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Details of Filing

Document Lodged:	Outline of Submissions
File Number:	NSD119/2015
File Title:	David Mulligan v Virgin Australia Airlines Pty Ltd
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink, reading 'Warwick Soden'.

Dated: 7/07/2015 10:00:47 AM AEST

Registrar

Important Information

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Federal Court of Australia
District Registry: New South Wales
Division: General Division

No.NSD119 of 201



David Mulligan

Appellant

Virgin Australia Airlines Pty Ltd

Respondent

**OUTLINE OF SUBMISSIONS OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION
SEEKING LEAVE TO INTERVENE OR APPEAR AS AMICUS CURIAE**

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1. The Australian Human Rights Commission (**Commission**) seeks leave to intervene or appear as amicus curiae in the appeal from the Federal Circuit Court's decision in *Mulligan v Virgin Australia Airlines Pty Ltd* [2015] FCCA 157 (27 January 2015) (**Decision**).
2. The Commission does not seek leave to be heard in support of either party or in relation to any factual dispute. Rather, the Commission seeks leave solely to assist the Full Court on questions of law and the proper interpretation of the *Disability Discrimination Act 1992* (Cth) (**DDA**). The questions raised in the appeal concern points of general principle, are of public importance and may affect persons other than the parties before the Court.
3. In his short reasons, his Honour dismissed the Appellant's complaint alleging unlawful discrimination in the provision of airline services because the Respondent was required by law to comply with an instrument issued by the Civil Aviation Safety Authority (**CASA**): see AB Part A Tab 4 at [6], [14].
4. The Appellant has identified nine (9) grounds of appeal in his Notice of Appeal filed on 29 April 2015 which, in summary, are directed to the proper construction of ss 11, 47(2) and s 54A of the DDA and sub regs. 256A(1) and (2) of the *Civil Aviation Regulations 1988* (**CAR**): see AB Part A at Tab 6.
5. On 9 March 2015, the Respondent filed a Notice of Cross Appeal raising five (5) grounds of cross-appeal which are directed to decisions concerning the admission of evidence; whether the Appellant has a disability within the meaning of s 4 of the DDA; and the application of s 9(2) of the DDA to the circumstances of the complaint: see AB Part A at Tab 7. The Respondent also filed Notice of Contention raising three (3) issues with respect to whether the Appellant and Willow (his dog) satisfied reg 256A(2) of CAR and s 98(6B) of the *Civil Aviation Act 1988* (Cth) (**CAA**): see AB Part A at Tab 8.

Issues addressed by the Commission

6. The Commission's written submissions address the following matters:
 - (a) the proper construction of subregs. 256A(1) and (2) of CAR, and the status and effect of permissions granted by the CASA pursuant to subreg. 256A(1)(b) of those regulations;
 - (b) the proper construction of s 47(2) of the DDA;
 - (c) the proper construction of ss 54A(5) and (6) of the DDA;
 - (d) the meaning of the term 'unjustifiable hardship' as affected by s 11 of the DDA, including what factors are relevant in determining whether unjustifiable hardship would be imposed on a person, and the burden of proof in establishing unjustifiable hardship; and
 - (e) the proper construction of s 9(2) of the DDA, and the meaning of the term 'assistance animal'.
7. Subject to any direction of the Full Court, the Commission seeks to make short oral submissions with respect to these or any other matters on which the Commission may assist the Full Court.

Civil Aviation Act and Regulations, and the Civil Aviation Safety Authority

8. The main object of the CAA is to *'to establish a regulatory framework for maintaining, enhancing and promoting the safety of civil aviation, with particular emphasis on preventing aviation accidents and incidents'*: s 3A.
9. The CAA establishes the CASA: s 8 of the CAA. CASA has the function of conducting the safety regulation of, among other things, civil air operations in Australian territory, including by developing and promulgating aviation safety standards, enforcement of these standards, and issuing certificates, licences, registrations and permits: s 9(1). In performing its functions, CASA *'must regard the safety of air navigation as the most important consideration.'*¹
10. Regulations may be made under s 98(1) of the CAA. These regulations *'may contain provisions that are inconsistent with the DDA if the inconsistency is necessary for the safety of air navigation'*² Before any such regulation is made, CASA is required to consult the Commission. Although, failure to undertake such consultation *'does not affect the validity of any regulation so made'*: s 98(6C). Notwithstanding these provisions, the Commission submits that CAR should be interpreted in a manner that minimises any impairment of a person's rights under the DDA insofar as that is possible.
11. The CAR have been made under s 98 of the CAA. These regulations limit the circumstances in which live animals may be carried in aircraft. Regulation 256A³ relevantly provides:

256A Carriage of animals

- (1) *Subject to subregulation (8), the operator of an aircraft may permit a live animal to be in the aircraft only if:*
 - (a) *the animal is in a container and is carried in accordance with this regulation; or*
 - (b) *the animal is carried with the written permission of CASA and in accordance with any conditions specified in the permission.*

Penalty: 25 penalty units.

- ...
- (2) *Subregulation (1) does not apply to a dog accompanying a visually impaired or hearing impaired person as a guide or an assistant if the dog is:*
 - (a) *carried in the passenger cabin of the aircraft; and*
 - (b) *placed on a moisture-absorbent mat as near to the person as practicable; and*
 - (c) *restrained in a way that will prevent the dog from moving from the mat.*

- ...
- (8) *An animal must not be carried on an aircraft if carrying the animal would be likely to affect a person on the aircraft in a way that may affect adversely the safety of the aircraft.*

- (9) *In this regulation, **animal** means any member of the animal kingdom other than man.*

CASA Permissions

12. For the purpose of r 256A(1)(b) of the CAR, CASA issued two instruments under r 256A(1)(b), granting the Respondent permission to carry assistance animals in its aircraft subject to specified terms and conditions. The first of these, '1-FHQK3(4)' was issued on 8 June 2011. It was replaced by the second, '1-FHQK3-5', on 20 February 2013. These instruments are in the

¹ *Civil Aviation Act*, s 9A.

² *Civil Aviation Act*, s98(6B).

³ The Commission notes that in *Mulligan v Virgin Australia Airlines Pty Ltd* [2015] FCCA 157 at [11], [12], [13], [17] and [21] his Honour refers to r 265A or s 265A. There is no regulation so numbered but it appears clear that his Honour intended to refer to regulation 256A.

same terms: see AB Part B at Tab 13. ('CASA Permission').⁴ The relevant part of the CASA Permission is reproduced at [4] of the Decision.

Regulation 256A(1) and (2) of CAR

13. Regulation 256A(1) prohibits an operator from allowing a live animal in an aircraft except in accordance with subregs (a) or (b). Regulation 256A(2) creates an express exception to r 256A(1) and is specific to dogs, rather than all animals. A dog that meets the criteria established by r 256A(2) is not affected by the prohibition in r 256A(1). Any permission given by CASA under r 256A(1)(b) therefore has no work to do with respect to a dog that meets the requirements of r 256A(2).
14. The Commission respectfully submits that his Honour's characterisation of r 256A(2) as being in 'the nature of a defence' is not correct: see [11] and [12] of the Decision. Further, the subregulation does not itself create a right for a person with a disability to be accompanied by that dog, or impose an obligation on an operator to allow that dog to enter its aircraft. Rather, the regulation has the effect that an operator is not prohibited from doing so (absent the potential operation of r 256A(8)). However, if the exception in r 256A(2) applies, and an operator refuses to carry a dog, the operator may still engage in unlawful discrimination for the purpose of the DDA.
15. Whether a dog satisfies each element of r 256A(2) is a question of fact. At [13] of the Decision, his Honour found that the Appellant '*requires an assistance dog by reason of his cerebral palsy as well as problems with his hearing and eyesight*' but found that r 256A(2) did not apply to Willow because the Appellant '*has cerebral palsy disabilities which required an assistance dog*'. The Commission assumes that these are the relevant factual findings directed to the elements of r 256A(2). The Commission respectfully submits that the approach taken by his Honour at [13] of the Decision is unduly narrow because it implies that the person assisted by a dog must have *only* a visual impairment or hearing impairment. If the person assisted by the dog and has any other disability in addition to a visual or hearing impairment, then on the approach taken by his Honour r 256A(2) does not apply.
16. The Commission submits that applying the well accepted rules of interpretation,⁵ there is no reason to restrict r 256A(2) to dogs that accompany only if person is either **only** visually impaired or **only** hearing impaired and can establish that there is no other disability. The Commission submits that r 256A(2) should apply if the dog accompanying a visually impaired or hearing impaired person as a guide or an assistant regardless of whether:
 - (a) the visually and/or hearing impaired person has other disabilities;
 - (b) a dog assists with a single disability or multiple disabilities, provided that it is a guide or assistant to a person with who is visually or hearing impaired.

Status of the CASA Permission

17. At [11] of the Decision, his Honour found the CASA Permission imposed binding obligations on the Respondent. In the reasons, his Honour found:

In this case, there was a binding obligation of law upon the respondent to comply with the

⁴ *Mulligan v Virgin Australia Airlines Pty Ltd* [2015] FCCA 157 at [2].

⁵ *Alphapharm Pty Ltd v H Lundbeck A/S* (2014) 314 ALR 182 at 193 [42], *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39], *Certain Lloyd's Underwriters Subscribing to Contract No. IH00AAQS v Cross* (2012) 248 CLR 378 at [23] – [26], [88] – [89], *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46 [47], *Project Blue Sky Inc v Australian Broadcasting Authority* ((1998) 194 CLR 355 at 384.

*instrument issued by the authority for safety of air navigation.*⁶

*...the respondent was required by law to comply with the instruments to which I have referred, which permissions have force of law...*⁷

*[of r 256A(2)] It is not an independent ground upon which the respondent can disregard an applicable instrument that creates an offence for non-compliance.*⁸

*It is not for operators to cavil with or selectively comply with permissions... of CASA.*⁹

18. The Commission respectfully submits that the Court has mischaracterised the CASA Permission. The Permission did not create any offence. It did not require the Respondent to do or refrain from doing anything. The CASA Permission is a general permission allowing the Respondent at relevant times, providing certain conditions were met, to carry assistance animals for the purpose of r 256A(1). It had no other effect. It did not create any new obligations. It did not, and did not purport to, constitute a comprehensive scheme governing the carriage of assistance animals on aircraft.

Section 47(2) DDA – ‘prescribed laws’

19. Section 47(2) of the DDA provides that an act is not unlawful if it is *‘done in direct compliance with a prescribed law.’* The Commission respectfully submits that his Honour’s statement at [10] of the Decision that certain rights are *‘not absolute rights, they governed by the rule law’* is misplaced in the context of the task of interpreting s 47(2) of the DDA. The Parliament has established a scheme in the DDA for when and how any rights created by the DDA may be limited.
20. At [11] of the Decision, his Honour found the CASA Permission was a ‘prescribed law’ for the purposes of s 47(2) of the DDA. The Commission respectfully submits that that finding was in error for the following reasons.
21. The expression ‘prescribed law’ is not defined in the DDA. The expression ‘prescribed’ is defined in s 2B of the *Acts Interpretation Act 1901* (Cth) as follows:
- ‘prescribed’** means prescribed by the Act or by regulations under the Act.
22. For the purposes of the DDA, a *‘prescribed law’* is a law prescribed by the DDA or by regulations under the DDA. This accords with s 132(1) of the DDA, under which the Governor-General may make regulations prescribing matters:
- (a) required or permitted by the DDA to be prescribed; or
 - (b) necessary or convenient to be prescribed for carrying out or giving effect to the DDA.
23. Section 132(2) expressly refers to the power to make regulations for the purposes of s 47 of the DDA. In turn, r 2A and Schedule 1 of the *Disability Discrimination Regulations 1996* (Cth) expressly prescribe a number of laws for the purposes of s 47(2). Neither the CASA Permission nor the CA Regulations are prescribed under either the DDA or regulations made under the DDA.

⁶ AB Part A Tab 4 at [11].

⁷ AB Part A Tab 4 at [13].

⁸ AB Part A Tab 4 at [12].

⁹ AB Part A Tab 4 at [17].

Legislative Instruments Act 2003

24. In finding that the CASA Permission was a 'prescribed law', his Honour appears to have considered determinative its finding that the Permission was a legislative instrument: see [3] of the Decision. For the reasons given above, the Permission was not in any event a prescribed law. The Commission also submits that it is not a legislative instrument.
25. Section 5 of the *Legislative Instruments Act 2003* (Cth) (**LIA**) defines 'legislative instrument' as follows:
- (1) *Subject to sections 6, 7 and 9, a **legislative instrument** is an instrument in writing:*
 - (a) *that is of a legislative character; and*
 - (b) *that is or was made in the exercise of a power delegated by the Parliament.*
 - (2) *Without limiting the generality of subsection (1), an instrument is taken to be of a legislative character if:*
 - (a) *it determines the law or alters the content of the law, rather than applying the law in a particular case; and*
 - (b) *it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.*
 - (3) *An instrument that is registered is taken, by virtue of that registration and despite anything else in this Act, to be a legislative instrument.*
 - (4) *If some provisions of an instrument are of a legislative character and others are of an administrative character, the instrument is taken to be a legislative instrument for the purposes of this Act.*
26. Section 6 provides a non-exhaustive list of instruments that are declared to be legislative instruments. These include regulations, statutory rules made prior to the passage of the LIA, Ordinances (or related rules, regulations or by-laws), disallowable instruments, and Proclamations. The CASA Permission does not fit any of these categories.
27. Section 7 provides a list of categories of instrument that are declared not to be 'legislative instruments'. None of these apply in the present case.
28. Section 5(2) of the LIA does not provide an exhaustive definition of the phrase 'legislative character.' The following have been identified as indicia of legislative character:
- ...a legislative instrument has the effect of *changing or determining the content of the law*, rather than applying the law;
 - ...a legislative instrument has a *binding quality* as opposed to one designed to provide guidance as to the way in which a decision-maker may or should act;
 - ...a legislative instrument is usually one which has *general application* and is not directed to apply only in a particular case.¹⁰
29. These indicia are not exhaustive or controlling.¹¹
30. It has also been held that whether or not an instrument is 'disallowable' by Parliament will be a relevant, but not controlling, feature in determining 'legislative character' – where an instrument is laid before Parliament this will suggest it is of a 'legislative character'.¹²
31. The Commission submits that his Honour erred in finding that the CASA Permission was a

¹⁰ *Vietnam Veterans' Affairs Association of Australia NSW Branch v Cohen* (1996) 70 FCR 419, 430 (Tamberlin J), citing with approval the Administrative Review Council, *Rule Making by Commonwealth Agencies*, Report No 35, Parliamentary Paper No 93 of 1992.

¹¹ *Ibid.*

¹² *Austral Fisheries Pty Ltd v Minister for Primary Industries and Energy* (1992) 37 FCR 463; *Melbourne Pathology Pty Ltd v The Minister for Human Services and Health* (1996) 40 ALD 565, 573.

legislative instrument, because:

- (a) it does not alter the content of the law, but rather applies the law in a particular case. The CA Regulations state that the operator of an aircraft may permit a live animal to be in the aircraft only if *'the animal is carried with the written permission of CASA and in accordance with any conditions specified in the permission'* (r 256A(1)(b)). The CASA Permission does not alter the content of this law, but rather it applies the law to a particular operator, namely the Respondent; and
 - (b) it is not an instrument of general application. It applies only to the Respondent. While it may indirectly affect other persons wishing to travel with assistance animals, it confers no rights or obligations on those persons.
32. Finally, the CASA Permission does not appear on the Federal Register of Legislative Instruments. Section 24 of the LIA provides that legislative instruments must be registered. Failure to register a legislative instrument when required to do so under the LIA renders the instrument unenforceable *'by or against the Commonwealth, or by or against any other person or body'* (s 31(1)).
33. In summary, his Honour's finding at [14] of the Decision that the CASA Permission was a prescribed law for the purpose of s 47(2) of the DDA and/or a legislative instrument was in error.

Sections 54(5) and (6) DDA

34. At [15] of the Decision, his Honour considered the application of s 54A of the DDA. Section 54A *'applies in relation to a person who has an assistance animal'*.¹³ The reference to 'assistance animal' must necessarily pick up the language of s 9(2) of the DDA.
35. Section 54A(5) provides that it is not unlawful for a person to request that a person with a disability produce 'evidence' that an animal is an assistance animal, or that it is trained to meet standards of hygiene and behaviour that are appropriate for an animal in a public place.
36. Section 54A(6) provides that, where a request that satisfies the provisions of s 54A(5) has been made, it is not unlawful for the person who requested the information to discriminate against a second person if that second person does not provide evidence of relevant matters.
37. The term 'evidence' is not defined in the DDA. It should therefore be given its ordinary meaning. Evidence is *'any matter of fact, the effect, tendency, or design of which is, to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact.'*¹⁴
38. Section 54(6) does not permit otherwise unlawful discrimination on the basis that a person with a disability fails to provide 'proof', or fails to satisfy the person making the request of relevant matters. Once a person with a disability has provided evidence of the relevant kind(s), s 54A(6) is spent.
39. Section 54(6) does not place any evidentiary burden on a person with a disability, other than to produce evidence. Other provisions of the DDA explicitly deal with burdens of proof – ss 6(4), 11(2) – and 'evidential burdens' – ss 107(1A) and 127(3). The use of the term 'evidence' rather than 'proof', and the omission of any onus (other than the production of some evidence), should be seen as deliberate drafting choices.

¹³ s 54A(1).

¹⁴ *Cheney v Spooner* (1929) 41 CLR 532, 537 (Isaacs and Gavin Duffy JJ).

40. Section 54A(5) allows a potential discriminator to request evidence about certain matters. It does not allow them to stipulate what they will accept as evidence of those matters. Similarly, s 54A(6) renders it lawful to discriminate if a person fails to provide evidence of certain matters; it does not permit discrimination on the basis that the person failed to provide particular kinds of evidence that have been specified by the potential discriminator. Nor does s 54A(6) permit discrimination because evidence supplied does not meet a particular threshold specified by the potential discriminator.
41. What may constitute 'evidence' of matters relevant for the purposes of s 54A(5) and (6) may depend on the training a particular animal has received. As discussed below, s 9(2)(c) provides that an animal may be an assistance animal for the purposes of the DDA having received relevant training from a non-accredited person, (for instance, its owner). In such a case, there is no reason why a statement from that person should not constitute evidence of training in satisfaction of s 54A(6). It cannot be the intended operation of s 54A(6) to allow discrimination against a person with an assistance animal for failing to produce evidence specified by a discriminator that may not exist – for instance, a demand for proof of training by an accredited training organisation.
42. This construction of s 54A will not 'open the floodgates' to claims of unlawful discrimination. Regardless of the existence of ss 54A(5) and (6), a person with a disability could not succeed in a claim alleging unlawful discrimination on the ground of that disability under s 46PO of the *Australian Human Rights Commission Act 1986 (Cth)* (**AHRC Act**) without proving on the balance of probabilities that they had a specified disability, and were accompanied by an assistance animal, and that that animal was an 'assistance animal' for the purposes of s 9(2).

Unjustifiable hardship

43. At [16] of the Decision, his Honour held that 'to expect' the Respondent to carry the Appellant's dog would have imposed an unjustifiable hardship on the Respondent.¹⁵
44. 'Unjustifiable hardship' may be relevant to determining whether unlawful discrimination under the DDA has occurred in several circumstances:
 - (a) ss 21B and 29A provide defences to complaints of unlawful discrimination in the fields of work and 'other areas' respectively. They stipulate that it is not unlawful to discriminate in relevant fields if avoiding the discrimination would impose an unjustifiable hardship on the discriminator. The complaint in this proceeding was brought under s 24; a defence under s 29A would therefore potentially be available to the respondent if the relevant factual basis were to be established;
 - (b) under ss 5(2) and 6(2) of the DDA, a person may discriminate against a person with a disability by failing to make 'reasonable adjustments'. An adjustment will be reasonable unless making it would impose 'unjustifiable hardship': s 4(1).
45. Whether a respondent experiences unjustifiable hardship is a question of fact informed by considering the matters identified in s 11 of the DDA. The Commission submits the following principles apply in considering whether 'unjustifiable hardship' arises in any particular case:
 - (a) when considering the defence in s 29A, the appropriate approach is to first determine whether or not a particular respondent has discriminated against the complainant and then determine whether or not the respondent is able to make out the defence of unjustifiable

¹⁵ AB Part A Tab 4 at [16]-[18].

hardship;¹⁶

- (b) the onus is on a respondent to establish the defence in s 29A: s 11(2);¹⁷
 - (c) implicit in the concept of unjustifiable hardship is that some hardship will be justifiable. The concept of unjustifiable hardship ‘connotes much more than just hardship’;¹⁸
 - (d) the financial circumstances of a discriminator are important, but must be considered in the context of the Act’s objects – the financial burden may be justifiable;¹⁹
 - (e) for the purposes of s 11(1)(a), the group of ‘any persons concerned’ to whom a benefit or detriment may apply extends beyond the immediate complainant and respondent. So too does the group of ‘any persons concerned’ with a disability referred to in s 11(1)(b);²⁰ However the defence in s 29A will only be made out if unjustifiable hardship is imposed on *a particular discriminator*;
 - (f) the extent of the hardship faced by a respondent is to be considered objectively and subjectively;²¹ and
 - (g) possible hardships from other potential and unproved liabilities are not to be considered.²²
46. At [17] – [18] of the Decision, his Honour identified two hardships on the Respondent, namely:
- (a) carrying the dog would have exposed the Respondent to a ‘risk’ of non-compliance with the CASA permission, and a subsequent risk of prosecution; and
 - (b) carrying the dog would have exposed other passengers to risk.
47. The first of these findings is predicated on an erroneous construction of the CASA Permission, for the reasons discussed above.
48. The Commission submits that a ‘risk’ of non-compliance with another obligation, including a ‘risk’ of prosecution for any such non-compliance, should not be considered to be a hardship, or a circumstance relevant to establishing the existence of a hardship, relevant to s 11 for the following reasons:
- (a) as a matter of law, it is not meaningful to talk of a ‘risk’ of a respondent violating a legal obligation. In this case, carrying the appellant’s dog either would have been contrary to the CAR or it would not. If it would have been contrary to the CAR, the ordinary canons of

¹⁶ Cf *King v Jetstar* (2012) 293 ALR 613, 625 [31] (Full Court); *King v Jetstar* (No. 2) 286 ALR 149, 189, *Cooper v Human Rights and Equal Opportunity Commission* (1999) 93 FCR 481 at 491-2; *Sluggett v Human Rights and Equal Opportunity Commission* (2002) 123 FCR 561, 567-8.

¹⁷ Amendments to the DDA effected by the *Disability Discrimination and Other Human Rights Amendment Act 2009* confirmed the position previously adopted by the courts: *King v Jetstar* (No. 2) (2012) 286 ALR 149 at 189; *Cooper v Human Rights and Equal Opportunity Commission* (1999) 93 FCR 481 at 491-492; *Scott & Anor v Telstra Corporation Ltd* (1995) EOC ¶92-717, 78,401.

¹⁸ Cf *Finney v Hills Grammar School*, [1999] HREOCA 14; [1999] EOC ¶93-020 at [52], affirmed on review in *Hills Grammar School v Human Rights and Equal Opportunity Commission* (2000) 100 FCR 306 at [48]; *King v Jetstar* (No. 2) 286 ALR 149, 189 [246]; *Daghlian v Australian Postal Corporation* [2003] FCA 759, [74]; [2003] EOC 93-287 *Access for All Alliance (Hervey Bay) v Hervey Bay Council* [2004] FMCA 915 at [84]; [2005] EOC 93-372.

¹⁹ *Access for All Alliance (Hervey Bay) v Hervey Bay Council* [2004] FMCA 915 at [84]. Cf *Francey v Hilton Hotels of Australia Pty Ltd* (1997) EOC ¶92-903 at 77,453.

²⁰ This is made explicit by the example in s 11. See also *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92 at [94] (McHugh and Kirby JJ dissenting); *Scott & Anor v Telstra* at 78,401, *Francey & Another v Hilton Hotels*, at 11; *King v Jetstar* (No. 2) 286 ALR 149, 191; *Cooper v Holiday Coast Cinemas* [1997] HREOCA 32 at 6.

²¹ *Scott & Anor v Telstra* at 78,401

²² *Scott & Anor v Telstra* at 78,402.

statutory interpretation would apply to resolve that inconsistency. If it would not have been contrary to the CAR, there is no hardship in avoiding the discriminatory conduct;

- (b) characterising 'risks' of the kind identified by the Court as hardships for the purposes of identifying 'unjustifiable hardship' would have the effect of rendering the DDA inoperative in any situation where there was any degree of uncertainty about the interaction between the obligations imposed by the DDA and other legislative regimes. That cannot have been the intention of Parliament;
- (c) in this particular case, interpreting 'unjustifiable hardship' in this way would render s 98(6B) of the CAA otiose; and
- (d) the exposure to legal liability is a matter of law. All of the examples in section 11 of circumstances that are relevant to the existence of unjustifiable hardship are matters of fact. That is an indication that the existence of the 'risks' identified by the Court, even if real, is not the kind of circumstance that is relevant in determining whether an unjustifiable hardship would be imposed on a person.

Assistance animals and the DDA

- 49. The Respondent's Cross Appeal raises questions with respect to proper interpretation of s 9(2) of the DDA. The Commission makes the following brief submissions to address these questions.
- 50. Divisions 1 and 2 of Part 2 of the DDA make it unlawful to discriminate against a person on the ground of the person's disability in specific areas of public life.²³ 'Discriminate' is defined in s 4(1) of the DDA as having 'the meaning given by sections 5 and 6'.
- 51. Sections 5 and 6 each specify a different type of conduct that will constitute discrimination under the DDA. Section 5 proscribes direct discrimination; s 6 proscribes indirect discrimination.
- 52. Section 8 has the effect that if a person discriminates against a second person because the second person has an assistance animal, they are taken to have done so because the person has a disability. For the purposes of the DDA, a person with a disability '*has an assistance animal*' if the person:
 - (a) is presently accompanied by, or possesses, the animal; or
 - (b) was previously accompanied by, or possessed, the animal; or
 - (c) may be accompanied by, or possess, the animal in the future; or
 - (d) is imputed to be accompanied by, or to possess, the animal.²⁴

Section 9(2) of the DDA

- 53. The phrase 'assistance animal' is defined in s 9(2) of the DDA as follows:

*For the purposes of this Act, an **assistance animal** is a dog or other animal:*

- (a) *accredited under a law of a State or Territory that provides for the accreditation of animals trained to assist a persons [sic] with a disability to alleviate the effect of the disability; or*
- (b) *accredited by an animal training organisation prescribed by the regulations for the purposes of this paragraph; or*
- (c) *trained:*

²³ These include: employment: ss 15-21; education: s 22; access to premises: s 23; goods, services and facilities: s 24; accommodation: s 25; land: s 26; clubs and incorporated associations: s 27; sport: s 28; administration of Commonwealth laws and programs: s 29.

²⁴ Section 9(4).

- (i). to assist a person with a disability to alleviate the effect of the disability; and
- (ii). to meet standards of hygiene and behaviour that are appropriate for an animal in a public place.

54. There are three ways in which an animal can qualify as an assistance animal. They are:

- (a). by accreditation - several, but not all, States have statutory schemes for the accreditation of dogs, or other kinds of animal, as assistance animals;²⁵
- (b). by accreditation by a prescribed training organisation - no organisations have been so prescribed;
- (c). by training for the purpose of s9(2)(c).

55. For the purpose of s 9(2)(c), the expression 'trained' is not defined. It should be given its ordinary meaning. *The Macquarie Dictionary* (3rd ed) defines the verb 'train' as including '... to discipline and instruct (an animal) to perform specified actions'.

56. Section 9(2)(c) does not impose any requirements about the type or amount of training to be undertaken by an assistance animal. For instance, there is no requirement that an animal:

- (a) be trained by a particular type of trainer or organisation;
- (b) undertake a particular amount of training; or
- (c) be accredited by or registered with a particular agency or organisation.

57. There is nothing else in the DDA or relevant regulations which imposes any such requirements.

58. While professional training may assist the Court in determining whether an animal is an assistance animal within the meaning of s 9(2)(c), it does not require an animal to be professionally trained or preclude an animal trained by its (non-professional) owner.²⁶ This is the intended operation of the section. The Explanatory Memorandum to the Bill which introduced s 9(2)(c) stated:

The purpose of this amendment is to provide greater certainty to both service providers and people with assistance animals. The third limb of the definition (paragraph 9(2)(c)) is designed to ensure that people with disability who may not live in a State or Territory that has a relevant accreditation scheme, or who may not have access to a recognised assistance animal trainer continue to be protected under the Disability Discrimination Act (if they are able to demonstrate the requirements of the relevant sections).²⁷

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²⁵ Eg *Guide, Hearing and Assistance Dogs Act 2009* (Qld); *Dog and Cat Management Act 1995* (SA).

²⁶ See *Sheehan v Tin Can Bay Country Club* [2002] FMCA 95; [2002] EOC 93-240 at [2] and [3] (decided under former s 9(1)(f)).

²⁷ Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 11 [50].