

1995

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

HUMAN RIGHTS LEGISLATION AMENDMENT BILL 1994

SUPPLEMENTARY EXPLANATORY MEMORANDUM

(Circulated by authority of the
Attorney-General, the Honourable Michael Lavarch MP)





HUMAN RIGHTS LEGISLATION AMENDMENT BILL 1994

GOVERNMENT AMENDMENTS

Outline

1. These amendments respond to the consequences of the High Court's decision in *Brandy v Human Rights and Equal Opportunity Commission and Others* on 23 February which held that the mechanism for the enforcement of determinations by the Human Rights and Equal Opportunity Commission (the Commission) under the *Racial Discrimination Act 1975* other than determinations made affecting respondents who are Commonwealth agencies was constitutionally invalid.

2. The mechanism for the enforcement of determinations used under the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Privacy Act 1988* is similar to that used in the *Racial Discrimination Act* and hence is also invalid on the basis of the Court's decision. That mechanism was added to the *Racial Discrimination Act 1975* the *Sex Discrimination Act 1984* and the *Disability Discrimination Act 1992* in 1992 and to the *Privacy Act 1988* in 1993 .

Determinations made prior to the coming into force of the invalidated regime are unaffected. As a consequence of the High Court's decision the determinations of discrimination made by the Commission under these Acts since the mechanism came into force are unenforceable and there is currently no mechanism for the enforcement of the determinations of the Commission.

3. These amendments amend the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Privacy Act 1988* to reinstate the procedure for the enforcement of the determinations made by the Commission as it operated prior to 1992. This will operate as an interim measure pending the development of a new mechanism to enforce determinations of the Commission to replace that which was held to be invalid.

4. The amendments also provide transitional provisions relating to those determinations made by the Commission since the commencement of the invalid scheme.

5. There is also an amendment to the *Human Rights and Equal Opportunity Commission Act 1986* relating to the delegation of the President's powers.

Financial Impact Statement

There may be some costs associated with the transitional provisions. These costs relate to the possible need to provide additional legal aid to parties affected by the determinations made under the invalid scheme. These costs are not expected to be significant.

Notes on Clauses

PART 1A - AMENDMENTS OF THE DISABILITY DISCRIMINATION ACT 1992, THE PRIVACY ACT 1988, THE RACIAL DISCRIMINATION ACT 1975 AND THE SEX DISCRIMINATION ACT 1984 RELATING TO ENFORCEMENT OF DETERMINATIONS

Disability Discrimination Act 1992

Clause 1A - Sections 104A, 104B and 104C

1. This clause provides that these sections of the Disability Discrimination Act 1992 are repealed.

Clause 1B - Section 106

2. This provides that in place of section 106 the following Division 3A is to be substituted.

Division 3A - Enforcement of determinations involving respondents other than Commonwealth agencies

3. A new Division of the Act is created concerning the enforcement of determinations involving respondents other than Commonwealth agencies. The provisions relating to Commonwealth agencies do not change.

Subdivision A - Determinations made after commencement of Division

4. Subdivision A provides for the reinstatement of the method of enforcement of determinations which applied prior to the invalid mechanism coming into force. The Subdivision relates to determinations made by the Human Rights and Equal Opportunity Commission (the Commission) under the Act after the commencement of the Division.

Clause 105A - Proceedings in the Federal Court to enforce a determination

5. Subclause 105A(1) provides that the Commission, the complainant or a person acting on behalf of the complainant may commence proceedings in the Federal Court for an order to enforce a determination made under either subsection 102(1), which concern interim determinations made by the Commission, or subsection 103(1) of the Act. As a result of the decision of the High Court such determinations made in favour of complainants are now unenforceable unless the person against whom the complaint was made is a Commonwealth agency. This provision provides that they may seek an order to enforce a determination which would otherwise be unenforceable except where the respondent is a Commonwealth agency or the Principal Executive of a Commonwealth agency.

6. Subclause 105A(2) provides that if the court is satisfied that the respondent to the determination has engaged in conduct or committed an act that is unlawful under the

Act then it may make such orders as it thinks fit including orders which give effect to a determination of the Commission.

7. Subclause 105A(3) provides that the Court may grant an interim injunction pending the determination of proceedings under subclause 105A(1). This will enable the position of the parties to be preserved pending the final resolution of proceedings under subclause 105A(1).

8. Subclause 105A(4) provides that the Court not make it a condition of granting an interim injunction referred to in subclause 105A(3) that the person seeking the injunction give an undertaking as to damages. This is intended to make it easier for persons who may be seeking to enforce a determination of discrimination made by the Commission to obtain an interim injunction.

9. Subclause 105A(5) makes clear that in any proceedings to enforce a determination under subclause 105A(1) the question whether the respondent has engaged in conduct or committed an act that is unlawful under the Act (see subclause 105A(2)) is to be dealt with by the Court by way of a complete rehearing of the matter. The subclause also provides that in its rehearing the Court may receive as evidence any of the following:

- (a) a copy of the written reasons of the Commission for the determination which it is sought to have enforced under subclause 105A(1);
- (b) a copy of any document that was before the Commission;
- (c) a copy of the record (including any tape recording) of the inquiry into the complaint by the Commission.

It is a matter for the discretion of the Court whether any or all of the above are received into evidence in any proceedings under subclause 105A(1) and if received what weight is to be given to such evidence.

10. Subclause 105A(6) provides that where the complaint is a representative complaint under section 69 of the Act, the complainant who may take an action under subclause 105A(1) means any member of the class to which the determination in relation to the representative complaint relates.

Clause 105B - Assistance in proceedings before the Federal Court

11. Subclause 105B(1) provides that a person who either commenced, or proposes to commence, proceedings under clause 105A, or a person who has done, or is alleged to have done, an act in relation to which those proceedings have been commenced in the Federal Court under clause 105A may apply to the Attorney-General for legal or financial assistance in relation to those proceedings.

12. Subclause 105B(2) provides that if there is such an application to the Attorney-General for legal or financial assistance and the Attorney-General is satisfied that it will involve hardship to the person seeking such assistance to refuse the application and it is reasonable to grant the application in the circumstances the Attorney-General may authorise the provision of such assistance. The Attorney-General may impose conditions on such legal or financial assistance.

Subdivision B - Determinations made from 1 March 1993 to commencement of Division

13. Clauses 105C - 106 relate to the determinations made by the Commission under the Act in the period from the commencement of the enforcement mechanism which has been found to be invalid to the date of the commencement of this Division.

Clause 105C - Interpretation

14. In relation only to this Subdivision of the Act two definitions are provided.

'recovery proceedings' - refer to proceedings, commenced by respondents to determinations of discrimination under the Act made by the Commission during the period when the invalid scheme was in operation, in which the respondent is seeking to recover money which he or she may have paid to a complainant as a result of the determination. Respondents to determinations were not always, or were not always solely, required to pay money to complainants under determinations made by the Commission. They could also be required, for example, to apologise to the complainant. The definition includes proceedings to seek a remedy other than, or in addition to, the payment of money.

'Subdivision B determination' - in relation to the subdivision (clauses 105C - 106) this term refers to determinations made by the Commission under the Act during the period from 1 March 1993 (when the scheme which has been found to be invalid commenced under the Act) to the date on which this Division commences except where the respondent to the determination is a Commonwealth agency or the Principal Executive of a Commonwealth agency.

Clause 105D - Proceedings in the Federal Court in relation to a Subdivision B determination

15. Subclause 105D(1) provides that the persons referred to in subsection (2) may commence proceedings in the Federal Court for an order in relation to a determination made by the Commission during the period from 1 March 1993 to the date on which this Division commences.

16. Subclause 105D(2) lists the persons who may commence proceedings under subclause 105D(1). They are the Commission, the complainant (note that subclause 105D(8) provides that in relation to a representative complaint this means a member of the class to which the determination relates), a person acting on behalf of the complainant or the respondent to the determination.

17. Subclause 105D(3) provides that the Court must consider whether the respondent to the determination has engaged in conduct, or committed an act, that is unlawful under this Act and may make any orders it thinks fit. The subclause also provides that the orders the court may make are subject to the matters indicated in subclause 105D(4).

18. Subparagraph 105D(4)(a) provides that in considering what orders to make under subclause 105D(3) the Court must take into account any money already paid to the complainant by the respondent to the determination or any conduct in which the respondent has engaged or not engaged as a result of the determination.

19. Subparagraph 105D(4)(b) provides that, in considering what orders to make under subclause 105D(3), the court must also take into account the outcome of any proceeding for recovery in relation to the determination.

20. It is possible that respondents who have paid moneys to complainants in relation to determinations which were registered under the mechanism which the High Court has found to be invalid may seek to recover those moneys. These amendments do not give a right to recovery, nor do they seek to take away any right which may exist under the general law. Respondents may seek to assert in the courts that a right to recovery does exist.

21. Where there are proceedings under clause 105D the Federal Court may also hear any such recovery proceedings (*Federal Court of Australia Act 1976*, sections 19, 22 and 32). If such proceedings are commenced in a State or Territory court, they are generally able to be transferred to the Federal Court pursuant to the *Jurisdiction of Courts (Cross - Vesting) Act 1987* so that this issue can be heard together with the proceedings under clause 105D. Where such recovery proceedings are not transferred the Attorney-General will be able to seek to intervene in the proceedings in the State or Territory court.

22. Subclause 105D(5) provides that the Court may grant an interim injunction pending the determination of proceedings under subclause 105D(1). This will enable the position of the parties to be preserved pending the final resolution of proceedings under subclause 105D(1).

23. Subclause 105D(6) provides that the Court not make it a condition of granting an interim injunction referred to in subclause 105D(5) that the person seeking the injunction give an undertaking as to damages. This is intended to make it easier for persons who may be seeking an order under this clause to obtain an interim injunction.

24. Subclause 105D(7) makes clear that in any proceedings under subclause 105D(1) the question whether the respondent has engaged in conduct or committed an act that is unlawful under the Act (see subclause 105D(3)) is to be dealt with by the Court by way of a complete rehearing of the matter. The subclause also provides that in its rehearing the Court may receive as evidence any of the following:

- (a) a copy of the written reasons of the Commission for the determination which is the subject of the proceedings;
- (b) a copy of any document that was before the Commission;
- (c) a copy of the record (including any tape recording) of the inquiry into the complaint by the Commission.

It is a matter for the discretion of the Court whether any or all of the above are received into evidence in any proceedings under subclause 105D(1) and if received what weight is to be given to such evidence.

25. Subclause 105D(8) provides that in relation to representative complaints, the term 'complainant' for the purposes of this clause means not only an individual but also an individual who is a member of the class covered by the determination (see also subclause 105D(2)).

Clause 105E - Federal Court may vary orders made under section 105D if a court determines recovery proceedings

26. Clause 105E deals with the situation in which the Federal Court has made an order under subclause 105D(3) and, at some later time, a court makes an order determining the recovery proceedings relating to the determination which was the subject of the Federal Court's earlier order. Subclause 105E(1) provides that in such a situation the person against whom the recovery proceedings were commenced may apply to the Federal Court to vary the order it made under subclause 105D(3).

27. Subclause 105E(2) provides that the court may vary the order made under subclause 105D(3) if it thinks it is appropriate to do so having regard to its reasons for making that order and having regard to the order made by the court in determining the recovery proceedings.

Clause 105F - Assistance in proceedings before the Federal Court

28. Subclause 105F(1) provides that a person who is a party to proceedings in the Federal Court under Subdivision B or who proposes to commence such proceedings may apply to the Attorney-General for the provision of assistance in respect of the proceedings.

29. Subclause 105F(2) provides that if there is such an application to the Attorney-General for assistance and the Attorney-General is satisfied that it is reasonable to grant the application in the circumstances the Attorney-General may authorise the provision of assistance. The Attorney-General may impose conditions on such legal or financial assistance.

Clause 106 - Subdivision does not create right for respondent to determination to commence proceedings

30. Clause 106 provides that, with the exception of clause 105D, Subdivision B does not create a right of action in favour of the respondent to a Subdivision B determination nor is it to be taken to create any such right.

Privacy Act 1988

Clause 1C. Division 3 of Part V

31. This clause provides that this Division of the Privacy Act 1988 is repealed. In place of the Division the following Division 3 is to be substituted.

Division 3 - Enforcement of determinations involving respondents other than Commonwealth agencies

32. A new Division of the Act is inserted concerning the enforcement of determinations involving respondents other than Commonwealth agencies.

Clause 54 - Application of Division

33. The new Division relates to determinations made by the Privacy Commissioner (the Commissioner) under the Act after the commencement of the Division. It does

not apply to determinations involving respondents which are Commonwealth agencies, except where the agency is an eligible case manager.

Clause 55 – Proceedings in the Federal Court to enforce a determination

34. Subclause 55(1) provides that the Commissioner or the complainant may commence proceedings in the Federal Court for an order to enforce a determination made under section 52 of the Act. As a result of the decision of the High Court such determinations made in favour of complainants are now unenforceable where they involve respondents other than Commonwealth agencies. This provision provides that the Commissioner or the complainant may seek an order to enforce a determination which would otherwise be unenforceable.

35. Subclause 55(2) provides that if the court is satisfied that the respondent to the determination has engaged in conduct that constitutes an interference with the privacy of the complainant, then it may make such orders as it thinks fit, including to give effect to a determination of the Commissioner. Section 13 of the Act sets out what conduct constitutes an interference with the privacy of an individual.

36. Subclause 55(3) provides that the Court may grant an interim injunction pending the determination of proceedings under subclause 55(1). This will enable the position of the parties to be preserved pending the final resolution of proceedings under subclause 55(1).

37. Subclause 55(4) provides that the Court not make it a condition of granting an interim injunction referred to in subclause 55(3) that the person seeking the injunction give an undertaking as to damages. This is intended to make it easier for persons who may be seeking to enforce a determination of an interference with privacy made by the Commissioner to obtain an interim injunction.

38. Subclause 55(5) makes clear that in any proceedings to enforce a determination under subclause 55(1) the question whether the respondent has engaged in conduct that constitutes an interference with the privacy of the complainant (see subclause 55(2)) is to be dealt with by the Court by way of a complete rehearing of the matter. The subclause also provides that in its rehearing the Court may receive as evidence any of the following:

- (a) a copy of the written reasons of the Commissioner for the determination which it is sought to have enforced under subclause 55(1);
- (b) a copy of any document that was before the Commissioner;
- (c) a copy of a record (including a tape recording) of any appearance before the Commissioner (including any oral submissions made) under subsection 43(5) of the Act.

It is a matter for the discretion of the Court whether any or all of the above are received into evidence in any proceedings under subclause 55(1) and if received what weight is given to any such evidence.

39. Subclause 55(6) provides that where the complaint is a representative complaint under section 36(2) of the Act, the complainant for the purposes of an action under

subclause 55(1) means any member of the class to whom the determination in relation to the representative complaint relates.

Clause 1D. Subsection 63(2)

40. This clause provides that subsection 63(2) of the Act is repealed and the following sub-clause is to be substituted. Subclause 63(2) provides that a person who either has commenced, or proposes to commence, proceedings under clause 55, or a person who has engaged in, or is alleged to have engaged in, conduct in relation to which such proceedings have been commenced, may apply to the Attorney-General for assistance in relation to those proceedings.

Racial Discrimination Act 1975

Clause 1E - sections 25ZAA, 25ZAB and 25ZAC

41. This clause provides that these sections of the Act are repealed.

Clause 1F - section 25ZC

42. This clause provides that the section is to be repealed and the following Division 3A is to be substituted.

Division 3A - Enforcement of determinations involving respondents other than Commonwealth agencies

43. A new Division of the Act is created concerning the enforcement of determinations involving respondents other than Commonwealth agencies. The provisions relating to Commonwealth agencies do not change.

Subdivision A - Determinations made after commencement of Division

44. Subdivision A provides for the reinstatement of the method of enforcement of determinations which applied prior to the invalid mechanism coming into force. The Subdivision relates to determinations made by the Human Rights and Equal Opportunity Commission (the Commission) under the Act after the commencement of the Division.

Clause 25ZC - Proceedings in the Federal Court to enforce a determination

45. Subclause 25ZC(1) provides that the Commission, the complainant or a trade union acting on behalf of the complainant, may commence proceedings in the Federal Court for an order to enforce a determination made under either subsection 25Y(1), which refers to interim determinations made by the Commission, or subsection 25Z(1) of the Act. As a result of the decision of the High Court such determinations made in favour of complainants are now unenforceable unless the person against whom the complaint was made is a Commonwealth agency. This provision provides that they may seek an order to enforce a determination which would otherwise be unenforceable except where the respondent is a Commonwealth agency or the Principal Executive of a Commonwealth agency.

46. Subclause 25ZC(2) provides that if the court is satisfied that the respondent to the determination has engaged in conduct, or committed an act, that is unlawful under the Act then it may make such orders as it thinks fit including an order to give effect to a determination of the Commission.

47. Subclause 25ZC(3) provides that the Court may grant an interim injunction pending the determination of proceedings under subclause 25ZC(1). This will enable the position of the parties to be preserved pending the final resolution of proceedings under subclause 25ZC(1).

48. Subclause 25ZC(4) provides that the Court not make it a condition of granting an interim injunction referred to in subclause 25ZC(3) that the person seeking the injunction give an undertaking as to damages. This is intended to make it easier for persons who may be seeking to enforce a determination of discrimination made by the Commission to obtain an interim injunction.

49. Subclause 25ZC(5) makes clear that in any proceedings to enforce a determination under subclause 25ZC(1) the question whether the respondent has engaged in conduct, or committed an act, that is unlawful under the Act (see subclause 25ZC(2)) is to be dealt with by the Court by way of a complete rehearing of the matter. The subclause also provides that in its rehearing the Court may receive as evidence any of the following:

- (a) a copy of the written reasons of the Commission for the determination which it is sought to have enforced under subclause 25ZC(1);
- (b) a copy of any document that was before the Commission;
- (c) a copy of the record (including any tape recording) of the inquiry into the complaint by the Commission.

It is a matter for the discretion of the Court whether any or all of the above are received into evidence in any proceedings under subclause 25ZC(1) and if received what weight is given to any such evidence.

50. Subparagraph 25ZC(6)(a) provides that where the complaint is a representative complaint under section 22 of the Act, the complainant who may take an action under subclause 25ZC(1) means any member of the class to which the determination in relation to the representative complaint relates. Subparagraph 25ZC(6)(b) provides that where the complaint was made by a trade union on behalf of a person and the complaint was not a representative complaint, the complainant who may take action under subclause 25ZC(1) means the person on whose behalf the trade union made the complaint. The term 'trade union' is defined in section 22 of the Act and has the same meaning for the purposes of this clause.

Clause 25ZCA - Assistance in proceedings before the Federal Court

51. Subclause 25ZCA(1) provides that a person who either has commenced, or proposes to commence, proceedings under clause 25ZC, or a person who has done, or is alleged to have done, an act in relation to which those proceedings have been commenced in the Federal court under clause 25ZC may apply to the Attorney-General for assistance in relation to those proceedings.

52. Subclause 25ZCA(2) provides that if there is such an application to the Attorney-General for legal or financial assistance and the Attorney-General is satisfied that it will involve hardship to the person seeking such assistance to refuse the application and it is reasonable to grant the application in the circumstances the Attorney-General may authorise the provision of such assistance. The Attorney-General may impose conditions on such legal or financial assistance.

Subdivision B - Determinations made from 13 January 1993 to the commencement of this Division.

53. Clauses 25ZCB - 25ZCF relate to the determinations made by the Commission under the Act in the period from the commencement of the enforcement mechanism which has been found to be invalid to the date of the commencement of this Division.

Clause 25ZCB - Interpretation

54. In relation only to this Subdivision of the Act two definitions are provided.

'recovery proceedings' - refer to proceedings, commenced by respondents to determinations of discrimination under the Act made by the Commission during the period when the invalid scheme was in operation, in which the respondent is seeking to recover money which he or she may have paid to a complainant as a result of the determination. Respondents to determinations were not always, or were not always solely, required to pay money to complainants under determinations made by the Commission. They could also be required, for example, to apologise to the complainant. The definition includes proceedings to seek a remedy other than, or in addition to, the payment of money.

'Subdivision B determination' - in relation to the subdivision (clauses 25ZCB - 25ZCF) this term refers to determinations made by the Commission under the Act during the period from 13 January 1993 (when the scheme which has been found to be invalid commenced under the Act) to the date on which this Division commences except where the respondent to the determination is a Commonwealth agency or the Principal Executive of a Commonwealth agency.

Clause 25ZCC - Proceedings in the Federal Court in relation to a Subdivision B determination

55. Subclause 25ZCC(1) provides that the persons referred to in subclause (2) may commence proceedings in the Federal Court for an order in relation to a determination made by the Commission during the period from 13 January 1993 to the date on which this Division commences.

56. Subclause 25ZCC(2) lists the persons who may commence proceedings under subclause 25ZCC(1). They are the Commission, the complainant, a trade union acting on behalf of the complainant or the respondent to the determination.

57. Subclause 25ZCC(3) provides that the Court must consider whether the respondent to the determination has engaged in conduct, or committed an act, that is unlawful under this Act and may make any orders it thinks fit. The subclause also provides that the orders the court may make are subject to the matters indicated in subclause 25ZCC(4).

58. Subparagraph 25ZCC(4)(a) provides that in considering what orders to make under subclause 25ZCC(3) the Court must take into account any money already paid to the complainant by the respondent to the determination, or any conduct in which the respondent has engaged or not engaged, as a result of the determination.

59. Subparagraph 25ZCC(4)(b) provides that, in considering what orders to make under subclause 25ZCC(3), the court must also take into account any outcome of any proceeding for recovery in relation to the determination.

60. It is possible that respondents who have paid moneys to complainants in relation to determinations which were registered under the mechanism which the High Court has found to be invalid may seek to recover those moneys. These amendments do not give a right to recovery, nor do they seek to take away any right which may exist under the general law. Respondents may seek to assert in the courts that a right to recovery does exist.

61. Where there are proceedings under clause 25ZCC the Federal Court may also hear any such recovery proceedings (*Federal Court of Australia Act 1976*, sections 19, 22 and 32). If such proceedings are commenced in a State or Territory court, they are generally able to be transferred to the Federal Court pursuant to the *Jurisdiction of Courts (Cross - Vesting) Act 1987* so that this issue can be heard together with the proceedings under clause 25ZCC. Where such recovery proceedings are not transferred the Attorney-General will be able to seek to intervene in the proceedings in the State or Territory court.

62. Subclause 25ZCC(5) provides that the Court may grant an interim injunction pending the determination of proceedings under subclause 25ZCC(1). This will enable the position of the parties to be preserved pending the final resolution of proceedings under subclause 25ZCC(1).

63. Subclause 25ZCC(6) provides that the Court not make it a condition of granting an interim injunction referred to in subclause 25ZCC(5) that the person seeking the injunction give an undertaking as to damages. This is intended to make it easier for persons who may be seeking an order under this clause to obtain an interim injunction.

64. Subclause 25ZCC(7) makes clear that in any proceedings under subclause 25ZCC(1) the question whether the respondent has engaged in conduct, or committed an act, that is unlawful under the Act (see subclause 25ZCC(3)) is to be dealt with by the Court by way of a complete rehearing of the matter. The subclause also provides that in its rehearing the Court may receive as evidence any of the following:

- (a) a copy of the written reasons of the Commission relating to the determination which is the subject of the proceedings;
- (b) a copy of any document that was before the Commission;
- (c) a copy of the record (including any tape recording) of the inquiry into the complaint by the Commission.

It is a matter for the discretion of the Court whether any or all of the above are received into evidence in any proceedings under subclause 25ZCC(1) and if received what weight is given to any such evidence.

65. Subparagraph 25ZCC(8)(a) provides that where the complaint is a representative complaint under section 22 of the Act, a complainant who may take an action under subclause 25ZCC(2) means not only an individual but also an individual who is a member of the class to which the determination in relation to the representative complaint relates. Subparagraph 25ZCC(8)(b) provides that where the complaint was made by a trade union on behalf of a person and the complaint was not a representative complaint, the complainant who may take action under subclause 25ZCC(2) means the person on whose behalf the trade union made the complaint. The term 'trade union' is defined in section 22 of the Act and has the same meaning for the purposes of this clause.

Clause 25ZCD - Federal Court may vary orders made under section 25ZCC if a court determines recovery proceedings

66. Clause 25ZCD deals with the situation in which the Federal Court has made an order under subclause 25ZCC(3) and, at some later time, a court makes an order determining the recovery proceedings relating to the determination which was the subject of the Federal Court's earlier order. Subclause 25ZCD(1) provides that in such a situation the person against whom the recovery proceedings were commenced may apply to the Federal Court to vary the order it made under subclause 25ZCC(3).

67. Subclause 25ZCD(2) provides that the court may vary the order made under subclause 25ZCC(3) if it thinks it is appropriate to do so having regard to its reasons for making that order and having regard to the order made by the court in determining the recovery proceedings.

Clause 25ZCE - Assistance in proceedings before the Federal Court

68. Subclause 25ZCE(1) provides that a person who is a party to proceedings in the Federal Court under Subdivision B or who proposes to commence such proceedings may apply to the Attorney-General for the provision of assistance in respect of the proceedings.

69. Subclause 25ZCE(2) provides that if there is such an application to the Attorney-General for assistance and the Attorney-General is satisfied that it is reasonable to grant the application in the circumstances the Attorney-General may authorise the provision of assistance. The Attorney-General may impose conditions on such legal or financial assistance.

Clause 25ZCF - Subdivision does not create right for respondent to determination to commence proceedings

70. Clause 25ZCF provides that, with the exception of clause 25ZCC, Subdivision B does not create a right of action in favour of the respondent to a Subdivision B determination nor is it to be taken to create any such right.

Sex Discrimination Act 1984

Clause 1G - sections 82A, 82B and 82C

71. This clause provides that these sections of the Act are repealed.

Clause 1H - section 84

72. This clause provides that the section is to be repealed and the following Division 3A is substituted.

Division 3A - Enforcement of determinations involving respondents other than Commonwealth agencies

73. A new Division of the Act is created concerning the enforcement of determinations involving respondents other than Commonwealth agencies. The provisions relating to Commonwealth agencies do not change.

Subdivision A - Determinations made after commencement of Division

74. Subdivision A provides for the reinstatement of the method of enforcement of determinations which applied prior to the invalid mechanism coming into force. The Subdivision relates to determinations made by the Human Rights and Equal Opportunity Commission (the Commission) under the Act after the commencement of the Division.

Clause 83A - Proceedings in the Federal Court to enforce a determination

75. Subclause 83A(1) provides that the Commission, the complainant or a trade union acting on behalf of the complainant may commence proceedings in the Federal Court for an order to enforce a determination made under either subsection 80(1), which refers to interim determinations, or subsection 81(1) of the Act. As a result of the decision of the High Court such determinations made in favour of complainants are now unenforceable unless the person against whom the complaint was made is a Commonwealth agency. This provision provides that they may seek an order to enforce a determination which would otherwise be unenforceable except where the respondent is a Commonwealth agency or the Principal Executive of a Commonwealth agency.

76. Subclause 83A(2) provides that if the court is satisfied that the respondent to the determination has engaged in conduct or committed an act that is unlawful under the Act then it may make such orders as it thinks fit including an order to give effect to a determination of the Commission.

77. Subclause 83A(3) provides that the Court may grant an interim injunction pending the determination of proceedings under subclause 83A(1). This will enable the position of the parties to be preserved pending the final resolution of proceedings under subclause 83A(1).

78. Subclause 83A(4) provides that the Court not make it a condition of granting an interim injunction referred to in subclause 83A(3) that the person seeking the injunction give an undertaking as to damages. This is intended to make it easier for persons who may be seeking to enforce a determination of discrimination made by the Commission to obtain an interim injunction.

79. Subclause 83A(5) makes clear that in any proceedings to enforce a determination under subclause 83A(1) the question whether the respondent has engaged in conduct, or committed an act, that is unlawful under the Act (see subclause 83A(2)) is to be dealt with by the Court by way of a complete rehearing of the matter. The subclause

also provides that in its rehearing the Court may receive as evidence any of the following:

- (a) a copy of the written reasons of the Commission for the determination which it is sought to have enforced under subclause 83A(1);
- (b) a copy of any document that was before the Commission;
- (c) a copy of the record (including any tape recording) of the inquiry into the complaint by the Commission.

It is a matter for the discretion of the Court whether any or all of the above are received into evidence in any proceedings under subclause 83A(1) and if received what weight is given to any such evidence.

80. Subparagraph 83A(6)(a) provides that where the complaint is a representative complaint under section 50 of the Act, the complainant who may take an action under subclause 83A(1) means any member of the class to which the determination in relation to the representative complaint relates. Subparagraph 83A(6)(b) provides that where the complaint was made by a trade union on behalf of a person and the complaint was not a representative complaint, the complainant who may take action under subclause 83A(1) means the person on whose behalf the trade union made the complaint. The term 'trade union' is defined in section 50 of the Act and has the same meaning for the purposes of this clause.

Clause 83B - Assistance in proceedings before the Federal Court

81. Subclause 83B(1) provides that a person who either has commenced, or proposes to commence, proceedings under clause 83A, or a person who has done, or is alleged to have done, an act in relation to which those proceedings have been commenced in the Federal Court under clause 83A may apply to the Attorney-General for assistance in relation to those proceedings.

82. Subclause 83B(2) provides that if there is such an application to the Attorney-General for legal or financial assistance and the Attorney-General is satisfied that it will involve hardship to the person seeking such assistance to refuse the application and it is reasonable to grant the application in the circumstances, the Attorney-General may authorise the provision of such assistance. The Attorney-General may impose conditions on such legal or financial assistance.

Subdivision B - Determinations made from 13 January 1993 to the commencement of this Division.

83. Clauses 83C - 84 relate to the determinations made by the Commission under the Act in the period from the commencement of the enforcement mechanism which has been found to be invalid to the date of the commencement of this Division.

Clause 83C - Interpretation

84. In relation only to this Subdivision of the Act two definitions are provided.

'recovery proceedings' - refer to proceedings, commenced by respondents to determinations of discrimination under the Act made by the Commission during the

period when the invalid scheme was in operation, in which the respondent is seeking to recover money which he or she may have paid to a complainant as a result of the determination. Respondents to determinations were not always, or were not always solely, required to pay money to complainants under determinations made by the Commission. They could also be required, for example, to apologise to the complainant. The definition includes proceedings to seek a remedy other than, or in addition to, the payment of money.

'Subdivision B determination' - in relation to the subdivision (clauses 83C - 84) this term refers to determinations made by the Commission under the Act during the period from 13 January 1993 (when the scheme which has been found to be invalid commenced under the Act) to the date on which this Division commences except where the respondent to the determination is a Commonwealth agency or the Principal Executive of a Commonwealth agency.

Clause 83D - Proceedings in the Federal Court in relation to a Subdivision B determination

85. Subclause 83D(1) provides that the persons referred to in subsection (2) may commence proceedings in the Federal Court for an order in relation to a determination made by the Commission during the period from 13 January 1993 to the date on which this Division commences.

86. Subclause 83D(2) lists the persons who may commence proceedings under subclause 83D(1). They are the Commission, the complainant, a trade union acting on behalf of the complainant or the respondent to the determination.

87. Subclause 83D(3) provides that the Court must consider whether the respondent to the determination has engaged in conduct, or committed an act, that is unlawful under this Act and may make any orders it thinks fit. The subclause also provides that the orders the court may make are subject to the matters indicated in subclause 83D(4).

88. Subparagraph 83D(4)(a) provides that in considering what orders to make under subclause 83D(3) the Court must take into account any money already paid to the complainant by the respondent to the determination or any conduct in which the respondent has engaged or not engaged as a result of the determination.

89. Subparagraph 83D(4)(b) provides that, in considering what orders to make under subclause 83D(3), the court also must take into account the outcome of any proceeding for recovery in relation to the determination.

90. It is possible that respondents who have paid moneys to complainants in relation to determinations which were registered under the mechanism which the High Court has found to be invalid may seek to recover those moneys. These amendments do not give a right to recovery, nor do they seek to take away any right which may exist under the general law. Respondents may seek to assert in the courts that a right to recovery does exist.

91. Where there are proceedings under clause 83D the Federal Court may also hear any such recovery proceedings (*Federal Court of Australia Act 1976*, sections 19, 22 and 32). If such proceedings are commenced in a State or Territory court, they are generally able to be transferred to the Federal Court pursuant to the *Jurisdiction of*

Courts (Cross - Vesting) Act 1987 so that this issue can be heard together with the proceedings under clause 83D. Where such recovery proceedings are not transferred the Attorney-General will be able to seek to intervene in the proceedings in the State or Territory court.

92. Subclause 83D(5) provides that the Court may grant an interim injunction pending the determination of proceedings under subclause 83D(1). This will enable the position of the parties to be preserved pending the final resolution of proceedings under subclause 83D(1).

93. Subclause 83D(6) provides that the Court not make it a condition of granting an interim injunction referred to in subclause 83D(5) that the person seeking the injunction give an undertaking as to damages. This is intended to make it easier for persons who may be seeking to obtain an order under this clause to obtain an interim injunction.

94. Subclause 83D(7) makes clear that in any proceedings to obtain an order under subclause 83D(1) the question whether the respondent has engaged in conduct, or committed an act, that is unlawful under the Act (see subclause 83D(3)) is to be dealt with by the Court by way of a complete rehearing of the matter. The subclause also provides that in its rehearing the Court may receive as evidence any of the following:

- (a) a copy of the written reasons of the Commission for the determination which is the subject of the proceedings;
- (b) a copy of any document that was before the Commission;
- (c) a copy of the record (including any tape recording) of the inquiry into the complaint by the Commission.

It is a matter for the discretion of the Court whether any or all of the above are received into evidence in any proceedings under subclause 83D(1) and if received what weight is given to any such evidence.

95. Subparagraph 83D(8)(a) provides that where the complaint is a representative complaint under section 50 of the Act, the complainant who may take an action under subclause 83D(2) means not only an individual but also an individual who is a member of the class to which the determination in relation to a representative complaint relates. Subparagraph 83D(8)(b) provides that where the complaint was made by a trade union on behalf of a person and the complaint was not a representative complaint, the complainant who may take action under subclause 83D(2) means not only an individual but also the person on whose behalf the trade union made the complaint. The term 'trade union' is defined in section 50 of the Act and has the same meaning for the purposes of this clause.

Clause 83E - Federal Court may vary orders made under subclause 83D if a court determines recovery proceedings

96. Clause 83E deals with the situation in which the Federal Court has made an order under subclause 83D(3) and, at some later time, a court makes an order determining the recovery proceedings relating to the determination which was the subject of the Federal Court's earlier order. Subclause 83E(1) provides that in such a situation the

person against whom the recovery proceedings were commenced may apply to the Federal Court to vary the order it made under subclause 83D(3).

97. Subclause 83E(2) provides that the court may vary the order made under subclause 83D(3) if it thinks it is appropriate to do so having regard to its reasons for making that order and having regard to the order made by the court in determining the recovery proceedings.

Clause 83E - Assistance in proceedings before the Federal Court

98. Subclause 83F(1) provides that a person who is a party to proceedings in the Federal Court under Subdivision B or who proposes to commence such proceedings may apply to the Attorney-General for the provision of assistance in respect of the proceedings.

99. Subclause 83F(2) provides that if there is such an application to the Attorney-General for assistance and the Attorney-General is satisfied that it is reasonable to grant the application in the circumstances the Attorney-General may authorise the provision of assistance. The Attorney-General may impose conditions on such legal or financial assistance.

Clause 84 - Subdivision does not create right for respondent to determination to commence proceedings

100. Clause 84 provides that, with the exception of clause 83D, Subdivision B does not create a right of action in favour of the respondent to a Subdivision B determination nor is it to be taken to create any such right.

Amendment to the Human Rights and Equal Opportunity Commission Act 1986

Clause 7A - After subsection 19(2)

101. Clause 7A allows the President of the Commission to delegate powers under the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984* or the *Disability Discrimination Act 1992*. Provision is made for the powers to be delegable to a member of the Commission (ie the other Commissioners) or to persons appointed as 'part-time hearing Commissioners' by the Attorney-General under the three Acts. These powers cannot be delegated using the existing provision in section 19(2) of the Act which relates only to powers conferred by this Act. The powers covered by this amendment are conferred under the individual anti-discrimination Acts. The clause excludes from delegation the President's power to make interim determinations which should be exercised only by the President given their scope.





