HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

DISABILITY DISCRIMINATION ACT 1992 (CTH)

Nos H97/50 & H97/51

Between:

NEIL FRANCEY

And

SUE MEEUWISSEN

Complainants

And

HILTON HOTELS OF AUSTRALIA PTY LTD

Respondent

Reasons for Decision

of the Inquiry Commissioner

Mr Graeme Innes AM

Hearing: Sydney

Dates: 19-20 May 1997

Date of Decision: 25 September 1997

Appearances: The Complainants appeared for themselves

Mr J. Stevenson instructed by Dunhill Madden Butler appeared for the Respondent

1. INTRODUCTION

This is an inquiry pursuant to s.79 of the *Disability Discrimination Act 1992* (Cth) ("the Act") into complaints by Mr Neil Francey and Ms Sue Meeuwissen against Hilton Hotels of Australia Pty Ltd, the owner and manager of the Sydney Hilton.

Mr Francey lodged his complaint with the Human Rights and Equal Opportunity Commission ("the Commission") on 20 March 1995. Ms Meeuwissen lodged her complaint on 20 March 1995. Ms Meeuwissen's complaint alleged discrimination on the ground of disability which

resulted in less favourable treatment in access to premises and the provision of services. Mr Francey's complaint alleged discrimination against him as Ms Meeuwissen's associate on the evening in question.

Conciliation in these matters was unsuccessful. On 7 February 1997 the Disability Discrimination Commissioner, being of the opinion that the nature of these matters was such that they should be referred for hearing, referred them to the Commission for public inquiry. Pursuant to s.81 of the Act a single inquiry into these two complaints was conducted by the Commission in Sydney on 19 and 20 May 1997.

2. STATUTORY PROVISIONS

The relevant provisions of the Act are sections 6, 11, 23 and 24.

Section 6 of the Act which defines indirect disability discrimination provides:

6 For the purposes of this Act, a person ("discriminator") discriminates against another person

("aggrieved person") on the ground of a disability 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 without the disability comply or

are able to comply; and

(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.

Section 11 which deals with unjustifiable hardship provides:

11 For the purposes of this Act, in determining what constitutes unjustifiable hardship, all relevant

circumstances of the particular case are to be taken into account including:

(a) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned; and

(b) the effect of the disability of a person concerned; and

(c) the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship; and

(d) in the case of the provision of services, or the making available of facilities - an action plan given to the Commission under section 64.

Section 23 of the Act which deals with access to premises provides:

23(1) It is unlawful for a person to discriminate against another person on the ground of the other person's disability or a disability of any of that other person's associates:

(a) by refusing to allow the other person access to, or the use of, any premises that the public or a section of the public is entitled or allowed to enter or use (whether for payment or not); or

(b) in the terms or conditions on which the first-mentioned person is prepared to allow the other person access to, or the use of, any such premises; or

(c) in relation to the provision of means of access to such premises; or

(d) by refusing to allow the other person the use of any facilities in such premises that the public or a section of the public is entitled or allowed to use (whether for payment or not); or

(e) in the terms or conditions on which the first-mentioned person is prepared to allow the other person the use of any such facilities; or

(f) by requiring the other person to leave such premises or cease to use such facilities.

23(2) This section does not render it unlawful to discriminate against a person on the ground of the person's disability in relation to the provision of access to premises if:

(a) the premises are so designed or constructed as to be inaccessible to a person with a disability; and

(b) any alteration to the premises to provide such access would impose unjustifiable hardship on the person who would have to provide that access.

Section 24 which deals with the provision of goods, services and facilities provides:

24(1) It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's disability or a disability of any of that other person's associates:

(a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person; or

(b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or

(c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.

24(2) This section does not render it unlawful to discriminate against a person on the ground of the person's disability if the provision of the goods or services, or making facilities available, would impose unjustifiable hardship on the person who provides the goods or services or makes the facilities available.

3. THE EVIDENCE

The evidence in this matter concerns the attendance by the two complainants at Julianna's Nightclub, situated in the Sydney Hilton, on the evening of 18 March 1995. Most of the relevant facts are not in dispute. After a stay of half to three-quarters of an hour the complainants left the nightclub due to Ms Meeuwissen being seriously affected by environmental tobacco smoke. The

complainants alleged that this constituted discrimination on the ground of Ms Meeuwissen's disability.

3.1 Background to the evidence

Ms Meeuwissen lives in Adelaide. She has cystic fibrosis and had a double lung transplant in 1994. Her new lungs, whilst being free of cystic fibrosis, have asthmatic tendencies.

Evidence was tendered by the complainants, and not disputed by the respondent, that 10% of the Australian population had such tendencies, and that such people were more susceptible to the problems caused by environmental tobacco smoke[1].

Ms Meuwissen, as well as describing her disability in her own evidence (as summarised above) tendered a letter from her doctor, Dr Trevor Williams. It states in part:

"At present Sue has had an excellent result from lung transplantation and the aim of her ongoing

therapy is to keep it this way. From this stand point, removing from her environment anything that

may be potentially hazardous to her, including passive cigarette smoking.

I believe that there is enough evidence as to the effect of passive smoking, to warrant my

recommendation that Sue Meeuwissen needs to live in a smoke-free environment."

Mr Francey met Ms Meeuwissen at a conference in Adelaide prior to her lung transplant, and again at another conference in Paris after the transplant. During conversations between them she had explained to him how her disabilities impacted on her life activities. She expressed a wish to be able to attend restaurants and nightclubs, which she had been unable to do before her transplant because of the effect of environmental tobacco smoke on her lungs as a result of her cystic fibrosis. After the transplant it was still difficult because of her asthma, but she felt that it might now be possible.

Mr Francey indicated that he would like to assist her to fulfil that aim. He talked of Margeaux's, the Hilton nightclub in Perth, to which he had been. He said that it was a non-smoking club. He suggested that they keep in touch, and see what could be arranged when they returned to Australia.

On 17 March 1995 Ms Meeuwissen and Mr Francey met again at a ball at the Curzon Hall in Sydney. They were seated at the same table and, following some distress to Ms Meeuwissen caused by smoking at the next table, and a complaint to the organisers by Mr Francey, the organisers announced that this was to be a smoke-free function. That evening Mr Francey invited Ms Meeuwissen to attend Julianna's nightclub with him the next evening.

3.2 Events of the evening of 18 March1995

The two complainants and two other friends met at the Hilton Hotel at about 9.30 pm on Saturday 18 March 1995. Mr Francey paid the $10 cover charge for each member of the party and they entered the nightclub. In answer to a question from one of the party the staff at the entrance advised that smoking was permitted in the nightclub. There is some dispute in the evidence about whether this question was asked before or after payment. My later explanation of

the law will demonstrate that the question is immaterial.

Julianna's nightclub, now refurbished and re-launched as Riche nightclub, is a rectangular room with the entrance on one of the long sides. It is approximately 35 metres long and 15 metres wide. There is a dance floor in the middle of the room, and a bar towards either end. Prior to the refurbishment the bars jutted out into the room creating a somewhat separate area in two corners. Tables are spread all around the room.

The party sat at a table in one of these more separate corners. There were about six tables in that area. They removed the ash-trays from the surrounding tables in an attempt to discourage other patrons sitting near them from smoking.

At the time of their arrival there were very few people in the room and no tobacco smoke was apparent. They bought a bottle of champagne which they drank while they talked.

After about half an hour a further bottle was ordered. By this time the room was beginning to fill up and tobacco smoke was much more in evidence. Ms Meeuwissen began to become distressed by the smoke. She said in her evidence-

"I started to wheeze and produce mucus. This doesn't happen these days unless there is environmental tobacco smoke. .. I felt pain and discomfort. .. When I started struggling to breathe I looked around and saw some women smoking. I went to the women's toilets fairly quickly .. because I hoped that it would be a safer place. I was feeling pretty distressed physically."

Mr Francey complained to various nightclub staff with whom he had conversations. The policy of the nightclub to allow smoking was reiterated. The second bottle of champagne arrived but was not opened. Mr Francey continued his discussions while Ms Meeuwissen remained in the women's toilets due to the distress which the tobacco smoke was causing her. She said-

"Because of how I was feeling I had no choice but to leave."

The party finally left after having further discussions with hotel staff in the foyer of the hotel.

3.3 Impact on the complainants

Ms Meeuwissen's immediate reaction to the smoke is described above. Her evidence made it very clear that, as a result of the environmental tobacco smoke, she had no alternative but to leave the nightclub.

She explained that she had measured her lung function prior to going out, and upon returning home. She had taken the first measurement because she regularly did so following her lung transplant. She took the second measurement on her return home as a result of the events of the evening. She was clear that there had been "a distinct decrease."

Ms Meeuwissen gave evidence of her disappointment at the loss of the experience of attending a nightclub. She described the way in which her lung transplant had expanded her capacity to participate in numerous community activities. Whilst she had not suffered the physical segregation imposed on many other people with disabilities by the community, her cystic fibrosis had the consequence of resulting in a very similar segregation. Therefore, to have the ability to attend a restaurant, nightclub, or other similar place where people gathered socially, was of much greater importance than for someone who could do it all of their adult life as a matter of course.

Ms Meeuwissen gave evidence that she remained at the house where she was staying the next day rather than going out because she felt sick and had less energy. She also said that she did not feel well that day.

Mr Francey was not physically inconvenienced. However, he had made a commitment to Ms Meeuwissen to accompany her while she attended the nightclub, and he was disappointed that the experience had ended so unsuccessfully. He was annoyed enough by the experience to write to the Manager of the hotel the next day questioning the appropriateness of the nightclub's policy and indicating that, in his view, it breached occupational health and safety as well as discrimination legislation.

4. THE LAW

4.1 Was there discrimination?

Ms Meeuwissen has alleged discrimination against her on the ground of her disability. The relevant disability to this complaint is her asthma, although if she had not had her lung transplant her cystic fibrosis would have caused her the same (or probably a greater) problem when attending the nightclub. Her asthma has been described by herself and Dr Williams in the previous section, and clearly falls within the definition of disability in the Act. Further, the respondent did not dispute this issue.

Mr Francey's complaint is based on his position as an associate of Ms Meeuwissen, a person with a disability. He clearly meets this definition. The definition, set out in section 4 of the Act, is not an exclusive one. Paragraph (e) would seem to apply in that the complainants are in a recreational relationship for the purpose of attending the nightclub. However, even if this were not the case, their attendance together as part of a group of four people at the nightclub is enough for them to be viewed, on that evening, as associates. Both the objects of the Act, and the parliamentary debate when it was introduced, make it clear that the definitions of "disability" and "associate" are intended to be interpreted broadly and beneficially so that people are not unintentionally excluded from lodging complaints under the Act. Further, the application of the definition of "associate" in this case was not disputed by the respondent.

In order to make out their complaints, the complainants must demonstrate that direct or indirect discrimination has occurred. I will firstly consider the question of indirect discrimination because if I find that this has occurred it will not be necessary for me to consider the question of direct discrimination. Indirect discrimination is dealt with in section 6 of the Act.

Section 6 provides that discrimination occurs if the discriminator requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of people without the disability can comply, which is not reasonable, and with which the aggrieved person cannot comply. Several High Court decisions have dealt with the interpretation of similar provisions in NSW and Victorian legislation.

In *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 Dawson J stated at p185:

"The starting point with s.24(3) [of the Anti-Discrimination Act 1977 (NSW)] must be the identification of the requirement or condition. Upon principle and having regard to the objects of the Act, it is clear that the words "requirement or condition" should be construed broadly so as to

cover any form of qualification or prerequisite demanded by an employer of his employees....Nevertheless, it is necessary in each particular instance to formulate the actual requirement or condition with some precision."

McHugh J stated at p195:

"Courts and tribunals interpreting the phrase "requirement or condition" in that legislation have generally given it a broad interpretation in order to implement the objectives of the legislation."

In *Waters v Public Transport Corporation* (1991) 173 CLR 349 Mason CJ and Gaudron J stated at p360:

"It is clear from that case [Australian Iron & Steel Pty Ltd v Banovic] that 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."

McHugh J stated at pages 406 to 407:

"The reported cases also require that the phrase "requirement or condition" in s.17(5) [of the Equal Opportunity Act 1984 (Vic)] be given a broad interpretation to enable the objectives of the Act to be fulfilled...In conformity with these pronouncements, s.17(5) should be given a liberal interpretation in order to implement the objectives of the legislation. In the context of providing goods or services, a person should be regarded as imposing a requirement or condition when that person intimates, expressly or inferentially,

that some stipulation or set of circumstances must be obeyed or endured if those goods or services are to be acquired, used or enjoyed.... a person could use the services provided by the Corporation's trams only if that person was prepared, inter alia, to endure using the trams without the assistance of conductors. That

being so, it is no misuse of ordinary language to hold that the Corporation imposed a requirement or condition on persons using its trams if the services provided are characterized as the provision of trams. No doubt, as counsel for the Corporation stressed, it is important to distinguish between the services provided

and the requirement or condition imposed....Whether or not it was a requirement or condition is a question of fact..."

I draw three relevant principles from these cases: firstly, that the determination of the requirement or condition is a question of fact in each case; secondly, that the provisions should be interpreted broadly to align with the objects of the legislation; and thirdly, that the complainant's awareness of the policy which leads to the requirement or condition is not relevant.

In this case the condition with which the respondent required the complainants to comply was the ability to tolerate environmental tobacco smoke. Its toleration is implicit for anyone attending the nightclub because patrons are allowed to smoke and no adequate provision was made for the extraction of that smoke from the atmosphere or for smoking to be limited to a specific area. The environmental tobacco smoke was therefore something which the complainants had to endure.

The difference between this situation and that referred to in *Waters v Public Transport Corporation* and *Australian Iron & Steel Pty Ltd v Banovic* is that the respondent here did not

cause the environmental tobacco smoke whereas in both those cases the respondents did cause the requirements or conditions. However, as the operator of the nightclub, the respondent was certainly in control of whether the tobacco smoke was in the environment. It could have prevented the smoke from being there by having and enforcing a no-smoking policy, restricting smoking to a particular sealed-off area or ensuring the removal of the smoke.

The two High Court cases referred to above indicate that similar provisions in State legislation should be interpreted broadly or liberally. In my view, even a somewhat narrow interpretation of the section would allow for a requirement or condition to be something which, even though it was not caused by the respondent, was in its knowledge and control.

McHugh J in *Waters* case, at p406 to 407 said-

"a person should be regarded as imposing a requirement or condition when that person intimates, expressly or inferentially, that some stipulation or set of circumstances must be obeyed or endured if those goods or services are to be acquired, used or enjoyed...."

In providing its services to Ms Meeuwissen, the respondent has imposed (albeit indirectly) a requirement to tolerate environmental tobacco smoke, if she is to use or enjoy those services.

If a person who used a wheelchair was unable to enter a shop because a group of school-children had left their school bags inside the entrance the person using the wheelchair should, if his or her protests to the shop owner are ignored (and depending on the circumstances of the case), be able to make out a complaint of indirect discrimination. The owner of the shop would either be able to move the bags or direct customers to put their bags in a different place.

It would be ludicrous to think that, just because the shop owner had not caused the entrance to the shop to be blocked, the shop owner would be able to escape an allegation of indirect discrimination despite having taken no action to keep the entrance clear.

The respondent submitted that indirect discrimination could not occur because the complainants were made aware of the nightclub's smoking policy and were not required to attend. Yet they still chose to enter the club. To accept this submission would create the ridiculous situation that indirect discrimination would not be possible if the discriminator warned the aggrieved person that it was going to occur. It would mean that a cinema which required customers who used wheelchairs to climb stairs in order to view a movie could continue to do so with impunity provided that it told them before they bought their tickets and gave them the choice of going home. This is not the intent of the spirit or objects of the Act.

Such reasoning is contrary to the decision in *Waters* case. To argue that a condition was not imposed when a choice not to use the service was available to the complainant would make a nonsense of the Act. I reject the submission.

Having established the requirement or condition, and the fact that most patrons could comply with it (and clearly most people can tolerate environmental tobacco smoke), I must then consider whether it was reasonable having regard to the circumstances of the case. In *Scott and ors v. Telstra* (1995) EOC
92-717, Sir Ronald Wilson, President of the Human Rights and Equal Opportunity Commission, said on this point at p78,400:

"It might be thought that in considering the question of the reasonableness of the requirement, I should place in the scales the evidence adduced for the respondent relating to its defence to a complaint of unlawful conduct contrary to s.24(1) of the DDA [the Act] of unjustifiable hardship. I do not agree. Nor did I understand Counsel for the respondent to contend otherwise. The careful elaboration in the DDA of the defence of unjustifiable hardship would be a nonsense if all such matters were relevant to establish the reasonableness of the requirement. Furthermore, there would be a reversal of the onus of proof.

This is not to say that the financial circumstances of the respondent are necessarily irrelevant. It all depends on the precise character of the requirement."

I adopt this reasoning.

In considering whether the requirement is reasonable in the circumstances of this case I return to the evidence that 10% of the Australian population have asthma and are therefore more affected by environmental tobacco smoke. Even if I accept the respondent's submission that Ms Meeuwissen is at the upper end of the spectrum, and that a large percentage of those affected would not be affected as seriously as she is, this is a major consideration.

If people whose skin was a particular colour made up 10% of the population, and if this group was more likely to be excluded from a public venue if their skin colour was more pronounced, the Australian community would be outraged. In fact, there is legislation at a Commonwealth level and in every State (except Tasmania) and Territory to prevent just such exclusion.

One of the main purposes for the enactment of the Act was to prevent people with disabilities from being excluded in just this way. For a person who used a wheelchair to be prevented from entering a facility used by the public because of a physical barrier - such as a step or the steepness of a ramp - is not only totally unacceptable but may be unlawful. This is not altered because some people who use wheelchairs can manoeuvre themselves up a single step, or push themselves up a ramp which is steeper than current Australian standards allow.

The situation in this case, where the barrier relates to the person's capacity to breathe without injury, and does not have the physical presence of a step or a ramp, is no different. When considered in this way, to find that this requirement was reasonable in the circumstances of this case would fly in the face of the objects of the Act.

The difference is that the barrier in the first example is physical, and in the second, behavioural. But asking someone to tolerate exclusion, whether because of a step or something that they cannot breathe without risk of injury, is equally unacceptable and abhorrent.

I recognise that in the second example, the barrier is caused by the behaviour of other patrons who wish to smoke. The implementation of any equal opportunity legislation requires a balancing of rights, and its underlying purpose is to provide redress for a person whose rights are unequally infringed. If the behaviour of one person causes unreasonable disadvantage to another then that behaviour must be curbed or some way found to minimise or prevent its impact. When testing for reasonableness, it seems to me that total exclusion weighs far more heavily than the pleasure gained from the smoking of a cigarette.

The respondent, of course, is not prevented from raising the issue of the rights of other patrons again when the question of unjustifiable hardship is considered later in this decision.

From her evidence it is clear that Ms Meeuwissen could not comply with this condition. As soon

as people started smoking around her she began to produce mucus, found breathing difficult, and had to leave. The complainants are therefore able to make out their allegation of indirect discrimination under the Act. It is not necessary for me to consider the question of direct discrimination.

Having determined that indirect discrimination has occurred I must consider whether it is unlawful discrimination in terms of sections 23 and 24 of the Act. Section 23 deals with access to premises and section 24 deals with provision of goods, services and facilities.

The relevant access to premises provision is section 23(1)(e) of the Act. This makes it unlawful to discriminate against a person on the ground of their disability, or the disability of an associate, in the terms or conditions on which the person allows the other person access to, or the use of, any such premises. The circumstances of this case fall squarely within this provision. The respondent, by allowing people to smoke in the nightclub, and by not taking effective steps to remove the environmental tobacco smoke, is setting a condition which precludes access to Ms Meuwiessen.

"Access" is not defined in the Act. The Concise Oxford Dictionary includes in its definition "a way of approaching or reaching or entering" and "opportunity to reach, or use or visit". It clearly relates to more than just physical access. It can include issues as diverse as physical access to a building or structure, or a part of a building or structure; access to a telephone network or to data on a computer or computer system; the ability to physically reach or to control the operation of a machine or piece of equipment; and the opportunity to enter into, and remain in, a building, structure or place, or any part thereof. The Second Reading Speech made when the Act was introduced indicated an intention to interpret the Act generally, and access in particular, broadly, so that people with particular types of disabilities were not excluded.

To be able to have access to, and have the use of, premises a person must be able to remain in the premises. Therefore, a policy which allows environmental tobacco smoke into the atmosphere, and which takes no or ineffective action to remove it, is a condition on which a person's access is allowed.

With respect to the provision of goods, services or facilities, the relevant provision is section 24(1)(b) and (c). Facilities are not defined but services are defined to include "services relating to entertainment, recreation or refreshment". The nightclub is clearly a facility, and amongst its services it provides recreation, entertainment and refreshment. The nightclub is not available to a person who cannot tolerate environmental tobacco smoke. Further, because such a person cannot remain there whilst other patrons are smoking, they cannot benefit from the services available. My comments relating to access apply equally to the provision of goods, services and facilities, with respect to both the terms and conditions on which they are provided and the manner in which they are provided.

I, therefore, find that the respondent has indirectly discriminated against the complainants on the ground of Ms Meuwissen's disability in the areas of access to premises; and provision of goods, services and facilities. I must now determine whether the respondent is able to make out the defence of unjustifiable hardship available in sections 23(2) and 24(2) of the Act, and described in section 11.

4.2 Unjustifiable hardship

Section 11 provides that, in determining what constitutes unjustifiable hardship, I must take into account all relevant circumstances of the particular case. It then lists four issues which should be

included in my consideration. However, this does not preclude additional factors. As the respondent has not lodged an Action Plan with the Commission under section 64 of the Act only the first three are relevant. I will look at each in turn, and then consider other factors.

The first factor is the benefit or detriment to any persons concerned. This includes the complainants, the respondent, staff and potential staff, patrons and potential patrons of the nightclub.

The complainants will clearly benefit if the unlawful discrimination, i.e. the allowing into the air of environmental tobacco smoke, ceases. Ms Meeuwissen would be able to return to the nightclub with the knowledge that her visit would not be ended in such an unfortunate and distressing manner. Mr Francey would be able to successfully complete the visit that he had arranged with Ms Meeuwissen which was interrupted by the unlawful conduct.

The respondent may also benefit from prevention of the discrimination. Evidence was provided that there are very few nightclub venues in Sydney where no-smoking policies are enforced. It is, therefore, reasonable to assume that a proportion of the community, either because their disabilities make them intolerant of environmental tobacco smoke, or because they prefer not to inhale it due to the risk to their health, may choose to attend the nightclub if a procedure were put in place so that such smoke was no longer a problem. It could be that such a procedure would give the nightclub a competitive advantage over others without such procedures.

On the other hand, such a procedure could be a detriment. Depending on the way in which the problem of environmental tobacco smoke was removed, smokers may choose not to attend the

nightclub. This may be the case if the unlawful discrimination was prevented by a no-smoking policy, but may not be if it was addressed by the introduction of a specific smoking area, or if such smoke were removed by acceptable technical means. I should comment here that the provision of a specific no-smoking area would be unlikely to fully address the issue as it would, by its nature, prevent people who cannot tolerate environmental tobacco smoke from using the facilities of the nightclub not included in such an area.

It is difficult to predict with any accuracy the attendance implications of a smoke-free venue. From the evidence it appears that only one Sydney nightclub or disco, at Panthers in Penrith, was in fact smoke-free. The information from Panthers suggested that, while it had taken a little time for patrons to adjust to the no-smoking policy, it was now generally accepted. Evidence about other venues where certain areas were no-smoking areas was that they were not well policed. Because of this, it is impossible to determine whether stricter compliance would have caused people not to patronise these venues. Witnesses for the respondent gave evidence that if a no-smoking policy was introduced patronage would decrease markedly, but this was based on their predictions rather than on any scientific assessment via a survey of current and potential patrons.

A further benefit to the respondent from a no-smoking policy would be the decreased cleaning/maintenance, filtering and air-conditioning bills, and the removal of the need to empty and clean ash-trays and other receptacles.

I must also consider benefits and detriments to patrons and staff of the nightclub. If the policy at the nightclub regarding environmental tobacco smoke were to change they would certainly be "persons concerned". Whilst I accept the submissions of the respondent that this is not a case about the general dangers of passive smoking, the medical and other evidence presented makes it clear that passive smoking is injurious to people's health. This has been confirmed by the recent

decision of the NSW Parliament to legislate to prevent smoking inside facilities used by the public in five years from the enactment of a regulation setting standards for the cleanliness of air. The affect of this legislation is that if those running such facilities want their patrons to be able to smoke they will have to install acceptable air removal and filtering systems. It is not difficult therefore, to draw the conclusion that the health of both staff and patrons at the nightclub will benefit from the removal of environmental tobacco smoke. The detriment to such staff and patrons will be that, depending on how this is achieved, they may not be able to smoke in the nightclub.

The second factor listed in section 11 is the effect of the disability of a person concerned. This relates to the actual effect of the disability of the person concerned rather than to assumptions or generalisations that may be made about its effect. It is not relevant in this case.

The third factor listed is the financial circumstances of the respondent, and the estimated amount of expenditure required to redress the discrimination. Before considering this factor it is

important to comment on the weight which it should be given. Many respondents imply that it should be given greater weight than other factors. Whilst it is important, it, along with all other provisions of the Act, must be considered in the context of the Act's objects. I do not suggest that intolerable financial imposts should be placed on respondents. However, for this defence to be made out the hardship borne must be unjustifiable. Therefore, if other factors mitigate in favour of preventing the discrimination - which is the Parliament's intention in this legislation - then the bearing of a financial burden by the respondent may cause hardship which is deemed justifiable.

I am somewhat constrained by not wishing to reveal what may be commercially sensitive information. It is also difficult to consider this factor in isolation, so the following discussion includes other factors.

I note the following pieces of evidence-

(a) the nightclub generates 6-7% of the total food and beverage revenue of the hotel;

(b) the nightclub is more than twice as profitable as the hotel's other food and beverage outlets;

(c) the actual expenditure to create a separate non-smoking area in the nightclub (not including revenue lost during the closure and advertising costs to re-launch the nightclub) would roughly equate with one year's profit for the nightclub;

(d) the creation of a separate smoking or no-smoking area would impact on the ambience of the nightclub and the movement of patrons;

(e) during refurbishments which occurred after the complaint was lodged but prior to the hearing funds were spent to filter air but airflow was not changed to expel air from the nightclub, or particular areas of the nightclub;

(f) nightclubs are short-term investments, and must be refurbished every three to four years;

(g) a total smoking ban would not cause the incursion of significant costs, but in the opinion of senior management there would be a significant loss in revenue;

(h) based on the observations of senior management a substantial portion of patrons are smokers, or attend the nightclub in groups having members who are smokers. However, no research has

been carried out to determine what percentage of these people would not attend if smoking was limited or prohibited, and the suggestion that 50% of business would be lost is only a guestimate;

(i) the operation of the nightclub supports other sections of the hotel;

(j) one-third of the rooms in the hotel are designated as non-smoking and all restaurants have a smoking and a non-smoking area.

From this evidence I make the following observations-

(i) the nightclub generates a small but significant part of the hotel's revenue and supports other sections of the hotel;

(ii) it is relatively very profitable but has high overheads because of the need for regular refurbishment;

(iii) some action was taken to address the issues which this complaint raises during the recent refurbishment but it appears to have not been effective;

(iv) the next refurbishment is not many years away;

(v) the financial and aesthetic cost of establishing a no-smoking area is relatively high but this is by no means the only option and is arguably not the best one;

(vi) no attempt has been made to determine accurately the potential loss in revenue of a no-smoking policy; and

(vii) in other areas of the hotel the increasing community demand for smoke-free areas has been recognised.

The respondent has argued unjustifiable hardship on the basis of cost if one alternative - the creation of a smoke-free area - is adopted. This is not the best option because it would restrict the free movement of the complainants and others to that area of the nightclub. For another alternative - the venue being totally smoke-free - it has relied on the experienced but unsubstantiated opinion of its senior management. A third alternative, air filtration, is considered to be impractical by Bassett Consulting Engineers. Other alternatives, such as a separate area for smokers, air curtains, or the arranging of airflow so that air containing tobacco smoke is expelled, do not seem to have been considered.

The respondent submitted that I should, when considering the question of unjustifiable hardship, take into account the "level playing field" argument. If it were required not to discriminate against people who could not tolerate environmental tobacco smoke it would be disadvantaged relative to other nightclubs upon which this requirement had not been imposed. I reject this submission as its acceptance would lead to the Act becoming totally ineffective. One of the objects of the Act is to eliminate, as far as possible, discrimination against people on the ground of their disability. If the first service provider against whom a complaint was lodged could use this argument as part of its defence then it follows that complaints could only address areas where others had already been successful. Such a course would place totally unacceptable limitations on the ambit of the legislation.

The final factor in the consideration of unjustifiable hardship is the impact of the recently enacted *Smoking Regulation Act* 1997 (NSW).

Section 6(1) of this Act provides that:

smoking is prohibited in an enclosed space on and from the day that is 5 years after the commencement

of a regulation that prescribes an air quality standard for the purposes of this section.

Section 6(3)(a) provides:

This section does not prohibit smoking in an enclosed public space that is constructed or equipped as to ensure that the air within the place complies with the air quality standards prescribed by the regulations.

Section 8 (1) provides that a breach constitutes an offence by the occupier of the enclosed place.

Whilst State legislation is not binding on the Commission, and whilst it does not take effect for at least five years, it demonstrates a legislative trend in Australia and indicates the strictures under which the respondent, and other similar venues, will be placed regarding smoking in five years from now. Arguably, therefore, a finding that the respondent's conduct is unlawfully discriminatory would not cause unjustifiable hardship because they will be required to rectify this situation within five years as a result of the NSW legislation.

Having weighed all of the above factors, I conclude that a finding that the respondent's conduct unlawfully discriminates against the complainants would not cause unjustifiable hardship. The capacity for all Australians, with or without a disability, to participate as far as possible in all aspects of community life must be the paramount consideration. When the benefits set out above to other patrons and staff, as well as to the respondent itself, are added, the scales are weighted heavily. Whilst there are clearly consequences which cause some hardship to the respondent, financial and otherwise, they are unable to tip the scales. The financial consequences depend very much on the course chosen to remedy the discrimination and even taken at their worst are not unduly large in the context of the respondent's overall revenue. Further, the respondent will be required to address the same issues in five years time by the NSW legislation already referred to.

5. CONCLUSIONS

My findings that Hilton Hotels of Australia Pty Ltd has unlawfully discriminated against Sue Meeuwissen and Neil Francey on the grounds of their disability or status as an associate of a person with a disability, and that the defence of unjustifiable hardship is not sustained, have been set out above. I now set out the determinations I make as a result of these findings pursuant to s 103(b) of the Act.

Under paragraph (i) of the subsection I declare that the respondent has engaged in conduct that is unlawful under the Act. Before making further orders under this paragraph, I propose that the parties make written submissions to me as to the nature of such orders and that, if necessary, a further hearing should take place at which argument may be put. I direct that the respondent file and serve written submissions within 28 days of the date of publication of this decision, and that the complainants file and serve written submissions within 28 days of the date that the respondents submissions are filed and served. After receipt of these submissions I will determine whether a further hearing is required.

Pursuant to paragraph (iv), I make a declaration that the respondent pay to the complainants damages by way of compensation. In the case of Ms Meeuwissen I have taken into consideration the physical and emotional impact of the discrimination on the evening in question as set out in section 3.3 above. The environmental tobacco smoke caused her serious physical distress and she was forced to leave the nightclub. This distress continued that night and into the next day. Further, the experience of attending a nightclub was spoiled, and a degree of emotional trauma was caused by the fact that she was prevented, by the actions of the respondent, from participating in a community activity. I direct that the respondent pay her the sum of $2,000 within 28 days of the date of publication of this decision.

Mr Francey was not physically affected by the actions of the respondent but he was certainly disappointed and embarrassed. He had promised to participate with Ms Meeuwissen in the attendance at the nightclub, and the physical distress of Ms Meeuwissen caused him emotional distress. He was also embarrassed by the fact that he could not fulfil the promise he had made, and from the evidence he was understandably angry about the discriminatory policy of the nightclub. I direct that the respondent pay him the sum of $500 within 28 days of the date of publication of this decision.

DATED at Sydney this twenty fifth day of September 1997

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Inquiry Commissioner

Graeme Innes AM [1]I refer to exhibit two, an extract from a decision of Morling J in Australian Federation of Consumer Organisations Inc -v- The Tobacco Institute of Australia (1991) ATPR 41-079, at p.52,254. Morling J said:

Dr Breslin said that about 20% of children under the age of 20 and about 10% of the total Australian population have asthma. His practice is to initially ask his patients what sort of things they have noticed trigger their asthma and then he subsequently asks them directly whether other things which he nominates, trigger it. Thirty to 35 per cent of patients volunteer that cigarette smoke appears to have an effect on their asthma. When patients are specifically asked whether cigarette smoke has an effect on their asthma, the percentage of patients who respond positively rises to the order of 50% or 60% (T.582).