibid.

[49] Ibid 368.

[50] Ibid 375.

essentially the same as that before his birthday. If, on the other hand, Qantas exempted him from the roster, his position would not be essentially the same because 'that would transform a position no different from that of any other B747-400 captain into a special position for him'.[51] Gaudron J was clear though that 'it would not be correct, in my view, to identify compliance with the roster system as an inherent requirement' of Mr Christie's position.[52] This was because '[a] roster system is simply an administrative arrangement designed to ensure the systematic performance of the work to which it relates'.[53] In the view of Gaudron J, the roster system is not, however, necessarily irrelevant to the inherent requirements of the position. Gaudron J did look to the roster system and identify some inherent requirements in it, including the need to work the specified minimum number of hours in the eight-week period.

In the result, Gaudron J was of the view that the Full Bench had not answered the ground in Mr Christie's appeal to it, to the effect that Wilcox CJ had erred in his finding that after Mr Christie's 60th birthday he would need to be allocated 'a large proportion' of short flights in order to reach the required minimum number of hours. Gaudron J accordingly ordered that Qantas' appeal be allowed and that the matter be remitted to the Full Court for a determination on this ground of appeal.[54]

3 *McHugh J*

McHugh J expressed the view that the test in s 170DF(2) ought to be applied 'according to the dictates of common sense',[55] and that the prohibition on age discrimination operated 'in the context of a free enterprise system of industrial relations where employers and employees have considerable scope for defining their contractual rights and duties'.[56] McHugh J found in favour of Qantas on the issue of inherent requirements. In contrast to other members of the High Court, McHugh J tied his reasoning to the effects of the Rule of 60 rather than the roster system as such. McHugh J held that the conclusion was 'inescapable' that 'it was an inherent requirement of Mr Christie's position as a Qantas Captain of international B747-400 flights that he be able to fly to a reasonable number of Qantas' numerous overseas destinations'.[57] Given the finding of fact that pilots over the age of 60 were unable to captain most of Qantas' international flights, his Honour held that 'it is an essential incident of that requirement and therefore an inherent requirement of the position of Captain that the holder be under 60'. When Mr Christie turned 60, 'he was unable to perform a large and essential part of his duties'.[58]

51 Ibid 376
52 Ibid.
53 Ibid.
54 Ibid.
55 Ibid 386.
56 Ibid 385.
57 Ibid 387–8 McHugh J suggested (but found it unnecessary to decide) that an ability to captain all Qantas' international routes was probably an inherent requirement of Mr Christie's position.
58 Ibid.

4 *Gummow J*

Gummow J tied the concepts of 'position', and therefore 'inherent requirements', to contractual (and statutory) rights and obligations more explicitly and more directly than the other High Court judges. In Gummow J's view 'the position of Captain Christie was constituted by the tasks and responsibilities which made up his duties and by the rights conferred upon him under his contract of employment' as supplemented by statute (and any collective agreement registered under statute).[59] After noting the references in Mr Christie's 1964 letter of appointment and one of the Certified Agreements to the requirement that pilots be available for duty 'in any part of the world', Gummow J identified that 'the primary requirement' of Qantas was that captains be available to fly to any part of the world.[60] His Honour said that this requirement was 'a property or attribute which gave to any tasks and responsibilities which made up the duties of Captain Christie their particular character.'[61] By implication then, this criterion was an inherent requirement of Mr Christie's position.[62] Due to the effect of the Rule of 60, he could not satisfy it, and so s 170DF(2) took effect to exonerate Qantas from liability under the unlawful termination provisions.

5 *Kirby J*

Kirby J dissented, holding that the appeal by Qantas ought to be dismissed. In contrast to the other High Court judges, Kirby J formed the view that issues of administrative practicality that might arise for Qantas if Mr Christie were to continue in his position after his 60th birthday, were not relevant to the inquiry under s 170DF(2). Questions about whether the roster system could accommodate Mr Christie were, in the view of Kirby J, therefore not to the point at this stage of the application. His Honour reached the same view as Gray and Marshall JJ in the Industrial Relations Court, holding that the only place a consideration of Qantas' administrative practicality (operational requirements) would be relevant would be in a consideration of the appropriate remedy were Mr Christie to be successful in his application. It might, for example, go to the question of whether reinstatement of Mr Christie was practicable or whether compensation ought to be ordered instead.[63]

Kirby J formed this view about the irrelevance of any potential problems in the operation of the roster system by contrasting the language used in s 170DF(2) of

[59] Ibid 391. Interestingly, in his judgment McHugh J distinguished between a person's job (the particular tasks required to be performed) and position (level or rank from which the person performs the tasks). In the view of McHugh J, it would be a mistake to think there is no distinction between a job and a position: ibid 382–3.

[60] Ibid 394.

[61] Ibid.

[62] Both Gaudron J (and Gray J in the Industrial Relations Court) expressed the view that being available for duty in any part of the world was not an inherent requirement of Mr Christie's position because in fact he was not required to be so available, but was only required to fly to those destinations necessary to comply with the roster system. In my view, Gaudron and Gray JJ present a stronger interpretation of the evidential material than Gummow J: ibid 375; *Christie v Qantas Airways Ltd* (1996) 138 ALR 19, 32 (Gray J).

[63] *Christie* (1998) 152 ALR 365, 407–8; *Christie v Qantas Airways Ltd* (1996) 138 ALR 19, 33 (Gray J), 40 (Marshall J)

the *Industrial Relations Act* with other legislative provisions, such as s 170DE(1) of the Act, and also provisions in Australian anti-discrimination statutes which provide exemptions relating to situations where an unreasonable burden or unjustifiable hardship would otherwise be imposed on an employer.[64] Section 170DE(1) of the *Industrial Relations Act* prohibited dismissal unless there was a valid reason or reasons connected with the employee's capacity or conduct, or based on the operational requirements of the employer's undertaking.[65] Kirby J noted that s 170DF(2) is not couched in the language of reasonableness, unjustified hardship or the operational requirements of the employer. According to his Honour, '[a] more stringent standard has been adopted [in s 170DF(2)], apparently deliberately'.[66] In the words of Kirby J:

> [T]he particular mention of 'operational requirements' in the immediately preceding section [s 170DE(1)] suggests (as the context of s 170DF confirms) that ... [s 170DF(2) was] not to be watered down by reference to 'operational requirements'.[67]

If operational requirements could be cited in relation to the ground of age, they could, in the view of Kirby J, be equally used to justify many discriminatory terminations, such as the example mentioned by Marshall J of dismissing all female pilots on the basis that some countries did not permit women to captain flights. In Kirby J's view, '[t]o allow such discrimination to operate would be to defy the purposes of the Act and of the international law to which it gives effect',[68] and, later in his judgment:

> [U]nless this approach to s 170DF is adopted there is a real risk that ... 'operational requirements' will be elevated to 'inherent requirements' of particular positions to the destruction of the high purpose to which s 170DF of the Act is directed.[69]

Although Kirby J declined to consider Qantas' operational requirements as a factor in the s 170DF(2) inquiry, he did examine the impact of the Rule of 60 in reducing the scope of flights that Mr Christie could now captain. As noted above, Kirby J emphasised that 'inherent requirements' involve 'permanent features of the position and thus not such features as vary in time and place'.[70] According to his Honour, applying this understanding of 'inherent' provides a clear answer that being under 60 years of age is not an inherent requirement of Mr Christie's position. This is so for a number of reasons. First, being under 60 years of age cannot be shown to be a 'permanent' requirement given that the expected age of

64 Provisions include, for example, *Disability Discrimination Act 1992* (Cth) s 15(4)(b); *Equal Opportunity Act 1995* (Vic) s 22(1)(b); *Anti-Discrimination Act 1977* (NSW) s 49D(4)(b).

65 This concept of valid reason now finds expression in the *Workplace Relations Act* s 170CG(3)(a).

66 *Christie* (1998) 152 ALR 365, 408. At this page, Kirby J noted that s 170DF(2) has been repealed and replaced with effectively identical provisions in the *Workplace Relations Act*.

67 Ibid 414. Gummow J also recognised that s 170DE(1) of the *Industrial Relations Act* involved a 'broader and different' inquiry to that under s 170DF(2): ibid 395.

68 *Christie* (1998) 152 ALR 365, 414.

69 Ibid 415.

70 Ibid 412.

retirement for pilots has successively increased over the years. When Christie accepted employment with Qantas in 1964, for example, the usual retirement age of pilots was 55 years. Second, the same aircraft may be flown within Australia by a pilot over 60 years of age as part of a domestic sector of an international flight. The requirement of being under 60 years of age is accordingly not 'inherent' at this time. Finally, being under the age of 60 years cannot be described as being 'inherent' when the aircraft is flown to, or over, countries which do not enforce the Rule of 60. Kirby J concluded that '[t]he disqualification upon the pilot [Mr Christie] is thus shown to be connected with geography and rostering. It is not an "inherent", ie a permanent, requirement of the particular position'.[71]

C *Comment*

Several interesting issues and questions arise from the court's decision on the inherent requirements of the position provision in s 170DF(2) of the *Industrial Relations Act*. This note examines the following two matters:

- the extent to which members of the court extended (and if so, whether this is appropriate) the inherent requirements provision in the *Industrial Relations Act/Workplace Relations Act* to include notions of reasonableness and justifiability; and
- whether and how *Christie* will shape the approach to be taken in interpreting similarly worded provisions in federal and State anti-discrimination statutes.

1 *What Is the Relevance of Reasonableness and Justifiability in Consideration of Section 170DF(2)?*

There is a strong argument that some members of the majority in *Christie* did include notions of reasonableness and justifiability in their consideration of the meaning and applicability of s 170DF(2) of the *Industrial Relations Act*. In my view, such broad readings of s 170DF(2) are inappropriate.

As Kirby J notes, the *Industrial Relations Act* (and now the current *Workplace Relations Act*) contains only two exculpatory provisions relevant to the unlawful dismissal protections — an inherent requirements of the position provision and, a provision relating to the genuine religious practices of religious institutions. State and federal anti-discrimination statutes also commonly contain these two types of provisions.[72] Such State and federal legislation often additionally includes clauses which apply (in most but not all statutes) to the sole ground of disability where a person with a disability, in order to carry out the functions of the job, requires her or his employer to provide services or facilities in circumstances in which this is said to place an unreasonable or unjustifiable burden on the

[71] Ibid 412–13

[72] See, eg, *Disability Discrimination Act 1992* (Cth) s 15(4) (inherent requirements); *Sex Discrimination Act 1984* (Cth) s 37 (religious practices of religious institutions); *Equal Opportunity Act 1995* (Vic) ss 75–7 (religious practices of religious institutions, religious beliefs); *Anti-Discrimination Act 1977* (NSW) s 49D(4)(a) (inherent requirements), s 56 (religious practices of religious institutions).

employer.[73] In such situations, the employer is not prohibited from declining to hire, or dismissing, the person on the ground of their disability. Although the absence of such reasonableness and unjustifiable hardship provisions from the *Industrial Relations Act*/*Workplace Relations Act* is surprising, it is difficult to disagree with Kirby J that the intention of the federal Parliament not to include such wider exculpatory provisions appears clear, both in inserting the protections into the *Industrial Relations Act* in 1993 and, more recently, in re-enacting them in substantively identical terms in the *Workplace Relations Act*. On the basis of this, I agree with Kirby J (and Gray and Marshall JJ in the Industrial Relations Court) that s 170DF(2) ought not to be construed to import notions of reasonableness and justifiability.

There is much in *Christie* to suggest that some members of the majority did include notions of reasonableness/justifiability in their consideration of the applicability of s 170DF(2). In my view, such an approach frustrates the will of Parliament. In addition, because such ideas of reasonableness were taken into account, not explicitly by judges, but rather in an indirect manner, they were, in my view, not dealt with fully. This is seen most obviously in the judgment of Brennan CJ, and, to a lesser extent, in the judgments of McHugh and Gummow JJ.

At the core of Brennan CJ's judgment appears to lie a concern over what is fair and reasonable as between Mr Christie, other (younger) B747-400 captains and Qantas. Brennan CJ's view seems to be that, as Qantas' roster system is 'equitable' and 'non-discriminatory' (his Honour's words), and an 'integral' part of Qantas' administrative machinery, being able to take part in it in the same way as all other B747-400 captains is an inherent requirement of Mr Christie's position. For me, this view raises a number of questions which, upon my reading of *Christie* and the previous decisions, were not fully addressed. It seems that had his Honour been more explicit about the framework he was using — reasonableness — these questions might have been addressed, at least to some degree. So, for example, the assertion that the roster system is 'equitable' and 'non-discriminatory'[74] is problematic. The fact that, as it currently operates, it appears unable to accommodate captains over the age of 60 suggests that it is indeed discriminatory. In addition, preference in the bidding system is given on the basis of seniority. Given the usual link between age and seniority, the roster system may for this reason be indirectly discriminatory against less senior (younger) pilots. It may also be indirectly discriminatory on the ground of sex, were it the case that at some time in the past Qantas barred the employment of women as pilots. Other airlines certainly had such policies in place until the 1970s.[75] These matters were simply not examined in the judgments of the High Court or below.

[73] See, eg, *Disability Discrimination Act 1992* (Cth) ss 11, 15(4); *Equal Opportunity Act 1995* (Vic) s 22; *Anti-Discrimination Act 1977* (NSW) ss 49C, 49D(4)(b).

[74] McHugh J formed a similar view to that of Brennan CJ on this point, describing the roster system as one which 'allocates flights in a fair and just manner': *Christie* (1998) 152 ALR 365, 387

[75] Such a policy is discussed, eg, in *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237.

Rather, Brennan CJ appears to have assumed that the roster system was fair and non-discriminatory.[76]

Views about reasonableness and fairness can also be seen in the judgments of McHugh and Gummow JJ. Although McHugh J stated that any detrimental impact on younger pilots, and administrative inconvenience (including cost) to Qantas resulting from Mr Christie remaining in employment after his 60th birthday, were irrelevant to the s 170DF(2) inquiry,[77] his Honour did nonetheless appear to come to a conclusion based on a view of what is reasonable as between Qantas and Mr Christie. After emphasising that the question ought to be determined 'according to the dictates of common sense',[78] McHugh J held that it was an inherent requirement of Mr Christie's position that he be able to fly to a 'reasonable' number of Qantas' overseas destinations. For McHugh J, being unable to fly to 'most' such destinations, left Mr Christie in a position of not satisfying this inherent requirement.

Gummow J also seems to have drawn on a view of reasonableness, although certainly his view of this element appears to be different to that of McHugh J. After identifying 'the primary requirement' of Qantas as being that its pilots be available for duty in any part of the world, Gummow J held that being able to fly to any destination was an inherent requirement of Mr Christie's position.[79] Clearly the imperatives of Qantas as an employer were given primary consideration in the judgment of Gummow J. Indeed, his Honour seems to have based his finding on a view of what Qantas as the employer has a right to expect from the pilots engaged in its international services. It is in this sense a finding of reasonableness from Qantas' point of view.

My concern is that not only do these judgments of Brennan CJ, McHugh and Gummow JJ appear to be based around views of what is reasonable and fair as between Mr Christie and Qantas, but they tend to construct their meaning of reasonableness on the basis of assumptions, 'common sense' and primarily from Qantas' point of view. We do not see in these judgments an explicit examination

[76] That 'integral' administrative structures of employers, such as the Qantas roster system, might involve issues of institutional or structural discrimination comes as no surprise. This is because, as numerous scholars have pointed out, work arrangements, norms and structures in Western societies have been constructed on the patterns of the historically dominant groups in such societies. In Australia, this means that workplace structures have tended to be based on, for example, traditional male work patterns, Christian traditions, heterosexual (married) family structures, Anglo-Australian cultural values, and, I would add, the working life experiences of people in their 30s and 40s. The resulting employment criteria advantage workers whose lives are closest to these experiences, and at the same time disadvantage people whose experiences are dissimilar to this paradigm. See, eg, Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990) especially 1–23; Rosemary Hunter, *Indirect Discrimination in the Workplace* (1992) especially 4–8; Rosemary Owens, 'Women, "Atypical" Work Relationships and the Law' (1993) 19 *Melbourne University Law Review* 399; Clare Burton, *The Promise and the Price: The Struggle for Equal Opportunity in Women's Employment* (1991); Cynthia Cockburn, *In the Way of Women: Men's Resistance to Sex Equality in Organisations* (1991).

[77] *Christie* (1998) 152 ALR 365, 387.

[78] Ibid 386.

[79] As noted above, McHugh J suggested (but found it unnecessary to decide) that an ability to captain all Qantas' international flights was probably an inherent requirement of Mr Christie's position: ibid 387–8.

of the concept of reasonableness (or unjustifiable hardship) in the form that we might expect to see under anti-discrimination statutes. Many questions are left unanswered. These include whether the roster system as it currently operates could successfully accommodate Mr Christie after his 60th birthday,[80] or, if not, whether (and how) it might be reorganised to accommodate pilots over 60; whether (and how many) other pilots would benefit from a reorganisation of the way in which flights are allocated to pilots; to what sort of expense such a restructure would give rise; what the impact on younger pilots would be etc.

Prior to the handing down of the High Court decision, Professor Ronald McCallum wrote a comment piece on this case in which he noted the limited range of exemptions under the *Industrial Relations Act*, and suggested that the preferable outcome in the High Court would be for the inherent requirements of the position defence to be interpreted to include notions of reasonableness/unjustifiable hardship.[81] His reasoning was that this would most accurately reflect the policy behind such discrimination protections as being about reasonableness and fairness as between the person claiming discrimination, his or her colleagues, as well as the employer.[82] In addition, in his view such a broader interpretation 'will facilitate the employment of disabled persons because it will take the focus away from all or nothing inherent requirements and place jobs in a reasonable accommodation setting'.[83] Having argued in favour of a broader interpretation of the inherent requirements defence, Professor McCallum did express the view that ultimately Christie ought to be successful because his continued employment after his 60th birthday would not impose an unreasonable hardship on Qantas. In Professor McCallum's view, it would be desirable for Parliament to remedy what he saw as an omission in the legislation by inserting an unjustifiable hardship defence into the *Workplace Relations Act*.[84]

Although there is certainly considerable merit in Professor McCallum's views, I feel much disquiet at the suggestion that anti-discrimination provisions, particularly those that operate to reduce the scope of the protection offered by the Act, ought to be read to encompass a consideration of matters that, in my view, place too much strain on the meaning of the words used in the section. Compounding this concern is a view that the concepts of reasonableness and justifiability are notoriously open-ended. As many commentators have shown, reasonableness has a history of taking on dominant values.[85] My concern is that given the current economic rationalist environment in which we live (and work) in Australia, any assessment of reasonableness may too easily construct employer cost imperatives and reified notions of managerial prerogative as outweighing the

[80] As noted above, Gaudron J formed the view that this question had not been resolved, and so ordered that the matter be remitted to the Full Court of the Industrial Relations Court: ibid 376.

[81] See McCallum, above n 5.

[82] Ibid 216–18.

[83] Ibid 218.

[84] Ibid.

[85] See, eg, Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (1990) 362–70; Australian Law Reform Commission, *Equality before the Law: Women's Equality*, Report No 69 (Pt II) (1994) 23–5.

human rights of an individual not to be subjected to discriminatory conduct.[86] I agree with Professor McCallum that, on the evidence available, the continued employment of Mr Christie after his 60th birthday would not appear to impose an unreasonable/unjustified hardship on Qantas. I note, however, that Brennan CJ, McHugh and Gummow JJ would appear to disagree with this view. For them, Qantas is not required to accommodate pilots once they reach 60 years of age.

2 *What Is the Relevance of* Christie *in the Future Interpretation of Federal and State Anti-Discrimination Statutes?*

Christie is a decision about the inherent requirements of the position provision in s 170DF(2) of the *Industrial Relations Act* (now s 170CK(3) of the *Workplace Relations Act*). As the first High Court examination of the provision, *Christie* has great importance for the future interpretation of these unlawful termination provisions in federal industrial legislation. The question arises, however, as to what extent *Christie* will shape the interpretation and direction of similar concepts and wording contained in anti-discrimination statutes.

As already noted, many State and federal anti-discrimination statutes contain provisions similar to s 170DF(2) of the *Industrial Relations Act*. Most of these provisions apply (in most but not all statutes) to the sole ground of disability, and include references to situations where a person is unable to perform either the 'inherent requirements' of the position in question or, under the *Equal Opportunity Act 1995* (Vic), the 'genuine and reasonable requirements' of the position.[87] The question arises as to whether, and to what extent, *Christie* will shape the construction of such provisions.

There has been a decision this year of the Full Court of the Federal Court of Australia commenting on the relationship between s 15(4) of the *Disability Discrimination Act 1992* (Cth) and the s 170DF(2) provision in the *Industrial Relations Act*.[88] Section 15(4) of the *Disability Discrimination Act 1992* (Cth) provides that an employer is not liable under that Act if it can establish that, after taking into account all relevant factors, a person, because of their disability, would be unable to carry out the inherent requirements of the particular employment or would, in order to carry out those requirements, require services or facilities the provision of which would impose an unjustifiable hardship on the employer. All members of the Full Court distinguished the interpretation of s 170DF(2) of the *Industrial Relations Act* arrived at by the Full Court of the Industrial Relations Court in *Christie v Qantas Airways Ltd*.[89] The decision of the Full Court of the Federal Court[90] was handed down prior to the High Court judgment in *Christie*. Drummond J of the Federal Court was of the view that the

[86] It is, however, noted that the New South Wales Equal Opportunity Tribunal has explicitly rejected the idea that the principles of economic rationalism are relevant: *Blatchford v Qantas Airways Ltd* (1997) EOC [92-888].

[87] See, eg, *Disability Discrimination Act 1992* (Cth) s 15(4)(a); *Equal Opportunity Act 1995* (Vic) s 22(1)(b); *Anti-Discrimination Act 1977* (NSW) s 49D(4)(a).

[88] *Commonwealth v Human Rights and Equal Opportunity Commission* (1998) 152 ALR 182.

[89] (1996) 138 ALR 19.

[90] *Commonwealth v Human Rights and Equal Opportunity Commission* (1998) 152 ALR 182.

absence in s 170DF(2) of the unjustifiable hardship aspect of s 15(4) rendered the two provisions materially different.[91] Burchett and Mansfield JJ, in contrast, held that the approach taken by the Full Court of the Industrial Relations Court (rather than the specific wording of s 170DF(2) as such) was not appropriate for s 15(4) of the *Disability Discrimination Act 1992* (Cth).[92] It is possible, therefore, that Burchett and Mansfield JJ might find the High Court views on s 170DF(2) in *Christie* instructive in the task of interpreting s 15(4) of the *Disability Discrimination Act 1992* (Cth). Given that *Christie* is a High Court decision, this seems likely. In addition to shaping the interpretation of 'inherent requirements' in the *Disability Discrimination Act 1992* (Cth), it appears likely that *Christie* will be influential to the development of 'inherent requirement' provisions in State anti-discrimination statutes.

There is another level on which *Christie* may operate in State and federal anti-discrimination jurisdictions. It relates to questions about whether broad or narrow constructions of provisions such as s 170DF(1) and s 170DF(2) ought to be undertaken. Kirby J set out a number of principles in relation to this. Amongst them was the proposal that legislative rules prohibiting discrimination ought to be construed beneficially (and not narrowly), and that 'derogations' from protection, such as that found in s 170DF(2), ought to be construed narrowly.[93] In contrast, Gaudron J (with whom Brennan CJ agreed) cast aside an argument put on behalf of Mr Christie, that as s 170DF(2) is an exception/exemption to the prohibition contained in s 170DF(1), it ought to be construed narrowly. Gaudron J doubted whether s 170DF(2) could be accurately described as an exception to or exemption from the prohibition on termination contained in the Act. Rather, her Honour suggested that the better view is that sub-s (2) is, 'in truth, part of the explication of what is and what is not discrimination for the purposes of' the *Industrial Relations Act*.[94] Her Honour concluded that the words 'inherent requirements' ought to be given 'their natural and ordinary meaning'.[95]

Although McHugh J described s 170DF(2) as an exception, his Honour did form the same view as Gaudron J that the words in s 170DF(2) ought to be given 'their natural and ordinary meaning.' In doing so his Honour appeared to reject the contention that s 170DF(2) ought to be narrowly construed. He said:

> No doubt, having regard to the objects of the Act, a court should not give the exception in s 170DF(2) an expansive interpretation. Nevertheless, if a requirement falls within the natural and ordinary meaning of the exception, it must be regarded as non-discriminatory for the purposes of the Act.[96]

Gummow J did not expressly address this issue regarding approaches to construction. It seems clear though, from his Honour's finding, that it was an inherent requirement of Mr Christie's position that he be available to fly to any part of the

[91] Ibid 198.
[92] Ibid 192–3 (Burchett J), 212–13 (Mansfield J).
[93] *Christie* (1998) 152 ALR 365, 405–6.
[94] Ibid 375.
[95] Ibid.
[96] Ibid 385

world, that Gummow J could not be described as adopting a narrow construction to s 170DF(2).

The question arises as to whether and how these views on approaches to construction will shape the interpretation of federal and State anti-discrimination statutes such as the *Disability Discrimination Act 1992* (Cth) and the *Equal Opportunity Act 1995* (Vic). Interestingly, and as noted by Kirby J, the approach he endorsed is commonly cited in decisions made under such anti-discrimination statutes.[97] To what extent then, might the views of Gaudron J, Brennan CJ, McHugh and Gummow JJ represent a shift in the approach to be taken under anti-discrimination provisions? McHugh J drew a clear distinction between the *Industrial Relations Act* (the *Workplace Relations Act*) and what he referred to as 'general anti-discrimination statute[s]', suggesting that the approach he took to construing s 170DF(1) and (2) would not necessarily be appropriate to provisions in, for example, the *Disability Discrimination Act 1992* (Cth) and the *Equal Opportunity Act 1995* (Vic). In relation to the views of Gaudron J, this part of her judgment appears confined to commenting on the *Industrial Relations Act* (*Workplace Relations Act*). Gummow J was clearly only referring to the s 170DF provision. The suggestion then, is not that these judgments of the majority will alter the approach taken to construing anti-discrimination statutes, but rather that they represent a divergence between the approach to federal industrial legislation (now the *Workplace Relations Act*) and the approach taken in relation to federal and State anti-discrimination statutes.

IV CONCLUSIONS

The High Court decision in *Christie* gives rise to many interesting questions and issues, both in relation to the emerging unlawful termination jurisdiction in federal industrial legislation and also in respect of the development of federal and State anti-discrimination jurisdictions. The aspect of the decision dealing with the inherent requirements of the position provision in s 170DF(2) of the *Industrial Relations Act* (and now s 170CK(3) of the *Workplace Relations Act*) is likely to have the greatest impact in terms of shaping the development of legal principle under the *Workplace Relations Act* and also under anti-discrimination statutes. The relatively broad reading given to 'inherent requirements' in s 170DF(2) by the majority of the High Court, coupled with the apparent weight accorded to Qantas' interests, provides an insight into what we might expect to see in this area of law in the future.

ANNA CHAPMAN*

97 Ibid 405–6. Kirby J cited the following cases: *IW v City of Perth* (1997) 146 ALR 696, 738–9; *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165, 196–7; *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359, 406–7.

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