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# A major victory for working women: Discrimination takes a beating

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# A MAJOR VICTORY FOR WORKING WOMEN

## DISCRIMINATION TAKES A BEATING

### WHAT IS DISCRIMINATION?

When an Aboriginal is refused service in an hotel, or a woman is denied full membership of the local golf club, or a long serving employee is sacked because of age, they have been discriminated against. They have been treated less favourably than others in the same situation because they belong to a particular group or because of stereotyped ideas about people who belong to that group. If a woman is denied a promotion at work because she is a woman or because the boss believes that women are more emotional than men and do not work well under stress, for example, that would be discrimination.

There are different kinds of discrimination:

- **Direct:** This occurs in an outright, obvious way. An example might be a restaurant that does not allow people with a physical disability to come in to eat because of their disability.
- **Indirect:** This is where practices or policies which appear to be neutral unfairly affect a certain group of people. Height regulations for entry to the police force, for example, had the unintended effect of excluding people with certain racial backgrounds who tend to be shorter than average.
- **Structural or systematic:** This arises where work is structured so that certain groups have less favourable access to the full range of employment opportunities, benefits or services.

### UNLAWFUL DISCRIMINATION

Not all discrimination is, however, unlawful. State and Federal laws aimed at counteracting discrimination do not apply to all forms of discrimination. In the main, they apply to discrimination which affects areas of public, rather than private, life. For example:

- Under the New South Wales Anti-Discrimination Act (ADA) it is unlawful to discriminate against a person on the grounds of race, sex, marital status, physical impairment, intellectual impairment, age or sexual preference in areas like employment, the provision of goods and services, education, accommodation, facilities, entry to registered clubs and associations and access to premises used by the public;
- Federal legislation includes the *Human Rights and Equal Opportunities Act*, the *Sex Discrimination Act* and the *Disabilities Discrimination Act* which cover specific kinds of discrimination (such as discrimination on the grounds of sex) in public situations.

### RESEARCH EXERCISES

1. On what grounds and in what areas is it unlawful to discriminate under Federal legislation?
2. On 20 July, 1995, a gay couple with a child won a case in the Equal Opportunity Tribunal against NIB, a medical insurance company, which had refused to insure them as a 'family'. On what grounds, and in what area of public life, did they argue that discrimination had occurred?

### A LANDMARK CASE IN DISCRIMINATION

In January, 1994, Australian Iron and Steel Pty Ltd (AIS), a subsidiary of BHP, settled the last of 743 complaints of discrimination made by women about its employment practices at the Port Kembla Steelworks in the late 1970s and early 1980s.

The women have received damages of more than 4 million dollars between them. The case has been hailed as 'a landmark in Australian industrial history', 'the most important piece of discrimi-

nation litigation that has occurred in this country' and 'the leading Australian case on indirect discrimination'.

## BACKGROUND

The dispute began back in the 1970s. AIS had used the 'protective legislation' of s36 of the *Factories, Shops and Industries Act* (NSW), which prohibited women from lifting over 16 kilos, as a backdoor way of keeping women out of their workforce.

In 1980, some of the 2000 women who had been denied work complained to the NSW Anti-Discrimination Board (ADB) that they were victims of of sex discrimination by AIS. The matter was referred to the Equal Opportunity Tribunal (EOT). After conciliation, some women were hired but were later put off when BHP shed staff on a 'last on, first off' basis.

Thirty four women made complaints to the EOT and, after extensive hearings in 1985 and 1986, the EOT ruled that they had been discriminated against and they were awarded $1.4 million. AIS lost its appeals in the NSW Court of Appeal in *Australian Iron and Steel Pty Ltd v Najdovska & Ors* (1988) 12 NSWLR 587) and in the High Court in *Australian Iron and Steel Pty Ltd v Banovic & Ors* (1989) 168 CLR 165).

At this time, AIS was forced to admit that it had discriminated against all women who had applied for jobs in the 1970s and early 1980s. This led to hundreds more women lodging claims and after 14 years of a long hard struggle, 709 women received compensation.

## THE INGREDIENTS OF A GREAT CASE

This case was seen as one of the greatest sucess in Australian legal history. It achieved what many though was impossible. A group of women, mostly migrants, many non-English speaking, took on Australia's largest company, and won.

## DISCUSSION QUESTIONS

1. How are ordinary people disadvantaged when they take legal action against large private and governmental organisations?
2. How important is legal aid in a case such as this?
3. As most of the women were from backgrounds where anti-discrimination laws do not exist what problems might this have posed to the taking of a class action such as this? How do you think the problem might have been resolved?
4. Some of the women may have feared reprisal by AIS, given that many of their husbands worked at AIS? Would this have been a valid fear?
5. Are there any other difficulties you think the complainants in this case may have faced?

## CLARIFICATION OF INDIRECT DISCRIMINATION

Even though indirect discrimination is unlawful, it is not a simple or easy thing to deal with. It can take forms which are difficult to identify and its definition has been difficult to understand and apply.

The AIS case clarified the meaning of indirect discrimination with regard to sex discrimination. The High Court decided that, under the legislation, conduct amounts to indirect discrimination if:

* The discriminator requires a person to comply with a requirement or condition that they cannot comply with,
* which a substantially higher proportion of people of the opposite sex are able to comply with, and
* which is not reasonable in the circumstances.

In the past, there had been problems deciding what base pool was to be used in assessing whether a substantially higher proportion of men than women could comply with a requirement or condition. Was the population of a particular workforce, or of New South Wales, or Australia to be used as the base pool?

In this case, the High Court said that the appropriate base pool was a matter of fact rather than law. In other words, that it depends on the circumstances of the case. The court also said that it shouldn't be one which incorporates the effects of past discriminatory practices.

At the time of the AIS case, the complainants had to prove that the requirement or condition imposed on them was not reasonable in the circumstances. These women argued that the "last on, first off" policy (or in other words, the requirement or condition that to continue to be employed at AIS, the employee must have commenced work at AIS 6 months prior to 6 January 1981) was unreasonable in these circumstances. It reflected built-in discrimination, that is, it repeated the discriminatory effect of the prior recruitment practices.

## ESSAY QUESTION

"The burden of proof in a case of indirect discrimination is too heavy a burden for a complainant to bear".

Discuss with reference to the various barriers a complainant would have to overcome in general and those in particular in the AIS case.

## THE IMPACT ON INDUSTRIAL LAW

Traditionally, employers, employer associations and unions have been reluctant to accept that discrimination law has a legitimate role in industrial relations. In fact, they had put up such strong resistance to the idea, that both Commonwealth and New South Wales anti-discrimination laws exempted action taken in the industrial sphere which was in compliance with awards and registered industrial agreements.

The AIS case was important because it forced a change to this situation. It demonstrated that a simple rule, such as "last on, first off," could be unfair and that the fact that something is accepted as an industrial practice, does not, and should not, put it beyond the reach of anti-discrimination law.

Since this case, industrial relations reforms have been made at the Commonwealth level. A complaint can now be made about discrimination in an award or enterprise agreement made or varied after 13 January 1994. Also, the Industrial Relations Commission can take whatever action it considers necessary to remove discrimination from an award or agreement.

In New South Wales, the *Anti-Discrimination (Amendment) Act 1994* (operative from May 1995) removed the exemption for conduct in compliance with awards, industrial orders and agreements. Section 36 of the *Factories Shops and Industries Act* (NSW), relied on by AIS to keep women out of employment, is no longer exempt under the new legislation and cannot, therefore, be used to discriminate, indirectly, against women.

## DEBATING TOPIC

"Education, not prohibition, is the only was to get rid of discrimination".