QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

Case number: APL294-14

Applicant:	**YU PING XI**
	AND
Respondent:	**WORKCOVER QUEENSLAND**
	AND
Intervener:	**ANTI-DISCRIMINATION COMMISSIONER QUEENSLAND**

SUBMISSIONS ON BEHALF OF THE ANTI-DISCRIMINATION COMMISSIONER QUEENSLAND

The role of the Anti-Discrimination Commissioner in the appeal proceedings

1. This is an appeal against the decision delivered on 28 May 2014 in the complaint made by the applicant against the respondent alleging unlawful race discrimination under the *Anti-Discrimination Act 1991* (AD Act).

2. Relevantly, the AD Act prohibits discrimination on the basis of race in the administration of State laws and programs.

3. The Anti-Discrimination Commissioner Queensland sought leave to intervene in this appeal to make written submissions about the meaning of race, the law relating to indirect discrimination, and where the tribunal may have erred in the construction and application of section 11 of the AD Act.

Meaning of race

4. Discrimination that is prohibited under the AD Act is discrimination on the basis of the attributes listed in section 7 of the AD Act. Race is one of

those attributes. Race is defined in the Schedule to the AD Act inclusively as follows:

> ***race*** includes —
> (a) colour; and
> (b) descent or ethnic origin; and
> (c) nationality or national origin.

5. For both direct and indirect discrimination, the meaning of an attribute is expanded by section 8 of the AD Act. Relevantly, section 8 provides that discrimination on the basis of an attribute includes direct and indirect discrimination on the basis of a characteristic that a person with any of the attributes generally has, and a characteristic that is often imputed to a person with any of the attributes.

6. In *Purvis v New South Wales* (2003) 217 CLR 92 at 134; [2003] HCA 62 at para 130, McHugh and Kirby JJ, said:

> Provisions that extend the definition of discrimination to cover the characteristics of a person have the purpose of ensuring that anti-discrimination legislation is not evaded by using such characteristics as 'proxies' for discriminating on the basic grounds covered by the legislation.

7. The following are findings of various tribunals relating to language and race:

   (a) accent is a characteristic of race – *Perera v Commissioner of Corrective Services* [2007] NSWADT 115; *Chew v Director General of the Department of Education and Training* [2006] WASAT 248.

   (b) an allegation of 'language difficulty' is an allegation of racial discrimination if raised by a person falling within the concept of race – *Campos v Tempo Cleaning Service* (1994) EOC 92-648.

   (c) language is a characteristic pertaining to race within the meaning of [the relevant provision] of the Act (i.e. a characteristic that appertains generally to person of the race of the aggrieved person) – *Korda v Black and White Distribution Pty Ltd* [2006] WASAT 75.

(d) speaking Spanish is a characteristic appertaining to [the complainants'] race (both were of Spanish origin) – *Moreira v Peter Robert Motors Pty Limited* [2002] NSWADT 70.

(e) a person's accent may reflect his / her race – *Ross-Teigan v Hitman Pest Control Pty Ltd & Ors* [2002] QADT 6.

8. In the discussion under the heading 'Direct Discrimination' in the decision under appeal, the Members said:

(a) the applicant's difficulty with the English language is a characteristic rather than an attribute, and cannot necessarily be connected with the attribute of race which is not necessarily connected with the attribute of race [16]; and

(b) it cannot be said that any allegation by the applicant that she cannot speak or read English fluently is necessarily an issue relating to her race [17].

9. At the hearing, the applicant was assisted by an interpreter, and there was no apparent suggestion that her language difficulty was associated with anything other than her race, for example an impairment or her level of literacy.

10. As an inclusive definition, together with the expanded meaning provided for in section 8, the attribute of race under the AD Act is capable of encompassing a person of Chinese origin who migrated to Australia in 2007[1], who has limited proficiency in communicating in English. The applicant's limited ability to communicate in English and reliance on an interpreter was apparent to the tribunal at the hearing.

11. Correctly identifying the attribute is relevant to a case of alleged indirect discrimination as well as a case of alleged direct discrimination.

[1] Transcript, page 30.

Indirect discrimination and the construction and application of section 11 of the AD Act

12. The Anti-Discrimination Commission would usually deal with a complaint alleging a failure to provide an interpreter as indirect discrimination rather than direct discrimination. The Commission deals with complaints alleging failure to provide language interpreters as well as complaints alleging failure to provide interpreters for people with impaired hearing.

13. The discussion in the decision under appeal mixes the various different elements of direct and indirect discrimination, in particular from paragraphs [59] to [64].

Definition of indirect discrimination

14. Indirect discrimination is defined in section 11 of the AD Act. The elements are:

    (a) a term, condition or requirement is imposed

    (b) the person with the attribute is not able to comply with the term

    (c) a higher proportion of people without the attribute are able to comply with the term

    (d) the term is not reasonable.

15. At paragraph [24] of the decision the tribunal says that the definition of indirect discrimination requires the applicant to prove:

    (a) that a term exists; and

    (b) that the term is more likely to cause a detrimental impact to people possessing a protected attribute; and

    (c) that the term is not reasonable.

16. The tribunal's description of indirect discrimination does not accord with the definition in section 11 of the AD Act; it omits the element of inability to comply in section 11(1)(a), and describes the proportionality test in terms of detrimental impact rather than ability to comply.

17. There is no requirement to show that 'that the term is more likely to cause a detrimental impact to people possessing a protected attribute', and the onus is on the respondent to prove that the term is reasonable (section 205 of the AD Act).

Imposing a term

18. In relation to the imposition of a term, the High Court provided the following guidance in *Waters v Public Transport Corporation* (1992) 173 CLR 349; [1991] HCA 49:

    (a) the words 'requirement or condition' should be construed broadly so as to cover any form of qualification or prerequisite – per Dawson and Tohey JJ at 393, and McHugh J at 406-407.

    (b) it is not necessary that the requirement was imposed, or proposed to be imposed, by way of a positive act or statement.

    (c) compliance may be required even if the requirement or condition is not made explicit: it is sufficient if a requirement or condition is implicit in the conduct which is said to constitute discrimination – per Mason CJ and Gaudron J at 360.

19. In the decision under appeal, the Members said the applicant alleged in her contentions that WorkCover engaged in indirect discriminatory conduct within the terms of section 11 of the Act because it imposed a term being the practice of failing to provide an interpreter/translator and/or failing to apply the applicable language policy to accommodate the applicant's attribute [27].

20. The tribunal could not see any breach of the term proposed by the applicant in her contentions [59]. The tribunal then found at [62]:

> If a term were to be imposed in this indirect claim, the Tribunal is satisfied that the term which would be imposed is that of whether or not an interpreter was required insofar as it was necessary for WorkCover to sufficiently understand the case of injured worker, in this case Ms Xi.

21. This finding is awkward in that it poses a question rather than defining or articulating a term.

22. The findings at paragraphs [59] and [63] also indicate a misunderstanding of indirect discrimination and a misunderstanding of the nature of the analysis and issues for consideration and determination by the tribunal. A breach of the term is not a requirement for indirect discrimination.

23. In *New South Wales v Amery* (2006) 230 CLR 174; [2006] HCA 14 at para [208] Callinan J observed:

> The Tribunal and the courts are not bound by an applicant's formulation of a condition or requirement. It is their duty to ascertain the actual position, including whether an (alleged) perpetrator has truly sought to impose, or permit indirectly, the imposition of a requirement or a condition which is discriminatory, and not reasonable within the meaning of the Act.

24. In a case alleging a failure to provide an interpreter in the administration of State laws and programs, the Commission would generally consider the term to be, to the effect, that communications between the person and the agency are to be in English. Where, in this case, the respondent left it to the applicant to arrange an interpreter if she needed one when she contacted the respondent, it was arguably open to the tribunal to find that by its conduct the respondent imposed a term that it would communicate with the applicant in English. Paragraph [30] of the decision under appeal indicates another term was also imposed, namely that for contact instigated by the applicant, the communication would be in English unless the applicant arranged an interpreter at her own initiative.

25. These suggested terms are supported by the instances of contact between the applicant and the respondent set out and analysed in the decision under appeal from paragraphs [29] to [47]. There are nine instances of contact between the applicant and the respondent on eight different dates. As indicated in footnote 6 in the decision, the evidence

of the respondent is contained in Exhibit 3. Exhibit 3 is the letter from the respondent to the tribunal dated 26 August 2013, and confirms that the contact referred to in paragraph [40] of the decision was initiated by the respondent.

26. Five out of the nine instances were initiated by the respondent, and all of those five were made without an interpreter. Four instances of contact were initiated by the applicant, two with an interpreter and two without an interpreter.

27. The tribunal found that on the five occasions initiated by the respondent the matters were of a process nature and not substantive.

28. Although not expressly stated, this finding appears to have informed the tribunal's implied finding that no term was imposed, or if a term was imposed, the tribunal's articulation of what that term would have been at [61] (which the Commission submits is an error of law).

29. If a distinction between process and substantive matters is relevant, its relevance should be a factor in deciding whether the term is reasonable, rather than determinative of whether a term was imposed.

30. The Commission disputes the finding of fact at paragraph [50] that the matters discussed were of a process nature and were not substantive. The Commission would consider each of the five contacts initiated by the respondent to be substantive, even where content may have involved process issues. The Commission considers that understanding process and being able to respond to it, is in itself a substantive issue in a workers' compensation claim, and impacts the outcome of the process.

Ability to comply

31. A liberal approach has been applied by courts and tribunals in assessing whether a person is able to comply with a relevant condition. It is not a strict literal test. See for example *Beu v PR Exhibitions Pty Ltd* [1997]

QADT 13, where a woman was not permitted to take a stroller into a fair, the tribunal said:

> In the present situation, I am satisfied that although Ms Beu was able to comply, with considerably difficulty and the assistance of her mother, with the requirement that she carry her baby or, alternatively, not use a pram or stroller, it was not an ability to comply in any practical sense. Her inability to comply was, moreover, the direct consequence of her situation as a parent. Insofar as the requirement was one that a pram or stroller could not be used, it was one with which a higher proportion of non-parents were clearly able to comply.

32. In *Hurst v State of Queensland* [2006] 151 FCR 562; [2006] FCAFC 100 the Full Court of the Federal Court of Australia applied the test of 'serious disadvantage' to the 'inability to comply' component of indirect discrimination under the *Disability Discrimination Act 1992* (Clth). In that case the requirement or condition was that the applicant (a child) be taught in English without Auslan assistance. The Full Court said at paragraph [134]:

> We have concluded that Lander J erred in his construction of the "not able to comply" component of s 6(c). His Honour's own findings ought to have led him to conclude that Tiahna was relevantly "not able to comply" with the requirement or condition that she be taught in English, without the assistance of Auslan. In our view, it is sufficient to satisfy that component of s 6(c) that a disabled person will suffer serious disadvantage in complying with a requirement or condition of the relevant kind, irrespective of whether that person can "cope" with the requirement or condition. A disabled person's inability to achieve his or her full potential, in educational terms, can amount to serious disadvantage. In Tiahna's case, the evidence established that it had done so.

33. In the present case, it was open to the tribunal to find, based on its observations of the applicant at the hearing, that the applicant was unable to comply with a term that she communicate or engage with the agency in English. It was open to the tribunal to find that the applicant was seriously disadvantaged in not fully understanding the communications from the respondent.

34. It was also open to the tribunal to accept, or take judicial notice, that more people in Queensland who were not born in China, or who are not of Chinese nationality or national origin with limited English, are able to

comply with a requirement that they communicate in English, than people of the applicant's race.

Reasonableness

35. The test for reasonableness of a term is described in *Mahommed v State of Queensland* [2006] QADT 21. The then President of the former tribunal said the test is an objective one, less demanding than a test of necessity but more demanding that a test of convenience. It requires the weighing of the nature and extent of the discriminatory effect against the reasons advanced in favour of the term and all other circumstances, including those specified in section 11(2) of the AD Act.

36. Reference is made to the Queensland Government Language Services Policy at paragraph [65] of the decision, and at paragraph [66] the tribunal says:

> The Tribunal does not accept that the language policy in itself provides a definition of, or a standard to access, discrimination within the Act.

37. The Language Services Policy is relevant to the issue of the reasonableness of the term. This is the approach adopted by the tribunal in *Hunter v State of Queensland* [2015] QCAT 179 at [61]. In determining that a requirement imposed by the respondent was not reasonable, the tribunal in *Hunter* took into consideration that the requirement was not in accord with the published policies of the respondent in relation to dealing with vulnerable persons with disabilities.

38. The Language Services Policy applies to all Queensland government agencies and is publicly available on the website of the Department of Communities, Child Safety and Disability Services. The Queensland Government has also published a Guideline with information and examples to assist agencies implement the policy. Discrimination is discussed in the Guideline, with specific reference to direct and indirect

discrimination under the *Anti-Discrimination Act 1991* and case examples.

39. The tribunal should have taken into consideration the requirements of the Language Policy in determining whether the terms imposed by the respondent were reasonable in the circumstance.

40. Further, in determining whether the term that the applicant arrange an interpreter when contacting the respondent was reasonable, the tribunal should have taken into consideration the process for communicating the requirement to the applicant. Evidence about communication of the requirement appears at page 73 of the transcript from 20 to 45 and page 74 from 1 to 20. The respondent's officer, Ms Qwaziniski, said (at line 20) that 6 July 2011:

> I advised Ms Xi in our first conversation that WorkCover would approve any translation services required by her and she was welcome to call me any time with a translator.

This requirement appears to have been communicated to the applicant in English without an interpreter.

When the Member queried whether the applicant understood, Ms Qwaziniski said (at line 40):

> I did reiterate to her through the translator in the initial - - think it was ---

The decision and the evidence indicates there was no interpreter for the initial contact when the term was conveyed to the applicant.

The Member asked if there was an information sheet or process or something in Mandarin that could be sent out to explain how they would use the interpreting service, and Ms Qwaziniski said there was not. The Member described the translation service as 'a bit of a process to use it' (page 74).

41. The Commission questions how a person with limited English is to clearly understand the requirement that they must arrange an interpreter when that requirement is communicated to them in English.

Outcome of the appeal

42. The submissions on behalf of the applicant set out the powers of the appeal tribunal. As the appeal is on questions of mixed fact and law, the appeal must be decided by rehearing, and the appeal tribunal may either:

    (a) confirm or amend the decision; or

    (b) set aside the decision and substitute its own decision.

43. In this appeal the Anti-Discrimination Commissioner is interested in the interpretation and application of the *Anti-Discrimination Act 1991*. The outcome sought is a matter for the applicant and the respondent.

Kevin Cocks
Anti-Discrimination Commissioner Queensland
21 September 2015