Reasonableness in the Sex Discrimination Act: No Package Deals

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One kind of unlawful discrimination under most anti-discrimination law in Australia is so called indirect discrimination. This form of discrimination occurs where a general rule is applied to a group of people. Although the rule is facially neutral it has the effect of disadvantaging some in the group and not others because of their race, sex, disability or other characteristic the subject of the anti-discrimination law. For example, a criterion for selection for a job might be that the applicant is at least six feet tall. The rule says nothing about women or Chinese but it could effectively disadvantage a woman or a Chinese man on grounds of sex and/or race.[1]

With respect to indirect discrimination the conduct is not unlawful if it was 'reasonable in the circumstances'.[2] It is the meaning of 'reasonableness' in the *Sex Discrimination Act 1984* (Cth) (SDA) which is the subject of discussion here; in particular, an aspect of its meaning is under discussion that has given rise to sharp disagreement between the Human Rights and Equal Opportunity Commission (HREOC) and the Federal Court. In two recent cases the Court has held that a 'whole package' of entitlements provided to an employee can be considered in the question of reasonableness. That is, a respondent is permitted unilaterally to assess a complainant's needs and choices, 'impose' this assessment on the complainant and then have it considered in a determination of reasonableness in a way that favours the respondent. This approach will be called the 'package deal approach'.

The article sets out the relevant provisions of the SDA, including amendments made in 1995, and the general test of reasonableness formulated in *Secretary, Department of Foreign Affairs and Trade v Styles*[3] and *Waters v Public Transport Corporation*[4]. It then explains the

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1 The other kind of discrimination made unlawful by anti-discrimination laws is so called 'direct discrimination', where a conscious, deliberate distinction is made on a prohibited ground.

2 Reasonableness has no application to direct discrimination.

3 (1989) 88 ALR 621.

package deal approach developed by the Federal Court in the two recent cases.

The primary mischief of the package deal approach is then explained: contrary to principle, it puts it within the power of a respondent to determine the needs of a complainant. Furthermore, there is no authority for the package deal approach in *Styles* or *Waters*, the foundational cases. It is further argued that the Federal Court has been influenced by its familiarity with concepts appropriate in administrative law but which are foreign to anti-discrimination law.

A correct approach is proposed – a respondent's reasons for subjecting a complainant to a detrimental rule must pertain to their (the respondent's) own situation and not to benefits it has otherwise 'imposed' on a complainant.

The 'Reasonableness' Test

Section 5(2) of the SDA

Prior to 1995

Before the 1995 amendments s 5(2) of the SDA provided:

> (2) For the purpose of this Act, a person (in this sub-section referred to as the 'discriminator') discriminates against another person (in this sub-section referred to as the 'aggrieved person') on the ground of the sex of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition--
>
> (a) with which a substantially higher proportion of persons of the opposite sex to the aggrieved person comply or are able to comply;
>
> (b) which is not reasonable having regard to the circumstances of the case; and
>
> (c) with which the aggrieved person does not or is not able to comply.[5]

No guidance was given on the meaning of reasonableness.

The 1995 amendments

Section 5(2) now reads:

> ... a person (the 'discriminator') discriminates against another person (the 'aggrieved person') on the grounds of sex ... if the discriminator im-

4 (1991) 103 ALR 513.

5 Sections 6(2) and 7(2) provided equivalent definitions of marital status and pregnancy related discrimination respectively.

> poses ... a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person.

Section 7B reads:

> A person does not discriminate against another person by imposing ... a condition, requirement or practice that has ... the disadvantaging effect mentioned in subsection 5(2) ... if the condition, requirement or practice is reasonable in the circumstances.

The matters to be taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances include:

> the nature and extent of the disadvantage resulting from the ... condition, requirement or practice; and
>
> the feasibility of overcoming ... the disadvantage; and
>
> whether the disadvantage is proportionate to the result sought by the person who imposes ... the condition, requirement or practice.

These amendments to the SDA made reasonableness a defence to a complaint of indirect discrimination, ie the onus of proof was placed on the respondent.[6] Prior to 1995 the question of reasonableness was contained in s5(2) as part of the definition of indirect discrimination. The onus was on the complainant[7] to prove that the disproportionate impact on grounds of sex was *not* reasonable in the circumstances.

The amendments have not, however, necessarily altered the meaning of reasonableness itself. Parliament has given guidance on factors to be considered when determining the question but the meaning of the concept, developed judicially before the amendments, remains relevant. This has been the approach taken by HREOC.[8]

The cases

Secretary, Department of Foreign Affairs and Trade v Styles[9]

In *Secretary, Department of Foreign Affairs and Trade v Styles* the Federal Court reviewed a decision made by HEROC pursuant to a com-

6 Section 7C of the SDA.

7 The burden of proof was probably on the complainant. See, eg, *Waters v Public Transport Corporation* (1991) 103 ALR 513, 559-560; *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 88 ALR 621, 628.

8 *Orford v Western Mining Corporation (Olympic Dam Operations) Pty Ltd* , Unreported [1998] HREOCA 22 (30 June 1998) (*AustLII* version).

9 (1989) 88 ALR 621.

plaint of sex discrimination in employment under s 14(2) of the SDA. In 1987 the Department of Foreign Affairs and Trade (Foreign Affairs) sought applications from journalists working in the department for transfer to a position in London. The position was for an A2 journalist. Two A2 journalists and ten journalists of the lower grade – A1 - applied for the job. One of the A2 journalists was successful. Styles was one of the A1 journalists whose application was not considered.

It was alleged by Helen Styles that the practical requirement that she be an A2 grade journalist indirectly discriminated against her within the definition in s 5(2) of the SDA because a substantially higher proportion of men than women in Foreign Affairs could comply and the requirement was not reasonable in the circumstances. HREOC found the complaint substantiated.

In the Federal Court Wilcox J concluded that Foreign Affairs appointed the A2 journalist because of considerations of expense and 'tidiness of administration' in the sense that it was tidy to appoint officers to positions at their substantive level. Wilcox J was 'prepared to assume' that expense was a factor relevant to the question of reasonableness under the SDA. However, on the evidence he concluded that Foreign Affairs would not in fact have incurred greater expense in appointing an A1 journalist in an acting position (with a higher salary) because the department had insufficient A2 journalists overall. Therefore some positions needed to be filled by those not graded at A2. Tidiness of administration was a factor Wilcox J was also prepared to consider but said in this case Foreign Affairs was already 'untidy' insofar as positions were frequently filled by officers acting in higher-level positions.

The requirement that Helen Styles be an A2-graded journalist was unreasonable and indirect discrimination was established in Wilcox J's view.

On appeal Bowen CJ and Gummow J formulated the test of reasonableness in a way which has been adopted by later courts. Their Honours wrote:

> As Wilcox J held the test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience. We agree. The criterion is an objective one, which requires the Court to weigh the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the requirement or condition on the other. All the circumstances of the case must be taken into account.

Their Honours agreed with Wilcox J with respect to expense and tidy administration but they considered the appointment of an officer to a

position of their own substantive grade involved more than tidiness. The requirement or condition was 'fair' and 'based on merit' and was therefore reasonable. Indirect discrimination was not established in their view and the appeal succeeded.

***Waters v Public Transport Corporation*[10]**

In *Waters v Public Transport Corporation* the High Court considered the concept of reasonableness in Victorian anti-discrimination legislation. There, the Public Transport Corporation (the Corporation) had introduced a system of paying for tram tickets which involved buying tickets from designated places before traveling and scratching the ticket to reveal the date of travel. No conductors were on trams to assist passengers. A group of disabled Victorians brought a complaint of indirect discrimination against the Corporation under s 44 of the *Equal Opportunity Act 1984* (Vic). The requirement to pay by the scratch ticket system was a neutral rule but affected the disabled Victorians disproportionately and disadvantageously because it was difficult or impossible for them to use the scratch tickets. Some of them could not travel on a tram without the assistance of a conductor.

Three of the judges referred to *Styles* with approval[11] and the approach of the Federal Court was generally endorsed. That is, both the reasons for the imposition of the requirement or condition being imposed and the discriminatory effect on the complainant should be taken into account. The particular issue in *Waters* was whether the economic circumstances of the respondent could be taken into account in determining reasonableness. The Court held that it was relevant. That is, evidence that a respondent could not afford to provide a service which did not impact disproportionately on disabled people, and therefore catered for the needs of disabled as well as able-bodied persons, was relevant in determining whether the requirement was 'reasonable'.

Thus, the test of reasonableness, according to the Federal Court, involves a balancing between the interests of the complainant and those of the respondent. The High Court approved the balancing test in relation to Victorian legislation in *Waters* and said that the economic circumstances of the respondent was a relevant factor.

[10] (1991) 103 ALR 513.

[11] Ibid 538 and 548.

Development of The Test: The Package Deal Approach

Since the general test was established in *Styles* and *Waters* the Federal Court has, where a particular kind of fact situation has arisen, been emphatic about what may be called the package deal approach. That is, it has said that, if relied on by a respondent, the 'whole package' of entitlements provided to a complainant by the respondent must be considered when determining the question of reasonableness. In effect, this means that a respondent can point to a benefit it has provided to the complainant as a 'reason' for imposing the impugned rule.

Commonwealth v Human Rights and Equal Opportunity Commission (Dopking (No2))[12] (*'Dopking'*)

Pursuant to a Ministerial Determination under the *Defence Act 1903* (Cth) the Department of Defence provided the 'Home Purchase or Sale Allowance' (HPSA) to employees with a 'family'. The allowance covers solicitor's, estate agent's and advertising costs, stamp duty and other fees and is aimed at assisting members of the defence force who are moved periodically from place to place as part of their service. The 'family' of an employee is defined in the Determination to mean the spouse, child, guardian or housekeeper of a child or other approved person who normally resides with the employee.

Mr Dopking was a single man with no dependents. In 1988 he was appointed by the Royal Australian Airforce to Townsville where he purchased and moved into a house. He applied to the Department of Defence for the HPSA but was refused on grounds that he was an employee without 'family'.

Mr Dopking claimed that the Determination amounts to indirect discrimination in employment on grounds of marital status contrary to ss 6(2) and 14 of the SDA.[13] Although the Determination was neutral with respect to marital status it imposed a requirement or condition which has a disproportionate impact on persons who are single. The requirement or condition was that Mr Dopking have a 'family' and it was common ground that a substantially higher proportion of married members of the defence forces could comply with this requirement. The primary issue was whether the requirement was reasonable.

12 (1995) 133 ALR 629

13 Section 6(2) defined discrimination on grounds of marital status in equivalent terms to the definition of discrimination on grounds of sex in s 5(2).

The Commonwealth advanced two reasons in support of the reasonableness of the requirement. One was the financial and resource situation of the Defence Department. Providing assistance to members with families created an incentive for those members to live off-base, relieving the Department of the expense of providing that accommodation. Providing the assistance to members without families would not make the same saving because the Department had a lot of single barracks accommodation.

The Commonwealth's second reason advanced in favour of the reasonableness of the requirement was that it had assessed the needs of members with and without families and they were, the Department said, different. Members with a family needed larger living space, 'adequate privacy' and the opportunity to live with their family. The Commonwealth did not spell out what it considered the needs of members without a family are, saying they had been met in a different but appropriate way. Such members were provided with on-base accommodation in barracks and a subsidised package of food, utilities and laundry.

HREOC rejected this second argument, saying that it was not for the Commonwealth unilaterally to determine the needs of different members. It found the complaint substantiated. The Federal Court reviewed the complaint and held that the Commission had erred in failing to take all circumstances into account. Particularly, it had failed to consider the whole 'package of entitlements' which the respondent provided to the complainant. Lockhart J wrote:

> It is important to remember that the condition with which this case is concerned is but one element in a carefully tuned package of rights, privileges and benefits available to members of the Defence Force. Care must be taken in considering whether to strike down one element of the package, as this may have ramifications for other elements. ...

The Australian Defence Force perceived that the needs, expectations and personal circumstances of the two categories of members of the force (members with a family and members without a family) were materially different, so that it was appropriate to provide for them differently. The resulting differences in their accommodation entitlements were based on the perceived fundamental differences between the two categories of member: primarily, the need and the expectation of a member with a family that he or she should be able to live with his or her family in self-contained accommodation, as

distinct from the absence of that need and expectation in the case of a member without a family.[14]

The complaint was found to be unsubstantiated and the court substituted its decision for that of HREOC.

Thus, the Federal Court held that the Commonwealth could rely on a package deal: ie could include in its reasons for imposing a requirement the fact that it provided on-base accommodation for members without families based on its own assessment of the different needs of persons with and without a 'family'. In other words the respondent could, as it were, neutralise the detriment in its requirement or condition by pointing to what *it* determined was a collateral benefit.

Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission[15] ('Commonwealth Bank case')

The Federal Court again adopted the package deal approach in the *Commonwealth Bank case*. The Finance Sector Union made a representative complaint under the SDA on behalf of more than 100 of its members against the Commonwealth Bank. The trade union's members were employees or former employees of the bank in Western Australia who had been on extended leave from the retail section of the bank during the period August to November 1993, for reasons connected with childbirth or childcare (class A women). The bank underwent a major restructure during that time. All positions in the retail section were abolished and new positions created, with a reduction of about 25 per cent of the positions. All staff in the retail section, except those on extended leave, were invited to apply for voluntary redundancy.

The class A women alleged that the exclusion of those on extended leave from the offer to apply for voluntary retrenchment amounted to indirect sex discrimination in employment contrary to ss 5(2) and 14(2) of the SDA.[16]

The requirement or condition was that: 'In order to express interest in retrenchment, a person must occupy a position in the retail bank'.[17] That is, they must not be on extended leave from that section. The

[14] (1995) 133 ALR 629, 638.

[15] (1997) 150 ALR 1.

[16] They also alleged that the conditions on which they were invited to apply for the new positions amounted to discrimination under the same sections of the SDA but it is the voluntary retrenchment issue that is relevant here.

[17] (1997) 150 ALR 1, 25.

requirement was found to disadvantage those it excluded because the opportunity for voluntary retrenchment was valuable and its imposition disadvantaged a substantially greater number of women than men. The question that occupied the court was whether the requirement was reasonable.

The bank argued that it withheld the retrenchment offer for four reasons. First, it was contrary to the relevant Award to offer redundancies unattached to the abolition of a particular position. Second, such an offer to those on leave might jeopardise the favourable tax situation for all those offered redundancies.[18] Third, ordinarily approximately 30 per cent of women on long leave do not return to work. Finally, the bank argued that it did not extend the offer of voluntary redundancy because those on extended leave were guaranteed a comparable position on their return to work and this entitlement was left unaffected. This was referred to in the judgments as the 'guarantee'.

The Commission held that redundancy offers would not have been contrary to the Award and the taxation risk was negligible[19] and was not, in reality, an issue to which the bank had put its mind at the time of the restructure. These findings were not pursued. The argument that 30 per cent of workers do not return in any case was rejected because it penalised all those on leave because an unidentified minority was expected to abandon the bank. The matter was challenged by the bank but formed no part of the Federal Court's analysis on review. The argument that the guarantee should be considered as one of the bank's reasons was, the Commission said, 'misconceived'. It found that the exclusion of class A women from the opportunities was not reasonable in the circumstances and that the complaint of indirect sex discrimination had been made out.

The Federal Court reviewed the decision and held that the Commission had, contrary to *Waters*, failed to take all circumstances into account. The bank had relied on the guarantee of re-employment as a reason for excluding the class A women from the offer relating to re-

18 Part of a redundancy payment is taxed at a low rate. The bank argued that if the Australian Tax Office suspected that payments to class A women were not bona fide redundancy payments then all of the payments might come under suspicion and could be taxed at a higher rate.

19 Because a redundancy offer need not be attached to a particular position. It was only the overall number of retrenchments that must match the number of redundancy offers.

trenchment and it therefore should have been considered as a factor suggesting reasonableness. Sackville J wrote:

> There is nothing in the Commission's reasons to indicate that it took the guarantee into account in undertaking the inquiry required by s5(2)(b) of the [SDA] or, if it did, why it considered the guarantee (along with the other factors relied on by the bank) was insufficient to outweigh any discriminatory effect the retrenchment requirement may have had.[20]

The case was remitted to HREOC.

Thus, as in *Dopking* the Court took the view that the package of entitlements provided to the complainant and pointed to by the respondent was to be considered. That meant that the respondent could include in its reasons for imposing the detrimental requirement what *it* determined was a collateral benefit.

The Package Deal Approach Is Incorrect

The mischief

The Federal Court criticised HREOC sharply for failing or refusing to grasp what the Court thought was an obvious idea.[21] The concepts of a package deal and taking all circumstances into account appeal to a sense of fairness but it is submitted that the approach is wrong. Despite its emphatic tone, the Court's reasoning is confused and misconceived.

The primary mischief in the package deal approach is that it puts it in the power of the respondent unilaterally to assess and determine the needs of a complainant. This flies in the face of the *Styles* test and is contrary to primary principles underlying anti-discrimination law. *Styles* sets out an objective test of reasonableness and the court stressed this objectivity in both *Dopking*[22] and the *Commonwealth Bank case*.[23] Yet the package deal approach permits the subjective assessment of a respondent to be embedded in the ultimate determination. The respondent can unilaterally assess the nature of the loss that the impugned rule imposes on the complainant *and* what compensation

[20] (1997) 150 ALR 1, 36. Davies and Beaumont JJ each expressed general agreement with Sackville J at 4 and 13.

[21] Indeed, there is a scarcely veiled anger at the Commission, particularly in *Dopking*. See (1995) 133 ALR 629, 639-640, 641; and the *Commonwealth Bank case*, (1997) 150 ALR 1, 10-12.

[22] (1995) 133 ALR 629, 638, 650.

[23] (1997) 150 ALR 1, 32-33.

might 'make-up' for that loss. The respondent need not take account of the complainant's standpoint, need not consult the group of which the complainant is a member and yet the respondent's subjective opinion influences the determination on reasonableness.

In *Dopking* the Commonwealth unilaterally determined the privacy needs of its members with and without families and *its* determination – resulting in the offer of the single barracks accommodation deal – made the exclusion of Mr Dopking from HSPA reasonable. Indeed, in that case the respondent was permitted even to determine *whether* there was a detriment *at all*. The respondent Commonwealth determined there was no disadvantage because the needs of each group were 'different'. The Federal Court performed a very broad review of the Commonwealth's decision[24] but the merits were not considered. The subjective point of view of the respondent was taken at face value rather than a truly objective assessment being made between the interests of the parties.

Moreover, allowing the respondent unilaterally to determine the nature and extent of a complainant's detriment and what might compensate him/her – as was permitted in both the cases discussed – is contrary to fundamental principles of anti-discrimination law. One of the most important aspects of an entitlement to equality is a recognition of self determination.[25] Equality consists, not only in receiving comparable benefits, but also in having equal freedom of choice to determine one's own circumstances. The package deal approach allows a respondent to take that freedom of choice from a complainant (while leaving it intact for those of the opposite sex or marital status). A respondent is permitted to 'know' what a complainant wants and needs while leaving others to determine what is best for themselves. The Commonwealth's opinion about the needs of a single person, and the Commonwealth Bank's opinion about how valuable an offer of redundancy might be to a woman on maternity leave, prevailed over an objective assessment of the complainant's experiences. Failure to discuss or even note this implication of its approach is the most striking omission in the Federal Court's analysis.

[24] The breadth of this review is itself an issue and is discussed below.

[25] See, eg, J.S. Mill, *On Liberty* (1978, first published 1859), 12, quoted in *R v Jones* [1986] 2 SCR 284, 318-319.

No justification for the package deal approach

Given the significant mischief created by the package deal approach its introduction should be thoroughly justified by authority. Yet it is not. The approach ignores the *Styles* test, is not required or supported by *Waters* and is based on principles associated with administrative law that are foreign to anti-discrimination law.

Ignores *Styles*

The package deal approach makes an analysis by reference to the *Styles* test absurd.

The *Styles* test is essentially a balancing exercise: the respondent's and the complainant's interests or objectives are weighed against each other. 'All circumstances' must be taken into account, according to Bowen CJ and GummowJ's formulation, but the test is a means, ultimately, of deciding between two parties' interests. The package deal approach, on the other hand, requires a general consideration of all factors. The binary nature of the *Styles* test is lost to a general consideration of all factors. The collateral benefits provided by the respondents were taken simply to be two of these factors, without any explanation about how they bore on the balancing exercise.

To explain this further, a collateral benefit fits properly with neither side of the *Styles* balance. The court appeared to assume, without discussion, that it could be a 'reason' for imposing the detriment – ie going towards the respondent's side of the balance.[26] But it is absurd to say that providing a benefit logically *after* a detriment is imposed, and in order to alleviate it, is a 'reason' for imposing that detriment. The compensatory guarantee of a job in the *Commonwealth Bank Case* and the single barracks deal in *Dopking* were designed to alleviate the detriment in being excluded from the benefits that other employees received. They were not, logically, *reasons for imposing* the detriments.

Likewise, a collateral benefit does not properly go towards the complainant's interests in the balancing test. It has been unilaterally determined and 'imposed' and is not truly a benefit from the standpoint of the complainant.

An illustration with more typical facts makes the logical absurdity more apparent. Say, a woman worked full time before taking maternity leave. On her return to work she was refused her request to work part-time though her full time position remained open to her. In showing the reasonableness of the requirement that she work full-

[26] See, eg, The *Commonwealth Bank case* (1997) 150 ALR 1, 36, 37.

time the employer would need to give reasons why part-time work would be too onerous for the organisation – say because of management difficulties or expense in training. It would be absurd to permit the employer to argue that one of the 'reasons' it refused a part-time position was because it offered a higher wage associated with the full-time position, and yet there would be nothing to preclude this argument if the approach in *Dopking* and the *Commonwealth Bank Case* were followed.[27]

Thus, the package deal approach, which requires a general consideration, works against the binary nature of the *Styles* test. It is not surprising, then, that despite the Federal Court's acceptance of *Styles* its analysis made no use of the test.[28]

Not required or supported by *Waters*

There is no authority in *Waters* for the package deal approach despite the Federal Court's reliance on that case as binding authority.

The Federal Court failed adequately to take account of the context of the High Court's conclusion that 'all' circumstances must be taken into account. This conclusion relates to the particular argument put by the complainant and legislation peculiar to Victoria. The complainant argued that in considering the question of reasonableness in s 17(5) of the *Equal Opportunity Act 1984* (Vic) factors affecting the *complainant only* and not those animating the *respondent* should be taken into account. This argument was based on a construction of ss 17(5) and 29(2)(b) of the Victorian Act. Section 17(5) defined discrimination in terms equivalent to those in the SDA prior to the 1995 amendments – the definition under discussion here. Section 29(2)(b) of the Victorian Act made an exemption from unlawful discrimination. It provided that performance of a service did not amount to unlawful discrimination on grounds of impairment where 'in consequence of the person's impairment, the person requires the service to be performed in a special manner

27 These are the facts in *Bogle v Metropolitan Health Services Board* (Unreported, Equal Opportunity Tribunal of Western Australia, 7 January, 2000.) Neither the Tribunal nor the parties gave any hint of the package deal approach – ie there was no suggestion that the employer's offer of full-time work was in any way relevant to the question of reasonableness. The requirement was found to be unreasonable because an offer of part-time work would not have been too onerous for the employer.

28 See *Dopking* (1995) 133 ALR 629, 637-8, 640, 650; and the *Commonwealth Bank Case* (1997) 150 ALR 1, 13, 32. Cf Davies J at 12. His Honour seems to recognise the dissonance between the *Styles* test and the general package deal approach.

> that can on reasonable grounds only be provided ... on more onerous terms than the terms on which the service could ... reasonably be provided to a person not having that impairment.'

There is no equivalent of s29(2)(b) of the Victorian Act in the SDA.

It was argued in *Waters* that, because s 29(2)(b) of the Victorian Act pertained to the respondent, s 17(5) pertained only to the complainant. The argument was rejected by the High Court, which held that, for the purposes of s 17(5), all relevant factors should be considered.

Therefore, in concluding that 'all' factors should be taken into account the High Court was insisting that factors from the point of view of both the complainant and the respondent should be considered. There are *obiter dicta* comments to the effect that there are 'no' restrictions on what can be considered,[29] but these, too, should be read in context. The Court gave guidance about what factors may be considered in the question of reasonableness in other fact situations – none of the examples contemplate the package deal approach. Brennan J said that

- the availability of alternative means for the respondent to achieve the desired objective;
- and efficiency in performing the respondent's activity

are relevant.[30]

Dawson and Toohey JJ added:

- the maintenance of good industrial relations;
- the observance of health and safety requirements; and
- the 'existence of competitors'.[31]

All these factors are reasons pertaining to the *respondent's own situation* and which make it difficult for him/her/it to avoid the requirement or condition. None involve the 'imposition' of a benefit as part of a package deal.

Thus there is no general mandate in *Waters* to consider any factor at all that the respondent puts forward.

[29] (1991) 103 ALR 513, 524.

[30] Ibid 535.

[31] Ibid 548. See also Hunter *Indirect Discrimination in the Workplace* (1992) 230-238. The author analyses 'reasonableness' in terms of 'The Employer's Reasons', 'The Discriminatory Effect' and 'The Surrounding Circumstances'. In none of these sections is there any reference to a benefit provided by the respondent.

Administrative law concepts foreign to anti-discrimination law

It is presumptuous to try to determine the mindset of judges and that is not attempted here. But it can be useful to consider the context of judgements to understand how a court arrived at a position. It is suggested that the Federal Court has been influenced in its analysis of anti-discrimination law by its expertise in administrative law. This, it is suggested, accounts for the irritation the Federal Court betrays towards HREOC for what it perceives as partiality in the Commission's decisions and approach.[32]

The wrongs that justify an action in administrative law are procedural. Remedies exist where a decision has been made in the wrong *way*. Anti-discrimination law, on the other hand, is prescriptive. Remedies arise not because of the process of decision-making but because a wrong decision has been made. It is concerned with substantive values in this regard, unlike administrative law. In *Dopking* and the *Commonwealth Bank Case* the Federal Court defers to the respondent's decision making in a way appropriate in administrative law but wrong under the SDA.

The Court assumes that *any* factor put forward by a respondent as associated with its decision to impose a requirement or condition must be considered. For example, in the *Commonwealth Bank Case* Sackville J wrote that 'the Commission is bound by s5(2)(b) to consider the grounds relied on by the alleged discriminator to support the reasonableness of the impugned condition or requirement'.[33] And that 's5(2)(b), properly construed, requires the Commission to take into account the considerations put forward by the alleged discriminator to support an impugned condition or requirement'.[34] The Federal Court is of the view that a respondent pointing to a reason is sufficient to make it relevant. No consideration is given to the limits on what is a relevant reason.

Furthermore, that the decision-maker *has considered* a matter is itself a factor in support of the reasonableness of the requirement or condition it would seem. It is worth quoting Sheppard J in *Dopking* at some length.

> What is involved is the question whether the determination unreasonably discriminates against an unmarried member because it denies to such a member the provision of the financial assistance for which the deter-

[32] *Dopking* (1995) 133 ALR 629, 639-640, 641.

[33] (1997) 150 ALR 1, 36.

[34] Ibid 37.

> mination provides. Because married members are treated differently, it may be said to be discriminatory in this sense. That is why there is no contest between the parties that the case is within paras 6(2)(a) and (c) of the Act. But then comes the question of reasonableness. The subsection will not apply if it is reasonable in all the circumstances to discriminate in the way that this determination does. In my opinion the requirement is plainly reasonable within the meaning of the subsection. That is not a subjective view of my own. Rather, *it is an acknowledgment of the power of those responsible for the determination to determine, upon reasonable grounds, the category or categories of members of the Defence Force who are to be entitled to the benefits provided for in the determination.* The basis for the discrimination which results from its application only to married members is, in the circumstances of the case, within the bounds of objective reasonableness. In other words, the point of distinction which has been adopted has a logical and understandable basis. *There may have been other ways of approaching the problem; views may differ about the matter. But, in my opinion, there was nothing unreasonable in adopting the point of distinction applied by those responsible for the determination.*[35]

This passage was endorsed in the *Commonwealth Bank Case*[36] and in *Australian Medical Council v Wilson and Siddiqui v Wilson.*[37] In the *Commonwealth Bank Case* Sackville J notes that the fact that a decision is 'logical and understandable' may not itself be sufficient but the general thrust is enthusiastically adopted. *Siddiqui* deals with reasonableness under the Commonwealth *Racial Discrimination Act 1975* but its facts do not raise the 'package deal' question. Nevertheless, the point made here – that the Court considers the *fact that* a respondent has considered a matter itself a factor in support of reasonableness – is, in this case also, enthusiastically embraced.

This is administrative law on reasonableness not anti-discrimination law. It makes the decision-maker the determiner of substantive values and does a very broad boundary check to see that she or he has not been bizarre or eccentric.[38] It uses existing community standards as its benchmark and refers to the judge's own good sense for good measure. The approach ignores the *Styles* test completely. The Court appears unfamiliar with the idea that anti-discrimination law prescribes

35 (1995) 133 ALR 629, 641 (emphasis added).

36 (1997) 150 ALR 1, 34-35.

37 (1996) 68 FCR 46, 61-62.

38 An administrative decision is unlawful if it is so devoid of plausible justification that no reasonable body of persons could have reached it: *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768; and see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 230; ss 5(2)(g) and 6(2)(g) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

substantive values and is concerned that the decision made is *correct*, not whether the *decision* has been made in the correct manner.

The Correct Approach: 'Reasons' Must Pertain to the Respondent's Objectives

The balancing of the interests of the respondent and complainant, the essence of the *Styles* test, is the correct approach for determining the question of reasonableness. But guidance is necessary about what can constitute a relevant 'reason' for imposing the requirement or condition: ie what kinds of factors a respondent can point to in support of imposing the requirement or condition. There are limits on this despite the Federal Court's apparent view that there are not.

It is suggested that the reasons in favour of the requirement or condition should be limited to those things which *pertain to the respondent's own situation*. That is, the things which animate him/her/it to impose the rule. There must be a nexus between the imposition of the impugned rule and the respondent's objectives. As discussed, all the reasons of a respondent suggested in *Waters* come into this category.[39] This avoids the mischief in the package deal approach – a respondent having the power unilaterally to determine the interests of the complainant. It also allows the *Styles* balancing test to be performed because the respondent's interests can be discerned and balanced objectively against those of the complainant.

In *Manchester Police v Lea*[40] the court dealt with a question related to that of the package deal and took the approach proposed here. Mr Lea brought a complaint of discrimination against Manchester Police when he was overlooked for a job. He had previous experience in the police force and was generally more highly qualified than the successful applicant. Manchester Police, however, claimed it had hired the successful applicant pursuant to a policy designed to help the unemployed. It hired those who were not in receipt of social security payment because those applicants were most in need.

The facts do not raise the package deal question because no benefit was provided to the complainant (rather to third parties) but they do raise the question of what limits can be placed on the respondent's 'reasons' and the relationship between those reasons and the respondent's own enterprise.

39 See section 'Not Required or Supported by *Waters*' above.

40 [1990] 1 IRLR 372.

The Court in *Lea* wrote:

> It was ... not enough ... for it to be shown ... that the condition was imposed in pursuance of an intrinsically entirely laudable and otherwise reasonable policy of helping the unemployed. There has in our judgment to be a nexus established between the function of the employer and the imposition of the condition.[41]

The Court went on to say that this approach was necessary because, without the nexus, it was impossible to carry out an objective balancing of two interests as is required by the English test.[42]

Conclusion

The amendments to the SDA in 1995 made reasonableness a defence to indirect discrimination. *Un*reasonableness was taken out of the definition of indirect discrimination and the onus of proving reasonableness was placed on the respondent.[43] In addition, a list of factors to be considered when determining reasonableness was provided in s7B(2).[44]

The list reflects the *Styles* balancing test and is non-exhaustive, making judicial analysis of the concept of reasonableness relevant still.[45] The package deal approach, therefore, could well be incorporated into this new formulation of the defence.[46] It has been argued that it should not be.

The approach creates significant problems that obscure the real merits of the respondent's and the complainant's cases. It flies in the face of the fundamental principle of anti-discrimination law in that it encroaches on the right to self-determination. Moreover, it has been argued that the approach is not justified by authority. It cannot sit with the *Styles* test because it makes the essential balancing exercise required there impossible. It is not justified by *Waters* because the context, as well as judicial discussion, in that case limits its ramifications. And, most subtlety but perhaps most importantly, it has been argued

41 Ibid 376

42 Ibid. The English test is one of 'justifiability' rather than reasonableness, but it also involves a balancing of the parties' interests.

43 Sections 7B and 7C of the SDA.

44 See section 'The 1995 Amendments' above.

45 See *Orford v Western Mining Corporation (Olympic Dam Operations) Pty Ltd*, [1998] HREOCA 22 (Unreported, 30 June 1998) (*AustLII* version).

46 Ibid. The Commissioner was not required to determine the question but indicated that he would take the package deal approach as in *Dopking* if it had been required.

that the approach is the product of reasoning relevant in administrative law but wrong in anti-discrimination law.

It has been suggested that the package deal approach should be abandoned and that the permissible reasons advanced by a respondent in favour of the impugned requirement or condition should be limited to those which exhibit a nexus between its imposition and the respondent's own objectives. They should pertain to the respondent's own circumstances and not include a 'benefit' 'imposed' on the complainant.