

Chapter 3

The Racial Discrimination Act

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The Racial Discrimination Act

3.1 Introduction to the RDA

3.1.1 Scope of the RDA

The RDA was the first Commonwealth unlawful discrimination statute to be enacted and is different in a number of ways from the SDA, DDA and ADA.¹ This is because it is based to a large extent on, and takes important parts of its statutory language from, the *International Convention on the Elimination of all Forms of Racial Discrimination*² ('ICERD'). A copy of ICERD is scheduled to the RDA.³

Unlike the SDA, the DDA and the ADA, the RDA does not provide a discrete definition of discrimination⁴ and then identify the specific areas of public life in which that discrimination is unlawful.⁵ Also unlike the SDA, DDA and ADA which contain a wide range of permanent exemptions⁶ and a process for applying for a temporary exemption,⁷ there are only a limited number of statutory 'exceptions' to the operation of the RDA⁸ (see 3.3 below).

Part II of the RDA sets out the prohibitions of racial discrimination and the right to equality before the law under s 10. Part IIA of the RDA, which was introduced in 1995, prohibits offensive behaviour based on racial hatred (discussed in detail under 3.4 below).

(a) The prohibition on discrimination in s 9

Section 9(1) prohibits what is generally known as 'direct' race discrimination:

- (1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

¹ For a comprehensive overview of the introduction of the RDA see Race Discrimination Commissioner, *Racial Discrimination Act 1975: A Review*, (1995).

² Opened for signature 21 December 1965, 660 UNTS 195 (entered into force generally 4 January 1969 and in Australia 30 September 1975). ICERD also creates the United Nations Committee on the Elimination of All Forms of Racial Discrimination (CERD Committee), an international body of experts responsible for monitoring state party implementation of ICERD through the examination of States reports and/or complaints from individuals about alleged violations. The work of the CERD Committee is available at <http://www2.ohchr.org/english/bodies/cerd/>.

³ The courts have held that where a statute, such as the RDA, gives effect to an international treaty (in this case, ICERD) the statute is to be construed in accordance with the corresponding words in the treaty: *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168, 264-265 (Brennan J). See further 6.17.

⁴ For example, ss 5-7A of the SDA; ss 5-9 of the DDA; ss 14-15 of the ADA.

⁵ For example, pt II of the SDA; pt 2 of the DDA; pt 4 of the ADA.

⁶ See pt II, div 4, SDA; pt 2, div 5 DDA; pt 4, div 5 ADA.

⁷ See s 44 of the SDA; s 55 of the DDA; s 44 of the ADA.

⁸ See ss 8(1) (special measures); 8(2) (instrument conferring charitable benefits); 9(3) and 15(4) (employment on a ship or aircraft if engaged outside Australia); 12(3) and 15(5) (accommodation and employment in private dwelling house or flat).

Section 9 makes unlawful a wide range of acts ('any act' involving a relevant distinction etc which has a relevant purpose or effect) in a wide range of situations ('the political, economic, social, cultural or any other field of public life').

Section 9(1A), which was inserted into the RDA in 1990, prohibits 'indirect' race discrimination:

(1A) Where:

- (a) a person requires another person to comply with a term, condition or requirement which is not reasonable having regard to the circumstances of the case; and
- (b) the other person does not or cannot comply with the term, condition or requirement; and
- (c) the requirement to comply has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life;

the act of requiring such compliance is to be treated, for the purposes of this Part, as an act involving a distinction based on, or an act done by reason of, the other person's race, colour, descent or national or ethnic origin.

In addition to the general prohibition on race discrimination in s 9, ss 11-15 of the RDA also specifically prohibit discrimination in the following areas of public life:⁹

- access to places and facilities;¹⁰
- land, housing and other accommodation;¹¹
- provision of goods and services;¹²
- right to join trade unions;¹³ and
- employment.¹⁴

Discrimination for the purposes of these specific prohibitions will be unlawful when a person is treated less favourably than another 'by reason of the first person's race, colour or national or ethnic origin'. These sections do not limit the generality of s 9¹⁵ and have been described as 'amplifying and applying to particular cases the provisions of s 9'.¹⁶

Complaints alleging race discrimination are sometimes considered under both s 9(1) and one of the specific prohibitions.¹⁷

(b) The right to equality before the law in s 10

Section 10 of the RDA provides for a general right to equality before the law:¹⁸

⁹ Note that the RDA has been held *not* to have extra-territorial operation: *Brannigan v Commonwealth* (2000) 110 FCR 566.

¹⁰ Section 11.

¹¹ Section 12.

¹² Section 13.

¹³ Section 14.

¹⁴ Section 15.

¹⁵ Section 9(4).

¹⁶ *Gerhardy v Brown* (1985) 159 CLR 70, 85 (Gibbs CJ).

¹⁷ See, for example, *Carr v Boree Aboriginal Corporation* [2003] FMCA 408.

¹⁸ Section 10 implements the obligation imposed by article 5 of ICERD to 'guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law'.

10 Rights to equality before the law

- (1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.
- (2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in article 5 of the Convention.
- (3) Where a law contains a provision that:
 - (a) authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or
 - (b) prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander;not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which subsection (1) applies and a reference in that subsection to a right includes a reference to a right of a person to manage property owned by the person.

There is no equivalent to s 10 in other State or Commonwealth anti-discrimination legislation. Section 10 does not make unlawful any acts, omissions or practices. It is 'concerned with the operation and effect of laws'¹⁹ rather than with proscribing the acts or conduct of individuals.

The language of s 10(1) does not require the complainant to show that the infringement of their rights was 'based on'²⁰ or 'by reason of'²¹ race, colour, or national or ethnic origin. The question under s 10 is whether the complainant, because of the operation and effect of law, does not enjoy a right to same extent as others not of that race. As the Full Federal Court in *Bropho v Western Australia*²² ('*Bropho*') stated:

In general terms, s 10(1) of the RD Act is engaged where there is unequal enjoyment of rights between racial or ethnic groups: see *Ward v Western Australia* (2002) 213 CLR 1. Section 10(1) does not require the Court to ascertain whether the cessation of rights is by reason of race, with the clear words of s 10 demonstrating that the inquiry is whether the cessation of rights is 'by reason of' of [sic] the legislation under challenge. Further, s 10 operates, not merely on the intention, purpose or form of legislation but also on the practical operation and effect of legislation (*Gerhardy v Brown*, at 99; *Mabo v Queensland [no 1]* (1988) 166 CLR 186 at 230-231; *Western Australia v Ward* at 103).²³

¹⁹ *Mabo v Queensland* (1988) 166 CLR 186, 230 (Deane J).

²⁰ See s 9(1).

²¹ See ss 11-15.

²² *Bropho v Western Australia* [2008] FCAFC 100. HREOC was granted leave to appear as intervener and its submissions are available at

<http://www.humanrights.gov.au/legal/submissions_court/intervention/bella_bropho.html>. See further 3.3.2(a)(iii), 3.2.4(a) and 3.3.2 below.

²³ [2008] FCAFC 100, [73].

Therefore, to make a successful claim under s 10 of the RDA, the complainant must be able to show:

- by reason of a law of the Commonwealth or of a State or Territory (or a provision of the law);
- persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race; *or*
- persons of a particular race, colour or national or ethnic origin enjoy a right to a more limited extent than persons of another race.²⁴

For example, in *Mabo v Queensland*²⁵ the High Court considered whether the *Queensland Coast Islands Declaratory Act 1985* ('the Queensland Act') breached s 10 of the RDA. The Queensland Act declared that the Murray Islands, upon first becoming part of Queensland in 1879, were vested in the Crown in right of Queensland, to the exclusion of all other rights and claims.

The majority of the High Court held that the Queensland Act discriminated on the basis of race in relation to the human rights to own property and not to be arbitrarily deprived of property, in that the native title interests that the Act sought to extinguish were only held by the indigenous inhabitants of the Murray Islands (the Miriam people). The majority found that the Queensland Act impaired the rights of the Miriam people 'while leaving unimpaired the corresponding human rights of those whose rights in and over the Murray Islands did not take their origin from the laws and customs of the Miriam people'.²⁶ Therefore, the Queensland Act was inconsistent with s 10 of the RDA and, by virtue of s 109 of the *Constitution*, invalid.

In *Bropho*, the Full Court held that, in applying s 10, it is necessary to recognise that some rights, such as property rights, are not absolute in their nature. Accordingly, actions that impact upon the ownership of property may not necessarily invalidly diminish the rights to ownership of property. The Court held that 'no invalid diminution of property rights occur where the State acts in order to achieve a legitimate and non-discriminatory public goal.'²⁷ The Court noted, however, that its reasoning was not 'intended to imply that basic human rights protected by the [RDA] can be compromised by laws which have an ostensible public purpose but which are, in truth, discriminatory'.²⁸

In *Bropho*, the *Reserves (Reserve 43131) Act 2003* (WA) ('Reserves Act') and actions taken under it were said to have limited the enjoyment of the property rights of the Aboriginal residents of the Swan Valley Nyungah Community (Reserve 43131) by, in effect, closing that community. The Court held that any interference with the property rights of residents was effected in accordance with a legitimate public purpose,

²⁴ *Sahak v Minister for Immigration & Multicultural Affairs* (2002) 123 FCR 514, 523 [35] (Goldberg and Hely JJ).

²⁵ (1988) 166 CLR 186.

²⁶ *Mabo v Queensland* (1988) 166 CLR 186, 218 (Brennan, Toohey and Gaudron JJ); see also 231 (Deane J); *Bropho v Western Australia* [2008] FCAFC 100, [61], [70].

²⁷ [2008] FCAFC 100, [83]; see generally [80]-[83].

²⁸ [2008] FCAFC 100, [82]. See further discussion at 3.2.4(a) below.

namely to protect the safety and welfare of residents of the community.²⁹ It therefore did not invalidly diminish the property rights of the residents.

(c) The interface between ss 9 and 10

Section 9(1) applies to allegations that an act or conduct of a person³⁰ is discriminatory.³¹

Section 10 applies to a law that is alleged to be discriminatory in its terms or its practical effect.³² To make a successful claim under s 10 of the RDA, the complainant must be able to show that the discrimination complained of arises by reason of a statutory provision.³³

The making of laws by the Commonwealth and State and Territory legislatures or delegated lawmakers cannot be challenged as an act under s 9.³⁴ Instead, the resulting law or delegated law can only be challenged under s 10.

Determining whether s 9 or s 10 applies in any particular case is important because different forms of action are required to be taken by a complainant depending on whether it is s 9 or s 10 that is said to be breached in a particular case.

Where s 9 is alleged to have been breached, a complaint of unlawful racial discrimination may be made to HREOC.³⁵ If the complaint cannot be resolved by conciliation, the President must terminate the complaint³⁶ and the person making the complaint can seek a legally enforceable decision from the Federal Court of Australia or the Federal Magistrates Court about whether discrimination has occurred.³⁷

In *Bropho v Western Australia*,³⁸ Nicholson J held that, while ordinarily an applicant claiming racial discrimination under s 9 must follow the procedures for making

²⁹ The Court noted that the ‘overwhelming evidence’ of a number of inquiries into the circumstances of the community was that ‘sexual and other forms of violence were pervasive’: *ibid* [82].

³⁰ ‘Person’ includes ‘a body politic or corporate as well as an individual’: *Acts Interpretation Act 1901* (Cth) s 22(1)(a).

³¹ This includes action taken by a person to implement a Commonwealth, State or Territory law where that person has discretion about whether to implement the law in a discriminatory or non-discriminatory manner. However, s 10 would appear to apply to a discriminatory action taken by a person which is required by a Commonwealth, State or Territory law. See *Gerhardy v Brown* (1985) 159 CLR 70, 92 (Mason J), 81 (Gibbs CJ); *Aboriginal Legal Rights Movement v South Australia* (1995) 64 SASR 558, [12] (Doyle CJ); *Western Australia v Ward* (2002) 213 CLR 1, 97-98 (Gleeson CJ, Gaudron, Gummow and Hayne JJ). HREOC was granted leave to intervene in *Western Australia v Ward* (2002) 213 CLR 1 and its submissions are available at <http://www.humanrights.gov.au/legal/submissions_court/guidelines/submission_miriuwung.html>.

³² See *Gerhardy v Brown* (1985) 159 CLR 70, 81 (Gibbs CJ), 92-93 (Mason J) and 119 (Brennan J); *Mabo v Queensland* (1988) 166 CLR 186, 198 (Mason CJ), 204 (Wilson J), 216 (Brennan, Toohey and Gaudron JJ) and 242 (Dawson J); *Western Australia v Ward* (2002) 213 CLR 1, 98 [103] and 107 [126] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Bropho v Western Australia* [2008] FCAFC 100, [73].

³³ *Sahak v Minister for Immigration & Multicultural Affairs* (2002) 123 FCR 514, 523 [35] (Goldberg and Hely JJ); *Bropho v Western Australia* [2008] FCAFC 100, [64], [73].

³⁴ *Gerhardy v Brown* (1985) 159 CLR, 81 (Gibbs CJ), 92-93 (Mason J), 120 (Brennan J); *Mabo v Queensland* (1988) 166 CLR 186, 197 (Mason CJ), 203 (Wilson J) and 216 (Brennan, Toohey and Gaudron JJ); *Western Australia v Ward* (2002) 213 CLR 1, 97-98 [102] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Bropho v Western Australia* [2008] FCAFC 100, [70].

³⁵ *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (‘HREOC Act’) s 46P. HREOC’s complaint handling regime is the exclusive means by which a person can obtain a remedy for alleged direct or indirect discrimination in breach of s 9. The courts therefore cannot grant remedies for a breach of s 9 unless a complaint has first been made to HREOC: *Re East; Ex parte Nguyen* (1998) 196 CLR 354, 365 [26] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Bropho v Western Australia* [2004] FCA 1209, [52]. See further 6.5 below.

³⁶ HREOC Act s 46PH.

³⁷ HREOC Act s 46PO.

³⁸ [2004] FCA 1209.

complaints to HREOC set out in the HREOC Act, issues as to constitutional validity can be litigated independently of the HREOC Act.³⁹

In contrast to s 9 of the RDA, a person cannot rely upon s 10 to make a complaint of unlawful discrimination to HREOC. HREOC has no jurisdiction to inquire into an allegation that a State or Territory law is invalid because it is inconsistent with s 10(1). Rather, a person must lodge proceedings in either the Supreme Court of the State or Territory in which the legislation was made⁴⁰ or in the Federal Court.⁴¹

3.1.2 Other unlawful acts and offences

Under s 17 of the RDA it is unlawful to incite or to assist the doing of an act of unlawful racial discrimination. To establish a successful claim the respondent will need to show the respondent was ‘actively inciting or encouraging’ behaviour that is made unlawful by Part II of the RDA or that the respondent assisted or promoted the doing of such acts.⁴²

Section 16 of the RDA also prohibits the publication or display of an advertisement that indicates an intention to do an act of unlawful racial discrimination.

The RDA does not make it a criminal offence to do an act that is made unlawful by the provisions of Part II or Part IIA of the Act.⁴³ However, Part IV sets out a number of specific offences, including:

- hindering, obstructing, molesting or interfering with a person exercising functions under the RDA;⁴⁴ and
- committing an act of victimisation, namely:
 - refusing to employ another person;
 - dismissing or threatening to dismiss an employee;
 - prejudicing or threatening to prejudice an employee; or
 - intimidating or coercing, or imposing a penalty upon another person;

by reason that the other person:

- has made, or proposes to make a complaint under the HREOC Act;
- has furnished, or proposes to furnish any information or documents to a person exercising powers under the HREOC Act; or
- has attended, or proposes to attend, a conference held under the RDA or HREOC Act.⁴⁵

³⁹ See further 6.5 below.

⁴⁰ As occurred in the context of the SDA in *Pearce v South Australian Health Commission* (1996) 66 SASR 486.

⁴¹ As occurred in the context of the SDA in *McBain v Victoria* (2000) 99 FCR 116.

⁴² *Obieta v NSW Department of Education & Training* [2007] FCA 86, [232].

⁴³ Section 26.

⁴⁴ Section 27(1).

⁴⁵ Section 27(2).

Conduct constituting such offences is also included in the definition of ‘unlawful discrimination’ in s 3 of the HREOC Act (see 1.2.1 above), allowing a person to make a complaint to HREOC in relation to it.

3.1.3 Interaction between RDA, State, Territory and other Commonwealth Laws

Sections 9 and 10 of the RDA interact with State, Territory and other Commonwealth laws in a number of ways.

(a) Impact of s 10 on enjoyment of rights

Section 10(1) operates to extend the enjoyment of rights under State, Territory and other federal laws where those laws otherwise fail to make a right universal. In *Gerhardy v Brown*,⁴⁶ Mason J stated:

If racial discrimination arises under or by virtue of State law because the relevant State law merely omits to make enjoyment of the right universal, ie by failing to confer it on persons of a particular race, then s 10 operates to confer that right on persons of that particular race. In this situation the section proceeds on the footing that the right which it confers is complementary to the right created by the State law. Because it exhibits no intention to occupy the field occupied by the positive provisions of State law to the exclusion of that law the provisions of the State law remain unaffected.⁴⁷

(b) Impact of s 10 on discriminatory State laws

Section 10(1) operates to make invalid, by virtue of s 109 of the *Constitution*,⁴⁸ State laws that would otherwise operate to discriminate against people of a particular race by denying them rights or freedoms⁴⁹ regardless of the date the State law was enacted.⁵⁰ As Mason J in *Gerhardy v Brown* stated:

When racial discrimination proceeds from a prohibition in a State law directed to persons of a particular race, forbidding them from enjoying a human right or fundamental freedom enjoyed by persons of another race, by virtue of that State law, s 10 confers a right on the persons prohibited by State law to enjoy the human right or fundamental freedom enjoyed by persons of that other race. This necessarily results in an inconsistency between s 10 and the prohibition contained in the State law.⁵¹

⁴⁶ (1985) 159 CLR 70.

⁴⁷ (1985) 159 CLR 70, 98. See also *Western Australia v Ward* (2002) 213 CLR 1, 99-100 [106] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

⁴⁸ Section 109 of the *Constitution* provides: ‘When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid’.

⁴⁹ See, for example, *Mabo v Queensland* (1988) 166 CLR 186, 198 (Mason CJ), 204 (Wilson J), 216 (Brennan, Toohey and Gaudron JJ) and 242 (Dawson J); *Western Australia v Ward* (2002) 213 CLR 1, 98 [103] and 107 [126] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

⁵⁰ This arises from the wording of s 109 of the *Constitution* which does not place any temporal limitations on the consideration of the relevant inconsistency. See, for example, *Ward v Western Australia* (2002) 213 CLR 1, 209 [468, [point 6]] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

⁵¹ (1985) 159 CLR 70, 98-99; *Western Australia v Ward* (2002) 213 CLR 1, 100 [107] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

(c) Impact of s 10 on discriminatory Territory laws

Section 109 of the *Constitution* does not apply to a conflict between a Commonwealth law and a Territory law. A Territory legislature, established under s 122 of the *Constitution*, is a subordinate legislature to the Commonwealth, and is not competent to pass laws that are repugnant to a Commonwealth law. Therefore, depending on the legislative scheme in place in a particular Territory, a law of that Territory may be ‘treated as ineffective’ to the extent that it is inconsistent with s 10 of the RDA.⁵²

(d) Impact of s 10 on discriminatory Commonwealth laws

Section 10 may operate to repeal racially discriminatory Commonwealth legislation enacted prior to the enactment of the RDA on 31 October 1975.⁵³ Whether repeal of the inconsistent law has occurred will be determined on a case by case basis.

Section 10 cannot, however, prevent the enactment of a discriminatory Commonwealth law after 31 October 1975 which expressly or impliedly repeals the RDA.⁵⁴

Section 10 has been used as a basis for challenging Commonwealth regulations alleged to deny or impair the enjoyment of rights by members of a particular national origin.⁵⁵

In *Clark v Vanstone*,⁵⁶ Gray J held that it was necessary, by virtue of s 10 of the RDA (amongst other factors), to read down s 4A(1) of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) (‘the ATSIC Act’) and cl 5(1)(k) of a 2002 Determination made under it relating to ‘misbehaviour’. This was on the basis that the effect of these provisions was to impose a higher standard on office holders under the ATSIC Act (who were more likely to be Indigenous people) than on those elected or appointed to similar offices and was therefore discriminatory.

On appeal in *Vanstone v Clark*,⁵⁷ this aspect of the decision of Gray J was overturned. Weinberg J, with whom Black CJ agreed, noted that the 2002 Determination applied to positions held by both Indigenous and non-Indigenous persons and that ‘it is no answer to the structure and text of the ATSIC Act to engage in speculation that holders of such officers were likely to be indigenous’.⁵⁸ His Honour stated:

Had the 2002 Determination provided a different test for suspension or termination of indigenous persons from that applicable to non-indigenous persons, it would obviously trigger the operation of s 10, and result in an adjustment of rights, as a matter of construction, as contemplated by the section... However, that is not the case here. There is no inconsistency of treatment based upon race within either the Act, or the 2002 Determination.⁵⁹

⁵² *Western Australia v Ward* (2002) 213 CLR 1, 108 [129] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

⁵³ See generally D Pearce and R Geddes, *Statutory Interpretation in Australia*, (6th ed, 2006) [7.9]-[7.13].

⁵⁴ *Pareroutja v Tickner* (1993) 42 FCR 32, 42.

⁵⁵ See, for example, *Macabenta v Minister for Immigration & Multicultural Affairs* (1998) 90 FCR 202, 209-213 and *Sahak v Minister for Immigration & Multicultural Affairs* (2005) 123 FCR 514, 522-526 [31]-[55] (Goldberg and Hely JJ).

⁵⁶ (2004) 211 ALR 412.

⁵⁷ (2005) 147 FCR 299.

⁵⁸ (2005) 147 FCR 299, 352 [198].

⁵⁹ (2005) 147 FCR 299, 352 [199].

(e) Impact of s 9 on State laws

Section 9 of the RDA may also render invalid inconsistent State laws, by virtue of s 109 of the *Constitution*. As Mason J in *Gerhardy v Brown* observed:

The operation of s 9 is confined to making unlawful the acts which it describes. It is s 10 that is directed to the operation of laws, whether Commonwealth, State or Territory laws, which discriminate by reference to race, colour or national or ethnic origin... This is not to say that s 9 of the [RDA] cannot operate as a source of invalidity of inconsistent State laws, by means of s 109 of the Constitution. Inconsistency may arise because a State Law is a law dealing with racial discrimination, the Commonwealth law being intended to occupy that field to the exclusion of any other law: *Viskauskas v Niland* (1983) 153 CLR 280. Or it may arise because a State law makes lawful the doing of an act which s 9 forbids: see *Clyde Engineering Co. Ltd. v Cowburn* (1926) 37 CLR 466 at 490.⁶⁰

(f) The RDA does not invalidate State laws that promote the objects of ICERD

In *Viskauskas v Niland*⁶¹ the High Court held that the RDA was intended to ‘cover the field’ in relation to racial discrimination in the provision of goods and services. Therefore, Pt II of the *Anti-Discrimination Act 1977* (NSW), which dealt with racial discrimination, was inconsistent and constitutionally invalid.

Following the decision in *Viskauskas v Niland*, the Commonwealth introduced s 6A into the RDA which, in ss (1), provides that the RDA ‘is not intended, and shall be deemed never to have been intended to exclude or limit the operation of a law of a State or Territory’ which promotes the objects of the ICERD and is capable of operating concurrently with the RDA.⁶²

However, in *University of Wollongong v Metwally*⁶³ the majority of the High Court held that this amendment could only have effect from the date it was enacted as Parliament was unable to deem that an inconsistency that had arisen by virtue of s 109 of the *Constitution* had never existed.⁶⁴

A person is required to choose between making a complaint of racial discrimination or racial hatred under the HREOC Act and taking action under the equivalent State or Territory legislation. If action has been taken under the State or Territory legislation, the person is statute barred from making a complaint under the HREOC Act.⁶⁵

⁶⁰ (1985) 159 CLR 70, 92-93. See also 121 (Brennan J); 146 (Deane J).

⁶¹ (1983) 153 CLR 280.

⁶² *Racial Discrimination Amendment Act 1983* (Cth). Similar provisions exist in the SDA (ss 10(3), 11(3)), the DDA (s 13(3)) and the ADA (s 12(3)).

⁶³ (1984) 158 CLR 447.

⁶⁴ (1984) 158 CLR 447, 455-458 (Gibbs CJ), 460-463 (Murphy J), 478 (Deane J), 475 (Brennan J).

⁶⁵ Section 6A(2). Provisions to this effect are also found in the SDA (ss 10(4), 11(4)), the DDA (s 13(4)), and the ADA (s 12(4)).

3.1.4 Constitutionality

(a) The RDA is supported by the external affairs power

The constitutional validity of the RDA was considered in *Koowarta v Bjelke Petersen*.⁶⁶ In this case, the Queensland Government refused to approve a transfer of Crown lease to the Aboriginal Land Fund Commission for the benefit of John Koowarta and other members of the Winychanam Group. When Mr Koowarta brought proceedings alleging that the Queensland Government's refusal to transfer the lease breached s 9 and s 12 of the RDA, the Queensland Government challenged the constitutional validity of the RDA.

The High Court upheld the validity of s 9 and s 12 of the RDA as an exercise of the Commonwealth's power to make laws with respect to external affairs under s 51 (xxix) of the *Constitution*. The High Court held that the RDA was enacted to give effect to Australia's international obligations under the ICERD.⁶⁷ The majority rejected the submission that the RDA was supported by s 51 (xxvi) of the *Constitution* which gives the Commonwealth the power to make laws with respect to the people of any race for whom it is deemed necessary to make special laws, on the basis that ss 9 and 12 applied equally to all persons and were not a special law for the people of any one race.⁶⁸

(b) Part IIA of the RDA does not infringe the implied right of freedom of political communication

The case of *Hobart Hebrew Congregation v Scully*⁶⁹ considered whether Part IIA of the RDA (prohibiting offensive behaviour based on racial hatred) infringed upon the implied constitutional right of freedom of political communication. Commissioner Cavanough referred to *Lange v Australian Broadcasting Corporation*⁷⁰ and *Levy v Victoria*⁷¹ and found that while the restrictions imposed by s 18C(1) of the RDA might, in certain circumstances, burden freedom of communication about government and political matters, the exemptions available in s 18D meant that Part IIA of the RDA was 'reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of government prescribed under the Constitution'.⁷² The legitimate end included the fulfilment of Australia's international obligations under ICERD, in particular article 4.

In *Toben v Jones*,⁷³ the appellant argued that to interpret s 18C of the RDA as extending beyond the expression of racial hatred would lead to that section being outside the scope of the external affairs power in s 51(xxix) of the *Constitution*, as article 4 of ICERD specifically refers to discrimination because of 'racial hatred'.

⁶⁶ (1982) 153 CLR 168.

⁶⁷ (1982) 153 CLR 168, 211-221 (Stephen J), 222-235 (Mason J), 237-242 (Murphy J), 253-261 (Brennan J).

⁶⁸ (1982) 153 CLR 168, 210-211 (Stephen J), 186-187 (Gibbs CJ), 245 (Wilson J), 261-262 (Brennan J). The scope of the 'race power' in s 51(xxvi) of the *Constitution* was considered by the High Court in *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

⁶⁹ Unreported, HREOC, Commissioner Cavanough QC, 21 September 2000 (extract at (2000) EOC 93-109).

⁷⁰ (1997) 189 CLR 520.

⁷¹ (1997) 189 CLR 579.

⁷² Unreported, HREOC, Commissioner Cavanough QC, 21 September 2000, 12-14 (extract at (2000) EOC 93-109).

⁷³ (2003) 129 FCR 515.

The Full Federal Court held that s 18C of the RDA was constitutionally valid (and did not need to be read down), as it was reasonably capable of being considered appropriate and adapted to implement the obligations under ICERD. The failure to fully implement ICERD (which also requires making racial hatred a criminal offence) did not render Part IIA substantially inconsistent with that convention. It was noted that Part IIA of the RDA was directed not only at article 4 of ICERD but also at the other provisions of ICERD and the *International Covenant on Civil and Political Rights*, which dealt with the elimination of racial discrimination in all its forms.⁷⁴

3.2 Racial Discrimination Defined

3.2.1 Grounds of discrimination

The RDA makes unlawful discrimination ‘based on race, colour, descent or national or ethnic origin’.⁷⁵ While these grounds of discrimination are not defined in the RDA, their meaning has been considered in a number of cases.

(a) Race

Courts have generally taken the view that ‘race’ as described in anti-discrimination legislation is a broad term and should be understood in the popular sense rather than as a term of art.⁷⁶ In *King-Ansell v Police*⁷⁷ (‘*King-Ansell*’) the New Zealand Court of Appeal rejected a biological test of race which distinguished people in terms of genetic inheritance and stated:

The ultimate genetic ancestry of any New Zealander is not susceptible to legal proof. Race is clearly used in its popular meaning. So are the other words. The real test is whether the individuals or the group regard themselves and are regarded by others in the community as having a particular historical identity in terms of their colour or their racial, national or ethnic origins. That must be based on a belief shared by members of the group.⁷⁸

The meaning of ‘race’ was considered in the context of disputes between Aboriginal people in *Williams v Tandanya Cultural Centre*.⁷⁹ Driver FM held:

The word ‘race’ is a broad term. Also, in addition to race, the RDA proscribes discrimination based upon national or ethnic origins or descent.

It will be apparent to anyone with even a rudimentary understanding of Aboriginal culture and history that the Australian Aborigines are not a single people but a great number of peoples who are collectively referred to as Aborigines. This is clear from language and other cultural distinctions between Aboriginal peoples. It is, in my view, clear that the RDA provides relief, not simply against discrimination against ‘Aboriginals’ but also discrimination against particular Aboriginal peoples. There is no dispute that the applicant is an Aboriginal person. There was some dispute within the Kaurua community as to the applicant’s links to that community. The alleged acts of discrimination by the first, second, fifth (and,

⁷⁴ (2003) 129 FCR 515, 524-525 [17]-[21] (Carr J), 528 [50] (Kiefel J), 534- 551[83]-[144] (Allsop J).

⁷⁵ The grounds of unlawful discrimination in the sections of the RDA that prohibit discrimination in specific areas of public life, are ‘race, colour or national or ethnic origin’, omitting the ground of ‘descent’: see ss 10, 11, 12, 13, 14, 15 and 18C.

⁷⁶ *Ealing London Borough Council v Race Relations Board* [1972] AC 342, 362 (Lord Simon).

⁷⁷ [1979] 2 NZLR 531.

⁷⁸ [1979] 2 NZLR 531, 542 (Richardson J).

⁷⁹ (2001) 163 FLR 203.

possibly third) respondents are all related in one way or another to that dispute and the alleged exclusion and lack of consultation are all linked by the applicant to his particular cultural associations within the Aboriginal community. In principle, I am satisfied that these acts, if found to be discriminatory, could constitute discrimination against either s 9 or s 13 of the RDA.⁸⁰

In *Carr v Boree Aboriginal Corporation*,⁸¹ Raphael FM found that the first respondent had unlawfully discriminated against the applicant in her employment and had dismissed her for reasons ‘which were to do with her race or non Aboriginality’.⁸² His Honour concluded that ‘the provisions of the RDA apply to all Australians’.⁸³

(b) Ethnic origin

Religious discrimination is not, per se, made unlawful by the RDA.⁸⁴ However the term ‘ethnic origin’ has been interpreted broadly in a number of jurisdictions to include Jewish and Sikh people. The Court in *King-Ansell* held that Jewish people in New Zealand formed a group with common ethnic origins within the meaning of the *Race Relations Act 1971* (NZ). Richardson J stated that:

a group is identifiable in terms of ethnic origins if it is a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from what in biological terms is a common racial stock. It is that combination which gives them an historically determined social identity in their own eyes and in the eyes of those outside the group. They have a distinct social identity based not simply on group cohesion and solidarity but also on their belief as to their historical antecedents.⁸⁵

Similarly, the House of Lords held in *Mandla v Dowell Lee*⁸⁶ that for a group (in that instance, Sikh people) to constitute an ethnic group for the purposes of the legislation in question, it had to regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics.

Their Lordships indicated that the following characteristics are essential:

- a shared history, of which the group was conscious as distinguishing it from other groups, and the memory of which it keeps alive; and
- a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance.

⁸⁰ (2001) 163 FLR 203, 209 [21].

⁸¹ [2003] FMCA 408.

⁸² [2003] FMCA 408, [9]. The decision does not disclose what the race of the applicant is, other than being ‘non-Aboriginal’.

⁸³ [2003] FMCA 408, [14]. Note, however the discussion at 3.4.3 below of the decision in *McLeod v Power* (2003) 173 FLR 31 in the context of the racial hatred provisions in which Brown FM stated that the term ‘white’ did not itself encompass a specific race or national or ethnic group, being too wide a term, 43 [55]. His Honour did, however, find that the word ‘white’ was used in that case because of the ‘race, colour or national or ethnic origins’ of the applicant, 44 [62].

⁸⁴ Note, however, that complaints about religious discrimination in employment may be made to HREOC under the ILO 111 discrimination provisions of the HREOC Act, although this does not give rise to enforceable remedies: see 1.2.2. HREOC has recommended that a federal law be introduced making unlawful discrimination on the ground of religion or belief and vilification on the ground of religion or belief: Human Rights and Equal Opportunity Commission, *Isma – Listen: National consultations on eliminating prejudice against Arab and Muslim Australians* (2004), 129.

⁸⁵ [1979] 2 NZLR 531, 543.

⁸⁶ [1983] 2 AC 548.

Their Lordships further held that the following characteristics will be relevant, but not essential, to a finding that a group constitutes an ‘ethnic group’:

- a common geographical origin or descent from a small number of common ancestors;
- a common language, not necessarily peculiar to the group;
- a common literature peculiar to the group;
- a common religion different from that of neighbouring groups or the general community surrounding it; and
- being a minority or an oppressed or a dominant group within a larger community.⁸⁷

In *Miller v Wertheim*,⁸⁸ the Full Federal Court dismissed a claim of discrimination under the RDA in relation to a speech made by the respondent (himself Jewish) which had criticised members of the Orthodox Jewish community for allegedly divisive activities. The Full Court stated that it could be ‘readily accepted that Jewish people in Australia can comprise a group of people with an “ethnic origin”’⁸⁹ for the purposes of the RDA, and cited with approval *King-Ansell*. However, in the present case, the members of the group

were criticised in the speech because of their allegedly divisive and destructive activities, not because the group or its members were of the Jewish race, of Jewish ethnicity or because they were persons who adhered to the practices and beliefs of orthodox Judaism.⁹⁰

The Court did not discuss further whether or not persons ‘adhering to the practices and beliefs of orthodox Judaism’ were a recognisable group for the purposes of the RDA.

There has been no jurisprudence concerning whether or not Muslim people constitute a group with a common ‘ethnic origin’ under the RDA. It is noted, however, that the Explanatory Memorandum to the *Racial Hatred Bill 1994* (Cth) (which became the *Racial Hatred Act 1995* (Cth) and introduced Part IIA of the RDA which prohibits offensive behaviour based on racial hatred) suggests that Muslims are included in the expressions ‘race’ and/or ‘ethnic origin’. It states:

The term ‘ethnic origin’ has been broadly interpreted in comparable overseas common law jurisdictions (cf *King-Ansell v Police* [1979] 2 NZLR per Richardson J at p.531 and *Mandla v Dowell Lee* [1983] 2 AC 548 (HL) per Lord Fraser at p.562). It is intended that Australian courts would follow the prevailing definition of ‘ethnic origin’ as set out in *King-Ansell*. The definition of an ethnic group formulated by the Court in *King-Ansell* involves consideration of one or more of characteristics such as a shared history, separate cultural tradition, common geographical origin or descent from common ancestors, a common language (not necessarily peculiar to the group), a common literature peculiar to the group, or a religion different from that of neighbouring groups or the general community

⁸⁷ [1983] 2 AC 548, 562.

⁸⁸ [2002] FCAFC 156.

⁸⁹ [2002] FCAFC 156, [14]. See also *Jones v Scully* (2002) 120 FCR 243, 271-273 [110]-[113], *Jones v Toben* [2002] FCA 1150, [101], *Jeremy Jones v Bible Believers Church* [2007] FCA 55, [21] and *Silberberg v Builders Collective of Australia Inc* [2007] FCA 1512, [22] where it was also found, in the context of complaints of racial hatred under Part IIA of the RDA, that Jews in Australia are a group of people with a common ‘ethnic origin’ for the purposes of the RDA.

⁹⁰ [2002] FCAFC 156, [13].

surrounding the group. This would provide the broadest basis for protection of peoples such as Sikhs, Jews and Muslims.

The term 'race' would include ideas of ethnicity so ensuring that many people of, for example, Jewish origin would be covered. While that term connotes the idea of a common descent, it is not necessarily limited to one nationality and would therefore extend also to other groups of people such as Muslims.⁹¹

Cases that have considered this issue in other jurisdictions have found that Muslims do not constitute a group with a common ethnic origin because while Muslims professed a common belief system, the Muslim faith was widespread covering many nations, colours and languages.⁹²

(c) National origin

The term 'national origin' has been interpreted by the courts as being distinct from nationality or citizenship. 'National origin' has been characterised as a status or attribute that is fixed at the time of birth whereas nationality and citizenship have been described as a 'transient status', capable of change through a person's lifetime. Acts of discrimination based on nationality or citizenship are not prohibited by the RDA.

In *Australian Medical Council v Wilson*⁹³ ('Siddiqui') Sackville J held 'national origin' 'does not simply mean citizenship'.⁹⁴ His Honour cited with approval Lord Cross in *Ealing London Borough Council v Race Relations Board*,⁹⁵ a case which had considered the materially similar *Race Relations Act 1968* (UK):

There is no definition of 'national origins' in the Act and one must interpret the phrase as best one can. To me it suggests a connection subsisting at the time of birth between an individual and one or more groups of people who can be described as 'a nation' – whether or not they also constitute a sovereign state.

The connection will normally arise because the parents or one of the parents of the individual in question are or is identified by descent with the nation in question, but it may also sometimes arise because the parents have made their home among the people in question.

...

Of course, in most cases a man has only a single 'national origin' which coincides with his nationality at birth in the legal sense and again in most cases his nationality remains unchanged throughout his life. But 'national origins' and 'nationality' in the legal sense are two quite different conceptions and they may well not coincide or continue to coincide.⁹⁶

Sackville J stated that this view was powerfully supported by article 1(2) of ICERD, which specifically provides that it is not to apply to distinctions, exclusions, restrictions or preferences made by a State Party between citizens and non-citizens.⁹⁷

⁹¹ Explanatory Memorandum, *Racial Hatred Bill 1994* (Cth), 2-3.

⁹² See, for example, the UK decisions of *Tariq v Young* (Unreported, Employment Appeals Tribunal, 24773/88) and *Nyazi v Rymans Ltd* (Unreported, Employment Appeals Tribunal, 6/88). See also a discussion of the term 'ethno-religious' (a ground of discrimination in the *Anti-Discrimination Act 1977* (NSW)) and the Muslim faith in *Khan v Commissioner, Department of Corrective Services* [2002] NSWADT 131.

⁹³ (1996) 68 FCR 46.

⁹⁴ (1996) 68 FCR 46, 75. Note that Black CJ and Heerey J did not specifically consider the meaning of 'national origin'.

⁹⁵ [1972] AC 342.

⁹⁶ [1972] AC 342, 365 (Lord Cross), cited in *Australian Medical Council v Wilson* (1996) 68 FCR 46, 75.

⁹⁷ (1996) 68 FCR 46, 75.

The Full Federal Court in *Macabenta v Minister for Immigration & Multicultural Affairs*⁹⁸ (*Macabenta*) followed *Siddiqui* and rejected the submission that ‘national origin’ could be equated with ‘nationality’ for the purposes of ss 9 and 10 of the RDA.⁹⁹ The Full Court held that the phrase ‘race, colour or national or ethnic origin’ in s 10 of the RDA should have the same meaning in the RDA as it has in ICERD, under which the ‘core concern is racial discrimination’. The words ‘colour, or national or ethnic origin’ were intended to give ‘added content and meaning to the word “race”’ and ‘capture the somewhat elusive concept of race’.¹⁰⁰ The Court continued:

In our opinion, the description ‘ethnic origin’ lends itself readily to factual inquiries of the type described by Lord Fraser in *Mandla v Lee* [at 562]. For example, is there a long shared history?, is there either a common geographical origin or descent?, is there a common language?, is there a common literature?, is there a common religion or a depressed minority? One can easily appreciate that the question of ethnic origin is a matter to be resolved by those types of factual assessments. Ethnic origins may once have been identifiable by reference to national borders, but that time ended hundreds or perhaps thousands of years ago. To some extent the same can be said of national origins as human mobility gained pace. It may well also be appropriate, given the purpose of the Convention, to embark on a factual enquiry when assessing whether the indicia of a law include national origin as a discrimen. Ethnic origins may have become blurred over time while national origins may still be relatively clear. That further reference point of national origin may be needed in order to identify a racially-discriminatory law. National origin may in some cases be resolved by a person’s place of birth. In other cases it may be necessary to have regard to the national origin of a parent or each parent or other ancestors either in conjunction with the person’s place of birth or disregarding that factor. If by reference to matters of national origin one can expose a racially-discriminatory law, then the Convention will have served its purpose. However, no Convention purpose is in any manner frustrated by drawing a distinction between national origin and nationality, the latter being a purely legal status (and a transient one at that).¹⁰¹

In *Commonwealth v McEvoy*,¹⁰² von Doussa J applied *Macabenta* in finding that the meaning of ‘national origin’ should be confined to characteristics determined at the time of birth – ‘either by the place of birth or by the national origin of a parent or parents, or a combination of some of those factors’.¹⁰³ In that case, Mr Stamatov, who was of Bulgarian nationality and had lived and worked in Bulgaria, was required to satisfy security checks for a position with the Department of Defence. Bulgaria was a country where security checks could not be meaningfully conducted. This meant that Mr Stamatov was found to be ‘uncheckable’ and therefore refused employment. His Honour held:

The evidence ... was clear that the elements of checkability which caused Mr Stamatov’s background to be uncheckable concerned checks with security

⁹⁸ (1998) 90 FCR 202.

⁹⁹ (1998) 90 FCR 202, 210-211. See also *Ebber v Human Rights & Equal Opportunity Commission* (1995) 129 ALR 455.

¹⁰⁰ (1998) 90 FCR 202, 209-210. A similar approach was taken to the word ‘colour’ in s 18C of the RDA by Brown FM in *McLeod v Power* (2003) 173 FLR 31, 43 [56], although his Honour did not mention the decision in *Macabenta v Minister for Immigration & Multicultural Affairs* (1998) 90 FCR 202: ‘The meaning of the word “colour” in section 18C is to be derived from its statutory context: *Project Blue Sky v ABA* (1998) 194 CLR 355, 368, 381. In my view it is to be interpreted in the context of the words that surround it in section 18C and the whole of the RDA itself’.

¹⁰¹ (1998) 90 FCR 202, 209-211.

¹⁰² (1999) 94 FCR 341.

¹⁰³ (1999) 94 FCR 341, 352 [34].

authorities in the place where the applicant resided. The checks were concerned with the activities of the applicant and were unrelated to the national origins within the meaning of that expression as construed in *Macabenta*. The fact that Mr Stamatov had been born in Bulgaria of Bulgarian parents was an irrelevant coincidence. A person of any other national origin that had lived his or her adult life in Bulgaria, and had followed the educational and employment pursuits of Mr Stamatov would also have a background that was uncheckable.¹⁰⁴

The same approach was taken by Merkel J in *De Silva v Ruddock (in his capacity as Minister for Immigration & Multicultural Affairs)*:¹⁰⁵

Although there are obvious difficulties in any precise definition of ‘national origin’ as that term is used in the [RDA], in my view it does not mean current nationality or nationality at a particular date which has no connection with the national *origin* of the persons concerned.¹⁰⁶ (emphasis in original)

Merkel J’s decision was upheld on appeal¹⁰⁷ and was followed by Raphael FM in *AB v New South Wales Minister for Education & Training*.¹⁰⁸ In that case, an interim injunction was sought against a decision to deny enrolment in a New South Wales Government school to a child who was not a permanent resident of Australia. One ground upon which Raphael FM rejected the application was that the argument of discrimination was unlikely to succeed on the basis of the authorities that established the distinction between ‘national origin’ and ‘nationality’.¹⁰⁹

In *AB v New South Wales*¹¹⁰ Driver FM dealt with the substantive issues that had first been litigated before Raphael FM. Driver FM held that the condition or requirement imposed on the applicant that he be an Australian citizen or a permanent resident in order to pursue study was not reasonable in the circumstances. However, because the condition or requirement was one pertaining to the ‘nationality’ or ‘citizenship’ not ‘national origin’ it was not discriminatory. In reaching this conclusion, Driver FM noted that ‘national origin’ had the meaning given to it by the Full Federal Court in *Macabenta* (see further below 3.2.3(e)).¹¹¹

3.2.2 Direct discrimination under the RDA

(a) Section 9(1)

Section 9(1) prohibits what is generally referred to as ‘direct’ race discrimination:

- (1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

¹⁰⁴ (1999) 94 FCR 341, 352 [35].

¹⁰⁵ [1998] FCA 95.

¹⁰⁶ (1999) 94 FCR 341, [18].

¹⁰⁷ *De Silva v Minister for Immigration* (1998) 89 FCR 502.

¹⁰⁸ [2003] FMCA 16.

¹⁰⁹ [2003] FMCA 16, [13]-[14]. It is noted that complaints about discrimination in employment on the basis of nationality may be made to HREOC under the ILO 111 discrimination provisions of the HREOC Act, although this does not give rise to enforceable remedies: see 1.2.2.

¹¹⁰ (2005) 194 FLR 156.

¹¹¹ (2005) 194 FLR 156, 174 [52].

This broad prohibition is based on the definition of ‘racial discrimination’ contained in article 1(1) of ICERD.¹¹²

To establish a breach of s 9(1), a complainant must establish the following elements:

- a person did an act;¹¹³
- the act involved a distinction, exclusion, restriction or preference;¹¹⁴
- the act was based on race, colour, descent or national or ethnic origin (see 3.2.2(a)(iii) below); and
- the act had the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life (see 3.2.4 below).

(i) *Proving the elements of s 9(1)*

The decision of the Full Federal Court in *Baird v Queensland*,¹¹⁵ emphasises a number of aspects to the correct approach to proving the elements of s 9(1) of the RDA.¹¹⁶ This case concerned the underpayment of wages to Aboriginal people living in the Hope Vale and Wujal Wujal communities in Queensland. Those communities were managed, in the relevant period, by the Lutheran Church (‘the Church’) which was funded by the Queensland government (‘the Government’) for this purpose.

It was alleged that the payment of under-award wages was racially discriminatory, contrary to the RDA. The claim covered the period from 1975 until 1986 (after which time Aboriginal people living on Government and church-run communities were paid award wages). The applicants argued that the Government was responsible for the discrimination either as the employer through the agency of the Church, contrary to s 15 of the RDA and/or through the act of paying grants to the Church which were calculated to include a component for wages to be paid at under-award rates, contrary to s 9(1) of the RDA. Significantly, the Church was not a respondent to the case.

At first instance,¹¹⁷ Dowsett J found that the claim under s 15 of the RDA failed because the Church, not the Government, employed the applicants and it did so in its own right. His Honour also rejected the claim under s 9(1) because there was no basis for asserting that the calculation of the grants involved a discriminatory element, nor was there a basis for finding that the payment of grants had the ‘purpose or effect of depriving the applicants of their proper pay rates’.¹¹⁸

¹¹² Article 1(1) of ICERD provides: ‘In this Convention, the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life’.

¹¹³ ‘Person’ includes ‘a body politic or corporate as well as an individual’: *Acts Interpretation Act 1901* (Cth) s 22(1)(a).

¹¹⁴ In the absence of any significant judicial consideration, it seems that these terms should be given their ordinary meaning: for example, this would appear to be the approach of Sackville J in *Australian Medical Council v Wilson* (1996) 68 FCR 46.

¹¹⁵ (2006) 156 FCR 451.

¹¹⁶ For a discussion of this case see Jonathon Hunyor, ‘Landmark decision in Aboriginal wages case’ (2007) 45 (1) *Law Society Journal* 46.

¹¹⁷ *Baird v Queensland (No 1)* (2005) 224 ALR 541.

¹¹⁸ (2005) 224 ALR 541, 576 [142].

On appeal, the decision of Dowsett J was overturned.¹¹⁹ Allsop J (with whom Spender and Edmonds JJ agreed) found that Dowsett J had erred in requiring the appellants to firstly, demonstrate an obligation for the Government to make payments to the Church and secondly, provide a ‘real life comparator’ or comparison against which to assess the ‘discriminatory element’.

The Full Court held that neither aspect is a necessary element of s 9(1). Allsop J stated that the purpose of ICERD and the RDA is the ‘elimination of racial discrimination in **all** its forms and manifestations – not merely as manifested by people who are obliged to act in a particular way’, and that to achieve this broad purpose ‘requires broad and elastic terminology’.¹²⁰ In particular, Allsop J noted that

it is important to treat the terms of s 9(1) as comprising a composite group of concepts directed to the nature of the act in question, what the act involved, whether the act involved a distinction etc based on race and whether it had the relevant purpose or effect...¹²¹

Allsop J also noted that s 9(1) does not require a direct comparison to be available to demonstrate discrimination, observing that ‘[t]hose suffering the disadvantage of discrimination may find themselves in circumstances quite unlike others more fortunate than they’.¹²²

The Full Court found that, on the facts as determined by Dowsett J, a breach of s 9(1) was made out. The acts of calculating and paying the grants by the Government clearly involved a distinction between award wages and below-award wages. This distinction was *based on* race because it was made by reference to the Aboriginality of the persons on reserves who were to be paid out of those grants. The Full Court also concluded that the act of the Government involving the distinction based on race could be seen to have ‘a causal effect on the impairment of the right of the appellants as recognised by Article 5 of the Convention to equal pay for equal work’.¹²³

(ii) Racist remark as an act of discrimination

In *Qantas Airways Ltd v Gama*,¹²⁴ the Full Federal Court accepted that a racist remark may, depending on the circumstances, be sufficient to constitute an act of discrimination within the scope of s 9 of the RDA.

At first instance,¹²⁵ Raphael FM accepted that the making of remarks to the applicant in the workplace that he looked like a ‘Bombay taxi driver’ and walked up stairs ‘like a monkey’ denigrated him on the basis of his race and therefore amounted to acts of race discrimination under s 9.

On appeal, Qantas argued that the racist remarks were not sufficient of themselves to constitute an act of discrimination. Qantas submitted that as Raphael FM had rejected the applicant’s other claims of race discrimination in employment relating to such matters as the denial of promotions and training opportunities, and there was no

¹¹⁹(2006) 156 FCR 451. HREOC was granted leave to intervene in the appeal. HREOC’s submissions are available at <http://www.humanrights.gov.au/legal/submissions_court/intervention/baird.html>.

¹²⁰(2006) 156 FCR 451, 468 [62] (emphasis in original).

¹²¹(2006) 156 FCR 451, 468 [61].

¹²²(2006) 156 FCR 451, 469 [63].

¹²³(2006) 156 FCR 451, 471-472 [74] (Allsop J).

¹²⁴[2008] FCAFC 69. HREOC was granted leave to appear as intervener in the appeal and its submissions are available at <http://www.humanrights.gov.au/legal/submissions_court/intervention/qantas_v_gama.html> and <http://www.humanrights.gov.au/legal/submissions_court/intervention/gama.html>.

¹²⁵*Gama v Qantas Airways Ltd (No 2)* [2006] FMCA 1767.

evidence of systemic racial bullying or harassment, there was no nexus between the racist remarks and any adverse impact on the conditions of his employment.¹²⁶

The Full Federal Court unanimously rejected Qantas' submission on this point.¹²⁷ It held that the making of a remark was an 'act' for the purposes of s 9.¹²⁸ It also held that, in the circumstances of the case, the act involved a distinction based on race, noting:

It may be that the remark involves a distinction because it is made to a particular person and not to others. The remark may convey no express or implicit reference to the person's race, colour, descent or national or ethnic origin. Nevertheless, a linkage may be drawn between the distinction effected by the remark and the person's race or other relevant characteristic by reason of the circumstances in which the remark was made or the fact that it was part of a pattern of remarks directed to that person and not to others of a different race or relevant characteristic. Where the remark, critical of one person and not others, expressly or by implication links the criticism or denigration to that person's race then that linkage establishes both the distinction and its basis upon race. That was the present case.¹²⁹

In relation to the final element of s 9, impairment of a person's enjoyment on an equal footing of any human right or fundamental freedom, the Court held:

The denigration of an employee on the grounds of that person's race or other relevant attribute can properly be found to have the effect of impairing that person's enjoyment of his or her right to work or to just and favourable conditions of work.¹³⁰

And further:

Undoubtedly remarks which are calculated to humiliate or demean an employee by reference to race, colour, descent or national or ethnic origin, are capable of having a very damaging impact on that person's perception of how he or she is regarded by fellow employees and his or her superiors. They may even affect their sense of self worth and thereby appreciably disadvantage them in their conditions of work. Much will depend on the nature and circumstances of the remark.¹³¹

The Court accepted that the finding at first instance that the relevant remarks adversely affected the applicant's conditions of employment was open to Raphael FM on the facts.¹³²

(iii) 'Based on' and intention to discriminate

Unlawful discrimination as defined by s 9(1) of the RDA requires that a 'distinction, exclusion, restriction or preference' be 'based on' race or other of the related grounds.

Section 18 of the RDA provides that where an act is done for two or more reasons, and one of the reasons is race (or other ground), the act will be taken to be done by reason of race (or other ground), whether or not this is the dominant or even a substantial reason for doing the act. It is sufficient if race or another ground is simply one of the reasons for doing an unlawful act.

¹²⁶ [2008] FCAFC 69, [73].

¹²⁷ [2008] FCAFC 69, [76] (French and Jacobson JJ, with whom Branson J generally agreed, [122]).

¹²⁸ [2008] FCAFC 69, [76].

¹²⁹ [2008] FCAFC 69, [76].

¹³⁰ [2008] FCAFC 69, [77]. For a further discussion of this element of s 9(1), see 3.2.4 below.

¹³¹ [2008] FCAFC 69, [78].

¹³² [2008] FCAFC 69, [78].

The meaning of ‘based on’ in s 9(1) was considered at length by Weinberg J in *Macedonian Teachers’ Association of Victoria Inc v Human Rights & Equal Opportunity Commission*¹³³ (‘*Macedonian Teachers*’). In this case, his Honour suggested that the expression ‘based on’ in s 9(1) of the RDA could be distinguished from other expressions used in anti-discrimination legislation such as ‘by reason of’ or ‘on the ground of’ which had been interpreted elsewhere to require some sort of causal connection.¹³⁴

After considering Australian and international authorities,¹³⁵ Weinberg J found that the relevant test imputed by the words ‘based on’ was one of ‘sufficient connection’ rather than ‘causal nexus’.¹³⁶ His Honour held that while there must be a ‘close relationship between the designated characteristic and the impugned conduct’, to require a relationship of cause and effect ‘would be likely to significantly diminish the scope for protection which is afforded by that subsection’.¹³⁷

The approach of Weinberg to the meaning of ‘based on’ was endorsed by the Full Federal Court in *Bropho v Western Australia*.¹³⁸ This was an appeal against the decision of Nicholson J¹³⁹ to dismiss claims by a member of the Swan Valley Nyungah Community Aboriginal Corporation that the *Reserves (Reserve 43131) Act 2003* (WA) (‘Reserves Act’) and actions taken by an Administrator under that Act breached ss 9, 10, and 12 of the RDA.

The Full Federal Court unanimously dismissed the appeal. However, the appeal decision identified certain errors in the approach of Nicholson J to the operation of ss 9 and 10 of the RDA. In particular, the Court noted that Nicholson J may have dealt with the various allegations of discrimination on the basis that there was no material distinction between the expression ‘by reason of’ in ss 10 and 12 and ‘based on’ in s 9.¹⁴⁰

The Full Federal Court said there was no reason to doubt the correctness of the following conclusions of Weinberg J in *Macedonian Teachers*:

There appears to me to be no authority which binds me to hold that the phrase ‘based on’ in s 9(1) of the Act is to be understood as synonymous with the other expressions typically used in anti-discrimination legislation such as, ‘by reason of’, or ‘on the ground of’.

What is established by the authorities is that anti-discrimination legislation should be regarded as beneficial and remedial legislation. It should, therefore, be given a liberal construction. I am conscious of the fact that ‘the task remains one of statutory construction’ and a court ‘is not at liberty’ to give such legislation ‘a construction that is unreasonable or unnatural’ – see *IW v The City of Perth* (1997)

¹³³ (1998) 91 FCR 8.

¹³⁴ (1998) 91 FCR 8, 29.

¹³⁵ (1998) 91 FCR 8, 24-41.

¹³⁶ (1998) 91 FCR 8, 33.

¹³⁷ (1998) 91 FCR 8, 33. The Full Federal Court on appeal indicated their agreement with Weinberg J’s construction of s 9(1): *Victoria v Macedonian Teachers’ Association of Victoria Inc* (1999) 91 FCR 47. So too did Drummond J in *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615. His Honour there stated that although s 9(1) ‘does not require proof of a subjective intention to discriminate on the grounds of race (although that would suffice), there must be some connection between the act and considerations of race’, [39].

¹³⁸ [2008] FCAFC 100. HREOC was granted leave to appear as intervener and its submissions are available at <http://www.humanrights.gov.au/legal/submissions_court/intervention/bella_bropho.html.

¹³⁹ *Bropho v Western Australia* [2007] FCA 519.

¹⁴⁰ *Bropho v Western Australia* [2008] FCAFC 100, [66].

191 CLR 1 at 12 per Brennan CJ and McHugh J. See also *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78 at 88 per Davies J. There is, however, nothing ‘unreasonable or unnatural’, in my view, in treating as encompassed within the phrase ‘based on’ the meaning of ‘by reference to’, rather than the more limited meaning of ‘by reason of’.¹⁴¹

Despite Nicholson J’s apparent failure to give the expression ‘based on’ in s 9(1) its broader meaning, his Honour’s decision to dismiss the claims under ss 9 and 12 was upheld.¹⁴² The Full Federal Court said that what was important was that his Honour had rejected the contention that the Administrator had acted to exclude the appellant (and others) from the reserve ‘by reason of’ race. It was therefore

not a large step to say that, even on the broader meaning of the expression ‘based on’ discussed by Weinberg J in *Macedonian Teachers’ Association*, the act of the administrator of excluding the appellant was not taken by reference to the appellant’s race. It was taken by reference to her (and others) as a member of a dysfunctional community in which the young had been, and continued to be, at risk of serious harm.¹⁴³

In *Macedonian Teachers* Weinberg J also stated that s 9(1) ‘should not be construed in such a way as to confine its proscription of racial discrimination to circumstances where there is an element of the improper motive [in the act]’.¹⁴⁴ Weinberg J’s conclusion that s 9(1) does not require motivation or intention to discriminate followed the decision of *Australian Medical Council v Wilson*¹⁴⁵ where Sackville J reviewed the Australian authorities in relation to other anti-discrimination statutes¹⁴⁶ and found that ‘the preponderance of opinion favours the view that s 9(1) [of the RDA] does not require an intention or motive to engage in what can be described as discriminatory conduct’.¹⁴⁷

In *House v Queanbeyan Community Radio Station*¹⁴⁸ Neville FM found that the decision of the respondent radio station to refuse the membership applications of two Aboriginal women contravened s 9(1) of the RDA. The decision to refuse the membership applications was made at a meeting of the board of the radio station. The original draft of minutes of that meeting stated

Wayne said he didn’t want any of them as members saying that they wanted to take over the station and the aboriginals were fighting on street corners and he didn’t want them. Ron moved that all the applications be rejected. Ron said we would have to good reason. Brian asked if any memberships had been refused in the past and Wayne said there had been no refusals.

¹⁴¹ *Macedonian Teachers*, 29-30 cited in *Bropho v Western Australia* [2008] FCAFC 100, [68].

¹⁴² *Bropho v Western Australia* [2008] FCAFC 100, [71]-[72].

¹⁴³ [2008] FCAFC 100, [71].

¹⁴⁴ (1998) 91 FCR 8, 39.

¹⁴⁵ (1996) 68 FCR 46.

¹⁴⁶ *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165, considering the *Anti-Discrimination Act 1977* (NSW); *Waters v Public Transport Corporation* (1991) 173 CLR 349, considering the *Equal Opportunity Act 1984* (Vic).

¹⁴⁷ (1996) 68 FCR 46, 74. See also *Bropho v Western Australia* [2007] FCA 519 where Nicholson J at [447] noted a breach of s 9 can be found ‘regardless of the motive or intent of the act’. This aspect of Nicholson J’s reasoning was cited, without demur, by the Full Federal Court on appeal: *Bropho v Western Australia* [2008] FCAFC 100, [67].

¹⁴⁸ [2008] FMCA 897.

The minutes were subsequently amended to remove these remarks. The two women were informed their applications were refused because they had applied for family membership but they lived at different addresses.

Neville FM found that the statements made at the Board meeting contravened s 9(1) of the RDA. By virtue of s 18A of the RDA the respondent radio station was found to be vicariously liable for the acts of its board members. His Honour added that even if the membership applications had been rejected because they failed to comply with 'the somewhat doubtful "family membership" requirement of the radio station' that was 'but one reason for rejection'. Therefore

Having found that statements contrary to s 9(1) of the Act had been made at the Board meeting in July 2006, whether or not the family membership consideration was relevant, by virtue of s 18 of the Act, the racially discriminatory statements are taken to be the relevant reason.¹⁴⁹

His Honour observed that while he did not consider that there was 'any malice or intent to be racially discriminatory by any of the Board members of the respondent radio station towards the applicants, the jurisprudence in relation to the RDA clearly states that 'intention is not a pre-requisite or requirement for an act to be rendered or found to be unlawful for the purposes of s 9(1)'.¹⁵⁰

(b) Prohibitions in specific areas of public life

In addition to s 9(1), ss 11-15 of the RDA prohibit discrimination in specific areas of public life 'by reason of the first person's race, colour or national or ethnic origin'.¹⁵¹

In *Purvis v New South Wales (Department of Education & Training)*¹⁵² the High Court considered the expression 'because of' in the DDA.¹⁵³ It would seem settled as a result of that decision that the appropriate approach to expressions such as 'by reason of', 'on the ground of' and 'because of' is to question the 'true basis' or 'real reason' for the act of the alleged discriminator.¹⁵⁴

In *Trindall v NSW Commissioner of Police*,¹⁵⁵ the applicant, a man of 'mixed Aboriginal/African race', asserted that his employment was subject to unreasonable restrictions by reason of his inherited condition known as 'sickle cell trait'. In addition to a claim of disability discrimination, the applicant claimed that sickle cell trait particularly affects black Africans and therefore the employment condition constituted a restriction based on race, which impaired his right to work.¹⁵⁶ Driver FM rejected the allegation of racial discrimination contrary to s 9(1) and s 15(1)(b) of the RDA, stating:

While it is true that the sickle cell trait is most common among black Africans or persons of African descent, the trait occurs in persons of a variety of ethnic

¹⁴⁹ [2008] FMCA 897, [109].

¹⁵⁰ [2008] FMCA 897, [110].

¹⁵¹ Note also that in relation to the racial hatred provisions contained in the RDA, s 18C provides that the relevant act must be done 'because of' race or other grounds: see 3.4.4 below.

¹⁵² (2003) 217 CLR 92.

¹⁵³ See 5.2.2(a)(i) of the DDA chapter.

¹⁵⁴ (2003) 217 CLR 92, 102 [14] (Gleeson CJ), 144 [166] (McHugh and Kirby JJ), 136 [236] (Gummow, Hayne and Heydon JJ). It remains to be seen whether the distinction drawn by Weinberg J between the expression 'based on' and the other formulations appearing in the RDA, SDA and DDA (see 3.2.2(a)(iii)) will be significant in future cases.

¹⁵⁵ [2005] FMCA 2.

¹⁵⁶ [2005] FMCA 2, [4].

backgrounds, including persons of various Mediterranean backgrounds. The condition is one that is inherited. While it may well have originated in Africa, it has spread by natural inheritance through generations all around the globe. In the case of [the applicant], while the conduct of the NSW Police Service was based upon [the applicant's] disability, it was not based upon his race or ethnicity. His Aboriginality was irrelevant. His black African heritage was relevant but was not a conscious factor in the actions of the NSW Police Service. The Police acted as they did because [the applicant] had the sickle cell trait, not because he was black.¹⁵⁷

(c) Drawing inferences of racial discrimination

The existence of systemic racism has been routinely acknowledged by decision-makers considering allegations of race discrimination. The extent to which this enables inferences to be drawn as to the basis for a particular act, especially in the context of decisions about hiring or promotion in employment, has been the subject of some consideration. The cases highlight the difficulties faced by complainants in proving racial discrimination in the absence of direct evidence.¹⁵⁸

In *Murray v Forward*,¹⁵⁹ it was alleged that the respondent's view that the literacy of the complainant was inadequate could only be explained by an acceptance of stereotypes relating to the literacy of Aboriginal people generally. Sir Ronald Wilson stated:

I have not found the resolution of this issue an easy one. Counsel acknowledges that to accept his submission on behalf of the complainant I must exclude all other inferences that might reasonably be open. I am sensitive to the possible presence of systemic racism, when persons in a bureaucratic context can unconsciously be guided by racist assumptions that may underlie the system. But in such a case there must be some evidence of the system and the latent or patent racist attitudes that infect it. Here there is no such evidence. Consequently there is no evidence to establish the weight to be accorded to the alleged stereotype.¹⁶⁰

In *Sharma v Legal Aid Queensland*¹⁶¹ ('*Sharma*'), Kiefel J held that a court should be wary of presuming the existence of racism in particular circumstances:

Counsel for the applicant submitted that an inference could be drawn because of the known existence of racism combined with the fact that the decision in question was one to be made between people of different races. It would seem to me that the two factors identified, considered individually or collectively, raise no more than a possibility that race might operate as a factor in the decision-making.¹⁶²

Sharma involved allegations of discrimination in recruitment for senior legal positions. The Federal Court was referred to the small number of people from non-English speaking backgrounds employed by the respondent, particularly at the level of professional staff and the fact that nobody holding the position for which they applied in any of the respondent's offices was from a non-English speaking background. The applicant argued that inferences could be drawn from this evidence as to the racially discriminatory conduct of the respondent. Kiefel J stated:

¹⁵⁷ [2005] FMCA 2, [183].

¹⁵⁸ See *Batzialas v Tony Davies Motors Pty Ltd* [2002] FMCA 243; *Chau v Oreanda Pty Ltd* [2001] FMCA 114; *Gama v Qantas Airways Ltd (No 2)* [2006] FMCA 1767; *Qantas Airways Ltd v Gama* [2008] FCAFC 69.

¹⁵⁹ [1993] HREOCA 21 (extract at EOC 92-545). See also Jonathon Hunyor, 'Skin-deep: Proof and Inferences in Racial Discrimination in Employment' (2003) 25 *Sydney Law Review* 537.

¹⁶⁰ [1993] HREOCA 21 4.

¹⁶¹ [2001] FCA 1699.

¹⁶² [2001] FCA 1699.

In such cases statistical evidence may be able to convey something about the likelihood of people not being advanced because of factors such as race or gender. The case referred to in submissions: *West Midlands Passenger Transport Executive v Jaquant Singh* [1988] [2 All ER 873, 877] is one in point. There it was observed that a high rate of failure to achieve promotion by members of a particular racial group may indicate that the real reason for refusal is a conscious or unconscious racial attitude which involves stereotypical assumptions about members of the group. It will be a question of fact in each case. Here however all that can be said is that a small number of the workforce of the respondent comes from non-English speaking backgrounds.¹⁶³

The Full Federal Court upheld her Honour's decision on appeal¹⁶⁴ and agreed that in appropriate cases, inferences of discrimination might be drawn:

It may be accepted that it is unusual to find direct evidence of racial discrimination, and the outcome of a case will usually depend on what inferences it is proper to draw from the primary facts found: *Glasgow City Council v Zafar* [1998] 2 All ER 953, 958. There may be cases in which the motivation may be subconscious. There may be cases in which the proper inference to be drawn from the evidence is that, whether or not the employer realised it at the time or not, race was the reason it acted as it did: *Nagarajan v London Regional Transport* [[2000] 1 AC 501, 510].¹⁶⁵

Similar issues arose in *Tadawan v South Australia*.¹⁶⁶ In this case, the applicant, a Filipino-born teacher of English as a second language, alleged victimisation by her employer on the basis of having made a previous complaint of racial discrimination. It was argued that victimisation could be inferred in the decision not to re-employ the applicant on the basis of the following factors: the applicant's superior qualifications and experience; that the applicant was 'first reserve' for a previous position but was not given any work; that new employees were taken on in preference to providing work for the applicant; and the lack of cogent reasons for the preference of new employees. Raphael FM commented:

In the absence of direct proof an inference may be drawn from the circumstantial evidence. The High Court has said that 'where direct proof is not available it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference; they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture ... But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then though the conclusion may fall short of certainty it is not to be regarded as a mere conjecture or surmise...' (*Bradshaw v McEwans Pty Ltd* (1951), unreported, applied in *TNT Management Pty Ltd v Brooks* (1979) 23 ALR 345).¹⁶⁷

Raphael FM found that he was unable to infer that the applicant was subject to victimisation as the decision not to re-employ her was made before she lodged her complaint.¹⁶⁸

¹⁶³ [2001] FCA 1699, [60].

¹⁶⁴ *Sharma v Legal Aid Queensland* [2002] FCAFC 196.

¹⁶⁵ [2002] FCAFC 196, [40].

¹⁶⁶ [2001] FMCA 25. See also *Oberoi v Human Rights & Equal Opportunity Commission* [2001] FMCA 34, [23]; *Maghiar v Western Australia* [2001] FMCA 98, [15] and on appeal *Maghiar v Western Australia* [2002] FCA 262, [24]-[25].

¹⁶⁷ [2001] FMCA 25, [52].

¹⁶⁸ [2001] FMCA 25, [52]-[59].

In *Meka v Shell Company Australia Ltd*,¹⁶⁹ the applicant was a foreign national whose application for employment was not considered by the respondent. In the absence of any direct evidence as to racial discrimination, the Court was asked to infer that this was the reason for the decision. However, counsel for the applicant had not cross-examined the witnesses for the respondent who had denied that the applicant's race was a factor in the decision. In those circumstances, the Court was not prepared to draw the inferences that the applicant sought to be drawn.¹⁷⁰

In *Gama v Qantas Airways Ltd (No 2)*¹⁷¹ Raphael FM was also asked to draw inferences that certain remarks and the treatment of the applicant in the workplace indicated an entrenched attitude towards the applicant based on his race. The applicant claimed that he was denied the same conditions of work and opportunities for training and promotion that were afforded to other employees on the basis of his race and disability and that certain remarks made to him by his supervisor and co-workers amounted to unlawful discrimination.

His Honour found that specific statements made to the applicant that he looked 'like a Bombay taxi driver' and that he walked up the stairs 'like a monkey' amounted to unlawful discrimination on the grounds of the applicant's race. His Honour also observed in the course of his reasons that 'there was a general culture inimical to persons of Asian background'.¹⁷² However, his Honour was not prepared to accept that this evidence demonstrated that the rejections of the applicant's attempts at training and promotion were acts based on his race.¹⁷³

In his cross-appeal to the Full Federal Court,¹⁷⁴ Mr Gama submitted that Raphael FM erred in applying the balance of probabilities test in relation to the drawing of inferences 'at such a high level that in the absence of direct evidence of racial discrimination, the [RDA] is ineffective'.¹⁷⁵ The court dismissed this ground of cross-appeal, noting simply that '[h]is Honour has dealt with these matters in his reasons in a way that does not disclose any error in the application of the standard of proof'.¹⁷⁶

The Court also rejected an appeal ground by Qantas that the negative comments by Raphael FM about a generally racist workplace culture infected his Honour's reasons yet were not relevant to his Honour's ultimate findings of liability and were not open on the evidence. Further, Qantas argued that his Honour relied on these comments to make sweeping generalisations about Qantas's workplace and some of its witnesses. The Full Court acknowledged that his Honour's comments about workplace culture were 'gratuitous', but held that they did not play any part in his determination of liability and therefore did not give rise to any error.¹⁷⁷

¹⁶⁹ [2005] FMCA 250.

¹⁷⁰ [2005] FMCA 250, [22]-[23].

¹⁷¹ [2006] FMCA 1767. For a discussion of this decision, see Christine Fougere, 'Vicarious liability for race and disability discrimination in the workplace', (2007) 45(3) *Law Society Journal* 37.

¹⁷² [2006] FMCA 1767, [97].

¹⁷³ [2006] FMCA 1767, [97].

¹⁷⁴ *Qantas Airways Ltd v Gama* [2008] FCAFC 69. HREOC was granted leave to appear as intervener in the appeal and its submissions are available at

<http://www.humanrights.gov.au/legal/submissions_court/intervention/qantas_v_gama.html> and

<http://www.humanrights.gov.au/legal/submissions_court/intervention/gama.html>.

¹⁷⁵ *Qantas Airways Ltd v Gama* [2008] FCAFC 69, [49].

¹⁷⁶ [2008] FCAFC 69, [113] (French and Jacobson JJ, with whom Branson J generally agreed, [122]).

¹⁷⁷ [2008] FCAFC 69, [64].

3.2.3 Indirect discrimination under the RDA

(a) Background

The RDA was amended in 1990¹⁷⁸ to include s 9(1A) which states:

(1A) Where:

- (a) a person requires another person to comply with a term, condition or requirement which is not reasonable having regard to the circumstances of the case; and
- (b) the other person does not or cannot comply with the term, condition or requirement; and
- (c) the requirement to comply has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life;

the act of requiring such compliance is to be treated, for the purposes of this Part, as an act involving a distinction based on, or an act done by reason of, the other person's race, colour, descent or national or ethnic origin.

Relatively few cases have considered issues of indirect discrimination under the RDA. However, some general principles from cases which have considered indirect discrimination provisions in other anti-discrimination laws are set out below to assist in the interpretation of the terms of s 9(1A). The development of these principles in the context of the SDA and DDA is discussed further in chapters 4 and 5.¹⁷⁹

The following elements are required to establish indirect discrimination:

- a term, condition or requirement is imposed on a complainant (see 3.2.3(c) below);
- the term, condition or requirement is not reasonable in the circumstances (see 3.2.3(d) below);
- the complainant does not or cannot comply with that term, condition or requirement (see 3.2.3(e) below); and
- the requirement has the effect of interfering with the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the complainant of any relevant human right or fundamental freedom (see 3.2.4 below).

The onus is on the applicant to make out each of these elements.¹⁸⁰

(b) The relationship between 'direct' and 'indirect' discrimination

Prior to the insertion of s 9(1A) into the RDA, a body of opinion suggested that the language of s 9(1) and the specific prohibitions in the RDA were wide enough to cover indirect racial discrimination. It has been suggested that the section was inserted

¹⁷⁸ By the *Law and Justice Legislation Amendment Act 1990* (Cth) which came into effect on 22 December 1990.

¹⁷⁹ See 4.3 and 5.2.3 respectively.

¹⁸⁰ *Australian Medical Council v Wilson* (1996) 68 FCR 46, 62 (Heerey J with whom Black CJ agreed on this issue, 47), 79 (Sackville J).

to remove doubt that s 9(1) and the succeeding provisions might not cover indirect discrimination rather than because its terms were not general enough to do so.¹⁸¹ However, in *Australian Medical Council v Wilson*¹⁸² (*'Siddiqui'*), the Full Court of the Federal Court held that ss 9(1) and (1A) of the RDA should be construed as being mutually exclusive. Heerey J stated that such an approach was 'consistent with the language of the provisions, their legislative history and the preponderance of authority'.¹⁸³ This does not prevent applicants from pleading both direct and indirect discrimination in the alternative.¹⁸⁴

Sections 11-15 of the RDA proscribe discrimination in particular fields of public life. The definition of 'indirect discrimination' in s 9(1A) explicitly applies for the purposes of Part II of the RDA, which contains ss 11-15. Therefore, it would appear that the definition of 'indirect discrimination' applies to the expression 'by reason of race, as used in ss 11-15.¹⁸⁵

(c) Defining the term, condition or requirement

The words 'term, condition or requirement'¹⁸⁶ are to be given a broad meaning. It is still necessary, however, to identify specifically a particular action or practice which is said to constitute the relevant requirement. In considering the expression 'requirement or condition' in the context of the sex discrimination provisions of the *Anti-Discrimination Act 1977* (NSW), Dawson J stated:

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 ... Nevertheless, it is necessary in each particular instance to formulate the actual requirement or condition with some precision.¹⁸⁷

A requirement need not be explicit but rather can be implicit. For example, a service which is provided in a certain manner may, in effect, impose a requirement that the service be accessed in that manner.¹⁸⁸

(d) Not reasonable in the circumstances

In the context of other anti-discrimination statutes, it has been held that factors relevant to assessing reasonableness will include:

¹⁸¹ See Race Discrimination Commissioner, *Racial Discrimination Act 1975: A Review: Community Consultation Guide* (1995), 61.

¹⁸² (1996) 68 FCR 46.

¹⁸³ (1996) 68 FCR 46, 55. Black CJ agreed with his Honour's reasoning in this regard, 47. Sackville J expressed the same view, 74.

¹⁸⁴ See, in the context of the DDA, *Minns v New South Wales* [2002] FMCA 60, [245]; *Hollingdale v Northern Rivers Area Health Service* [2004] FMCA 721, [19]. See also discussion at 6.8.

¹⁸⁵ Note, however, that in *Bropho v Western Australia* [2007] FCA 519, Nicholson J held that indirect discrimination has no application to s 12(1)(d) (ibid [468]). The decision of the Full Federal Court on appeal did not express a view on the correctness or otherwise of this aspect of Nicholson J's reasoning: see *Bropho v Western Australia* [2008] FCAFC 100, [38]. HREOC appeared as intervener in this case and submitted that s 12(1)(d) prohibited both direct and indirect discrimination. HREOC's submissions are available at <http://www.humanrights.gov.au/legal/submissions_court/intervention/bella_bropho.html>.

¹⁸⁶ The term 'requirement' will be used as shorthand for the expression 'term, condition or requirement'.

¹⁸⁷ *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165, 168. Similarly, in the context of the DDA, see *Waters v Public Transport Corporation* (1991) 173 CLR 349, 393 (Dawson and Toohey JJ), 406-407 (McHugh J); *Daghlian v Australian Postal Corporation* [2003] FCA 759, [110].

¹⁸⁸ See *Waters v Public Transport Corporation* (1991) 173 CLR 349, 360 (Mason CJ and Gaudron J), 407 (McHugh J).

- whether or not the purpose for which the requirement is imposed could be achieved without the imposition of a discriminatory requirement, or by the imposition of a requirement that is less discriminatory in its impact;¹⁸⁹
- issues of effectiveness, efficiency and convenience in performing an activity or completing a transaction and the cost of not imposing the discriminatory requirement or substituting another requirement;¹⁹⁰
- the maintenance of good industrial relations;¹⁹¹
- relevant policy objectives;¹⁹² and
- the observance of health and safety requirements and the existence of competitors.¹⁹³

The requirement of ‘reasonableness’ under s 9(1A)(a) of the RDA was considered in *Siddiqui*. In that matter, Dr Siddiqui sought unrestricted registration to practice medicine in Victoria. To obtain such registration, a person was required to be a graduate of a university, college or other body accredited by the Australian Medical Council (‘AMC’) or hold a certificate from the AMC certifying that the person was qualified to be registered as a medical practitioner. To obtain the necessary certificate so as to fall within this second category, it was necessary (amongst other things) to sit a written multiple choice question (‘MCQ’) exam and achieve a result which ranked the candidate within a quota set by the AMC.

Dr Siddiqui was not a graduate of an accredited institution. He sat the MCQ exam on a number of occasions and, although passing, he was not within the top 200 candidates, which was the quota set by the AMC at the time. Dr Siddiqui complained, amongst other things,¹⁹⁴ that the requirement to sit an exam and pass with a score which placed him within the quota constituted indirect racial discrimination.

HREOC, at first instance, considered whether or not the requirement was reasonable. It held that the setting of a quota was reasonable, but the manner in which it was applied to Dr Siddiqui was unreasonable. HREOC stated:

We are not persuaded that the Health Ministers acted unreasonably in determining that a quota was necessary nor in fixing it at 200 each year. But we are persuaded that the AMC acted unreasonably in using it to screen the number of those doctors who, having successfully met the minimum requirements of the MCQ, should be permitted to advance to the clinical examination. It was unreasonable to require the complainant to sit again for the MCQ within a year or so of his having satisfied the minimum requirements. If those minimum standards were intended by the AMC to ensure that measure of medical knowledge considered to be requisite for practice in Australia, then it was unreasonable to introduce an exclusionary principle based on comparative performance in the MCQ examination. The evidence has left us

¹⁸⁹ (1991) 173 CLR 349, 363-364 (Mason and Gaudron JJ), 378 (Brennan J), 395 (Dawson and Toohey JJ).

¹⁹⁰ (1991) 173 CLR 349, 378 (Brennan J).

¹⁹¹ (1991) 173 CLR 349, 395 (Dawson and Toohey JJ); *Secretary, Department of Foreign Affairs & Trade v Styles* (1989) 23 FCR 251, 263-264 (Bowen CJ and Gummow J).

¹⁹² (1991) 173 CLR 349, 410 (McHugh J).

¹⁹³ (1991) 173 CLR 349, 395 (Dawson and Toohey JJ). See also *Daghlian v Australian Postal Corporation* [2003] FCA 759, [111]. In the context of the DDA, the Full Federal Court has provided a confirmation and summary of the principles to be applied to assessing ‘reasonableness’ which is likely to be relevant in the context of the RDA: see *Catholic Education Office v Clarke* (2004) 138 FCR 121, 145 [115] (Sackville and Stone JJ).

¹⁹⁴ Dr Siddiqui’s complaint of *direct* discrimination was dismissed by HREOC on the basis that the relevant distinction drawn by the AMC was not based on race, but rather whether or not a person trained in an accredited medical school. See *Siddiqui v Australian Medical Council* (1995) EOC 92-730.

with the conclusion that it should have been possible for the AMC to implement the direction of the Health Ministers' Conference in such a way as to minimise the trauma associated with repeated success in the MCQ followed by repeated failure to be included in the quota.¹⁹⁵

On review under the *Administrative Decision (Judicial Review) Act 1977* (Cth), the Full Court of the Federal Court found that HREOC had erred in a number of respects in relation to its findings on reasonableness.

It was held that HREOC had incorrectly reversed the onus of proof:

It approached its task by identifying alternative means of applying the quota (which would have resulted in Dr Siddiqui's acceptance) and then finding that the AMC provided 'no convincing explanation' why such alternatives could not be utilised. However, the onus remained on Dr Siddiqui to show that the term, condition or requirement in fact applied was not reasonable, in the sense of being not rational, logical and understandable.¹⁹⁶

Further, it was held that HREOC had erred in its approach to reasonableness and its conclusion that the application of the quota to Dr Siddiqui was unreasonable.¹⁹⁷ The Court approved of the following test of 'reasonableness'¹⁹⁸ articulated by Bowen CJ and Gummow J in *Secretary, Department of Foreign Affairs & Trade v Styles*:¹⁹⁹

The test of reasonableness is less demanding than one of necessity, but more demanding than one of convenience ... The criterion is an objective one, which requires the court to weigh the nature and extent of the discriminatory effect, on the one hand, against the reason advanced in favour of the requirement or condition on the other. All the circumstances of the case must be taken into account.²⁰⁰

Heerey J observed that the relevant 'circumstances of the case' included, but were not limited to, the personal impact of the requirement on Dr Siddiqui. Also relevant were the reasons for which the AMC had imposed the requirement.²⁰¹ In assessing whether or not a requirement is 'reasonable', the focus is on 'reason and rationality' rather than whether the requirement is 'one with which all people or even most people agree'.²⁰²

The Court held that once it was accepted, as HREOC had done, that a quota of 200 could lawfully be imposed, it was 'impossible to say that it [was] not a rational application of that quota to select the first 200 candidates in order of merit'.²⁰³

In *Commonwealth Bank of Australia v Human Rights & Equal Opportunity Commission*,²⁰⁴ Sackville J confirmed (in the context of the SDA) that in assessing reasonableness, 'the question is not simply whether the alleged discriminator could

¹⁹⁵ *Siddiqui v Australian Medical Council* (1995) EOC 92-730.

¹⁹⁶ (1996) 68 FCR 46, 62.

¹⁹⁷ (1996) 68 FCR 46, 62.

¹⁹⁸ (1996) 68 FCR 46, 60 (Heerey J, with whom Black CJ generally agreed, 47, and with whom Sackville J agreed on the issue of reasonableness, 79).

¹⁹⁹ (1989) 23 FCR 251.

²⁰⁰ (1989) 23 FCR 251, 263.

²⁰¹ (1996) 68 FCR 46, 60.

²⁰² (1996) 68 FCR 46, 61.

²⁰³ (1996) 68 FCR 46, 62 (Heerey J, with whom Black CJ generally agreed, 47, and with whom Sackville J agreed on the issue of reasonableness, 79).

²⁰⁴ (1997) 80 FCR 78.

have made a “better” or more informed decision’.²⁰⁵ However, his Honour cautioned against an over reliance on ‘logic’ in assessing reasonableness:

The fact that a distinction has a ‘logical and understandable basis’ will not always be sufficient to ensure that a condition or requirement is objectively reasonable. The presence of a logical and understandable basis is a factor – perhaps a very important factor – in determining the reasonableness or otherwise of a particular condition or requirement. But it is still necessary to take account of both the nature and extent of the discriminatory effect of the condition or requirement ... and the reasons advanced in its favour. A decision may be logical and understandable by reference to the assumptions upon which it is based. But those assumptions may overlook or discount the discriminatory impact of the decision.²⁰⁶

In *Aboriginal Students’ Support & Parents Awareness Committee, Alice Springs v Minister for Education, Northern Territory*,²⁰⁷ HREOC considered the closing of a primary school in Alice Springs which almost solely catered to Aboriginal students and was said to be unique in its curriculum and services. The relevant requirement was said to be that the children attend another school which was not similarly equipped to meet the needs of Aboriginal students.

Commissioner Carter noted that the onus is on a complainant to prove the requirement is not reasonable. The Commissioner noted the competing opinions in the evidence before him as to the education that the children would receive in the different schools. While the Commissioner noted that he ‘shared some of the concerns’ of the complainants, he was not persuaded that the requirement was ‘not reasonable’.²⁰⁸

In *AB v New South Wales*,²⁰⁹ Driver FM held that the term, condition or requirement imposed upon the applicant that he be an Australian or New Zealand citizen or an Australian permanent resident in order to be eligible for education in a selective school operated by the respondent was not reasonable in the circumstances. His Honour stated:

I accept that places at selective schools in New South Wales are a scarce commodity...I also accept that it is reasonable to impose requirements to ensure that, as far as is practicable, persons entering a selective school are likely to complete their course of education. However, that purpose could, in my view, be achieved by a requirement that the student has applied for Australian permanent residency or citizenship. Making such an application demonstrates a commitment to live in Australia indefinitely sufficient to meet the expectation of completion of a course of secondary education.

It is true that the fact that there is a reasonable alternative that might accommodate the interests of an aggrieved person does not, of itself, establish that a requirement or condition is unreasonable. The Court must objectively weigh the relevant factors, but these can include the availability of alternative methods of achieving the alleged discriminator’s objectives without recourse to the requirement or condition: *Catholic Education Office v Clarke* (2004) 138 FCR 121 at 146 [115]. It is well known that the process of obtaining permanent residency and citizenship in Australia can be a lengthy one. Even where an application is refused, the process of review and appeal can take years. The present applicant has lived in this country for ten years and is seeking permanent residency. In my view, there is nothing in

²⁰⁵ (1997) 80 FCR 78, 113.

²⁰⁶ (1997) 80 FCR 78, 112.

²⁰⁷ (1992) EOC 92-415.

²⁰⁸ (1992) EOC 92-415, 78,968. See also discussion by Drummond J in *Ebber v Human Rights & Equal*

Opportunity Commission (1995) 129 ALR 455.

²⁰⁹ (2005) 194 FLR 156.

his circumstances which render it less likely that he would complete a course of education at Penrith Selective High School than if he had already been granted permanent residency or citizenship. The respondent's condition is unnecessarily restrictive and is disruptive to the educational expectations of both NSW residents, and those who may relocate to NSW from other States, which do not have selective public schools.²¹⁰

Driver FM held, however, that the applicant had not made out his case of indirect discrimination: see 3.2.3(e) below.

(e) Ability to comply with a requirement or condition

An applicant must prove that an affected individual or group 'does not or cannot comply' with the relevant requirement or condition.

As outlined above, the complainant in *Siddiqui* had failed on a number of occasions to meet a requirement set by the AMC to sit an exam and pass with a score which placed him within a certain quota. The Full Federal Court held that it was correct to find in those circumstances that the complainant 'does not' comply with the relevant requirement. It was not necessary for a complainant to demonstrate that it was impossible for them ever to comply with the requirement because of some 'immutable characteristic'. Sackville J suggested:

It seems to me that the primary purpose underlying s 9(1A)(b) is to ensure that the complainant (or someone on whose behalf a complainant acts) has sustained some disadvantage by reason of the requirement or condition or requirement under scrutiny. That purpose is satisfied if the relevant individual in fact does not comply with the condition or requirement, regardless of whether the non-compliance flows from some immutable characteristic or from a different cause. Certainly it should not be enough to exclude the operation of s 9(1A) that a complainant might ultimately be able to comply with a condition or requirement which discriminates against members of the group to which the complainant belongs.²¹¹

In assessing whether or not a person 'cannot comply' with a requirement, it is a person's 'practical' (as opposed to theoretical or technical) ability to comply that is most relevant.

This issue was considered by the House of Lords in *Mandla v Dowell Lee*²¹² ('*Mandla*'), which concerned the ability of Sikh men to comply with a dress code:

It is obvious that Sikhs, like anyone else, 'can' refrain from wearing a turban, if 'can' is construed literally. But if the broad cultural/historic meaning of ethnic is the appropriate meaning of the word in the Act of 1976, then a literal reading of the word 'can' would deprive Sikhs and members of other groups defined by reference to their ethnic origins of much of the protection which Parliament evidently intended the Act to afford to them. They 'can' comply with almost any requirement or condition if they are willing to give up their distinctive customs and cultural rules.²¹³

In obiter comments in *Siddiqui*, Sackville J cited, with apparent approval, the analysis in *Mandla* as authority for the proposition that 'can comply' should be understood to

²¹⁰ (2005) 194 FLR 156, 169-170 [41]-[42].

²¹¹ (1996) 68 FCR 46, 80 (see also Heerey J, 62, with whom Black CJ agreed, 47).

²¹² [1983] 2 AC 548.

²¹³ [1983] 2 AC 548, 565.

mean ‘can in practice’ or ‘can consistently with the customs and cultural conditions of the racial group’.²¹⁴

As discussed above, in *AB v New South Wales*,²¹⁵ the applicant, a boy of Romanian national origin, was refused enrolment at a selective high school operated by the respondent, on the basis that he was not an Australian citizen or permanent resident. He claimed that this amounted to indirect discrimination on the basis of national origin.

Driver FM found that it was appropriate to make a comparison between persons of Romanian national origin and persons of Australian or New Zealand national origin (‘national origin’ being a concept distinct from citizenship)²¹⁶ in determining whether or not indirect discrimination had occurred.

Driver FM rejected the applicant’s claim on the basis that there was no evidence that there was a broad class of persons of Australian national origin who were better able to comply with the respondent’s requirement for citizenship or permanent residence than persons of Romanian national origin (whether they were born in Romania or in Australia).²¹⁷

3.2.4 Interference with the recognition, enjoyment or exercise of human rights or fundamental freedoms on an equal footing

(a) Human rights and fundamental freedoms defined

Sections 9 and 9(1A) of the RDA provide protection for a person’s human rights and fundamental freedoms on an equal footing with persons of other races. Section 10 provides for the equal enjoyment of rights by people of different races.²¹⁸ The RDA specifically provides that these references to human rights and fundamental freedoms and the equal enjoyment of rights include the rights referred to in article 5 of ICERD.²¹⁹

In considering the meaning of the terms ‘human rights’ and ‘fundamental freedoms’, the Courts have held that article 5 is not an exhaustive list of the human rights and fundamental freedoms protected by the RDA.²²⁰ Rather, courts have taken a broad approach to the rights and freedoms protected. For instance, in *Gerhardy v Brown*,²²¹ Mason J held:

The expression ‘human rights’ is commonly used to denote the claim of each and every person to the enjoyment of rights and freedoms generally acknowledged as

²¹⁴ (1996) 68 FCR 46, 80. A similar approach has been taken in the context of the DDA: see, for example, *Travers v New South Wales* (2001) 163 FLR 99, 103 [17]; *Clarke v Catholic Education Office* (2003) 202 ALR 340, 352-353 [49].

²¹⁵ (2005) 194 FLR 156.

²¹⁶ See 3.2.1(c).

²¹⁷ (2005) 194 FLR 156, 175 [56]-[57].

²¹⁸ See 3.1.1(b) and 3.1.3 for a discussion of the application of s 10.

²¹⁹ See ss 9(2) and 10(2).

²²⁰ *Gerhardy v Brown* (1985) 159 CLR 70, 85 (Gibbs CJ), 101 (Mason J) and 126 (Brennan J); *Secretary, Department of Veterans’ Affairs v P* (1998) 79 FCR 594, 596 (Drummond J). The CERD Committee has also indicated that the list of rights set out in article 5 should not be taken by States as being an exhaustive list: *General Recommendation XX (Article 5)*, UN Doc HRI/GEN/1/Rev.5, 188-189 [1] available at <[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/8b3ad72f8e98a34c8025651e004c8b61?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/8b3ad72f8e98a34c8025651e004c8b61?Opendocument)>.

²²¹ (1985) 159 CLR 70.

fundamental to his or her existence as a human being and as a free individual in society ... As a concept, human rights and fundamental freedoms are fundamentally different from specific or special rights in our domestic law which are enforceable by action in the courts against other individuals or against the State, the content of which is more precisely defined and understood.²²²

Similarly, Brennan J stated:

The term connotes the rights and freedoms which must be recognized and observed, and which a person must be able to enjoy and exercise, if he is to live as he was born - 'free and equal in dignity and rights', as the Universal Declaration of Human Rights proclaims ... The conception of human rights and fundamental freedoms in the Convention definition of racial discrimination describes that complex of rights and freedoms the enjoyment of which permits each member of a society equally with all other members of that society to live in full dignity, to engage freely in any public activity and to enjoy the public benefits of that society.²²³

The High Court also considered the meaning of 'right' in *Mabo v Queensland*,²²⁴ Deane J stating:

The word 'right' is used in s 10(1) in the same broad sense in which it is used in the International Convention, that is to say, as a moral entitlement to be treated in accordance with standards dictated by the fundamental notions of human dignity and essential equality which underlie the international recognition of human rights: cf. the preamble to the International Convention.²²⁵

In *Secretary, Department of Veteran's Affairs v P*,²²⁶ the Federal Court considered whether entitlement to a war veteran's benefit (namely a government-subsidised housing loan) was a right or freedom protected by ss 9(1) or 10 of the RDA. Drummond J held:

Although it is well-established ... that neither s 9(1) nor s 10(1) of the [RDA] is confined to the rights actually mentioned in article 5 of the Convention, those sections are nevertheless concerned only with rights fundamental to the individual's existence as a human being. In *Ebber v Human Rights & Equal Opportunity Commission* (1995) 129 ALR 455, I reviewed relevant High Court authority and said (at 475):

Section 9(1) [of the RDA] can only apply where a discriminatory act based on national origin also affects 'any human right or fundamental freedom'. The Act focuses on protecting from impairment by acts of racial discrimination certain fundamental rights which each individual has; it does not purport to aim at achieving equality of treatment in every respect of individuals of disparate racial and national backgrounds...

I concluded (at 476-477):

the rights and freedoms protected by ss 9(1) and 10(1) [of the RDA] do not encompass every right which a person has under the municipal law of the country that has authority over him or every other right which he may claim; rather are those sections limited to protecting those particular rights and freedoms with which the Convention is concerned and those other rights and freedoms which, like those specifically referred to in the

²²² (1985) 159 CLR 70, 101-102.

²²³ (1985) 159 CLR 70, 125-126.

²²⁴ (1988) 166 CLR 186.

²²⁵ (1988) 166 CLR 186, 229. See also 217 (Brennan, Toohey, Gaudron JJ): 'right' is not necessarily a legal right enforceable at municipal law.

²²⁶ (1998) 79 FCR 594.

Convention, are fundamental to the individual's existence as a human being.²²⁷

Drummond J held that the right to the war veteran's benefit in question 'cannot be characterised as a right of the kind which is the concern of s 9 and s 10' of the RDA as the benefit, being 'confined to those persons who have served the interests of one nation against the interests of other nations, stands outside the range of universal human rights'.²²⁸ Further, the benefit 'cannot be regarded as falling within the kind of right to social security and social services mentioned in para (e)(iv) of Article 5' of ICERD as para (e)(iv) 'deals only with State-provided assistance to alleviate need in the general community and with benefits provided to advance the well-being of the entire community of the kind that many national states now make available to their citizens'.²²⁹

In *Macabenta v Minister of State for Immigration and Multicultural Affairs*,²³⁰ Tamberlin J held:

Although Article 5 of the Convention is cast in wide terms in respect of the right to residence, it does not follow that every non-citizen who lawfully enters Australia has any claim by way of a right to permanently reside here. The equality envisaged in the enjoyment of the enumerated rights does not encompass circumstances where a government, on compassionate grounds, has declined to return a group of persons from certain states to their national states. Therefore, the law does not unequally affect persons from other countries who do not have a similar history and who are differently affected because of that history.²³¹

In *Australian Medical Council v Wilson*²³² ('*Siddiqui*'), Heerey J expressed doubt that there existed a right to practise medicine on an unrestricted basis.²³³

In *Hagan v Trustees of the Toowoomba Sports Ground Trust*,²³⁴ Drummond J considered a complaint of racial discrimination brought in relation to the maintenance of a sign saying 'The ES "Nigger Brown" Stand' at an athletic oval. His Honour held, citing *Ebber v Human Rights & Equal Opportunity Commission*:²³⁵

[Section 9(1)] is not directed to protecting the personal sensitivities of individuals. It makes unlawful acts which are detrimental to individuals, but only where those acts involve treating the individual differently and less advantageously to other persons who do not share membership of the complainant's racial, national or ethnic group and then only where that differential treatment has the effect or purpose of impairing the recognition etc of every human being's entitlement to all the human rights and fundamental freedoms listed in Article 5 of [ICERD] or basic human rights similar to those listed in Article 5.

...

It can be accepted that s 9(1) protects the basic human right of every person who is a member of a particular racial group to go about his recreational and other

²²⁷ (1998) 79 FCR 594, 599-600. In *Ebber v Human Rights & Equal Opportunity Commission* (1995) 129 ALR 455, to which his Honour refers, Drummond J held that the applicants' claim that their German educational qualifications (in architecture) should be accepted as sufficient for the purposes of registration under Queensland law was not of itself a claim to a human right or fundamental freedom of the type protected by ss 9 and 10.

²²⁸ (1998) 79 FCR 594, 600.

²²⁹ (1998) 79 FCR 594, 601.

²³⁰ (1998) 154 ALR 591.

²³¹ (1998) 154 ALR 591, 600.

²³² (1996) 68 FCR 46.

²³³ (1996) 68 FCR 46, 59-60, citing *Jamorksi v Attorney-General (Ontario)* (1988) 49 DLR (4th) 426.

²³⁴ [2000] FCA 1615.

²³⁵ (1995) 129 ALR 455.

ordinary activities without being treated by others less favourably than persons who do not belong to that racial group...²³⁶

Drummond J ultimately held that the maintenance of the sign did not,

even if based on race, [involve] any distinction etc having either the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom of the kind referred to in s 9. Only Mr Hagan's personal feelings were affected by the act. Because there was no distinction etc produced by the act capable of affecting detrimentally in any way any human rights and fundamental freedoms, there was no racial discrimination involved in the act.²³⁷

In *AB v New South Wales*,²³⁸ Driver FM accepted that Article 5 of ICERD 'establishes that the right to education and training is a fundamental right protected by [ICERD]'.

In the matter of *Bropho v Western Australia*,²³⁹ Bella Bropho, a member of the Swan Valley Nyungah Community Aboriginal Corporation (SVNC) and former resident of Reserve 43131 ('the Reserve'), complained that the *Reserves (Reserve 43131) Act 2003* (WA) ('Reserves Act') and actions taken by an Administrator appointed under that Act interfered with the enjoyment and exercise of the Applicants' human rights and fundamental freedoms.

The Reserve had been designated in 1994 for the use and benefit of Aboriginal persons. In response to concerns about the sexual abuse of women and children, the Reserves Act was introduced in 2003. Amongst other things, the Reserves Act removed the power of care, control and management of the Reserve from the SVNC and placed it with an Administrator who was empowered to make directions in relation to the care, control and management of the Reserve.

The Administrator acted under the Reserves Act to direct all persons to leave the Reserve and prohibited entry to the Reserve. The applicants claimed that the Reserves Act and the actions of the Administrator were in breach of ss 9(1), 10 and 12(1)(d) of the RDA. They claimed that the Reserves Act interfered with, amongst other things, their enjoyment of the right to own property.

On appeal, the Full Federal Court took a broad approach to identifying the rights protected by the RDA. Contrary to the approach taken at first instance,²⁴⁰ the Court held that neither the RDA nor ICERD supported the conclusion that rights to property must be understood as 'ownership of a kind analogous to forms of property which have been inherited or adapted from the English system of property law or conferred by statute'.²⁴¹

Instead, the Court considered international law to help determine the content of the right to own property. In support of the proposition that the right to own property

²³⁶ [2000] FCA 1615, [38]. Drummond J's approach was upheld on appeal: *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2000) 105 FCR 56, 61 [28]. Note that following the refusal of special leave to appeal to the High Court (*Hagan v Trustees of the Toowoomba Sports Ground Trust* B17/2001 (19 March 2002)) the applicant lodged a communication with the United Nations Committee on the Elimination of Racial Discrimination (*Hagan v Australia*, Communication No. 26/2002: Australia 14/04/2003. CERD/C/62/D/26/2002) which found a violation of certain articles of ICERD.

²³⁷ [2000] FCA 1615, [42].

²³⁸ (2005) 194 FLR 156.

²³⁹ [2008] FCAFC 100 (Ryan, Moore and Tamberlin JJ); [2007] FCA 519 (Nicholson J).

²⁴⁰ *Bropho v Western Australia* [2007] FCA 519, [378].

²⁴¹ [2008] FCAFC 100, [78]. HREOC, appeared as intervener in this case and made submissions on this issue: see <http://www.humanrights.gov.au/legal/submissions_court/intervention/bella_bropho.html>.

contained in ICERD encompassed indigenous forms of property holdings, the Court cited the jurisprudence of the Inter-American Court of Human Rights which had recognised the proprietary nature of communal rights in several Latin American indigenous communities.²⁴²

However, the Full Federal Court concluded that in this case s 10 did not invalidate the Reserves Act because the property rights in question were not absolute and, in fact, ‘no property right, regardless of its source or genesis, is absolute in nature, and no invalid diminution of property rights occurs where the State acts in order to achieve a legitimate and non-discriminatory public goal’.²⁴³ Therefore, it was not inconsistent with s 10 to limit property rights in order to achieve a legitimate and non-discriminatory public goal such as, in this case, protecting the safety and welfare of women residing at the Reserve.²⁴⁴

(b) Equal footing

To breach ss 9(1) and 9(1A)(c) of the RDA, a requirement must have the purpose or effect of impairing the recognition, enjoyment or exercise, ‘on an equal footing’, by people of the same race of any relevant human right or fundamental freedom. Section 10 requires an applicant to prove that they ‘do not enjoy’ a right, or do so ‘to a more limited extent’ than persons of another race.

That expression ‘on an equal footing’ requires a comparison between the racial group to which the complainant belongs and another group without that characteristic (usually referred to as the ‘comparator’).

In *Siddiqui*, the Full Federal Court considered the meaning of ‘equal footing’ in s 9(1A)(c). As outlined above, the case concerned the requirement that overseas trained doctors submit to an examination as a requirement of registration to practice medicine in Australia. This did not apply to doctors trained at an accredited institution.

The case was argued on the basis that the appropriate comparison in determining the question of whether or not rights were being enjoyed on ‘an equal footing’ was between the group to which Dr Siddiqui belonged (either defined as ‘overseas trained doctors’ or ‘overseas trained doctors of Indian national origin’) and applicants from accredited medical schools who were not required to sit the examination.²⁴⁵

Black CJ²⁴⁶ and Sackville J²⁴⁷ (Heerey J dissenting)²⁴⁸ held that it was not necessary for the groups that are compared to have been subject to the same requirement.²⁴⁹ Sackville J stated:

In my opinion, the language used in s 9(1A)(c) is satisfied if the effect of a requirement to comply with a particular condition is to impair the exercise of a human right by persons of the same group as the complainant, on an equal footing

²⁴² [2008] FCAFC 100, [79].

²⁴³ [2008] FCAFC 100, [83].

²⁴⁴ [2008] FCAFC 100, [82].

²⁴⁵ (1996) 68 FCR 46, 63.

²⁴⁶ (1996) 68 FCR 46, 47.

²⁴⁷ (1996) 68 FCR 46, 80-82.

²⁴⁸ (1996) 68 FCR 46, 63. His Honour stated that the ‘two groups compared have to be subject to the *same* term, condition or requirement’.

²⁴⁹ Note that the terms of s 9(1A) of the RDA differ to the terms of other anti-discrimination legislation which require a comparison of the ability of different groups to comply with the relevant requirement or condition: see for example s 6 of the DDA.

with members of other groups, regardless of whether or not those other groups are required to comply with the same condition. Of course, the usual case of alleged discrimination involves the disparate impact of a particular requirement or condition upon two or more groups, each of which is identified by reference to race, colour, descent or national or ethnic origin. But there may well be cases in which members of a group are impaired in the exercise of a human right precisely because they must comply with a condition to which members of other groups are not subject.²⁵⁰

Black CJ and Sackville J were, however, of the view (expressed in obiter comments) that the examination and quota requirements applied in that case did not have the proscribed effect on human rights and fundamental freedoms. Sackville J stated that the evidence did not establish that persons of Indian origin were denied relevant opportunities, or disadvantaged by the requirements for registration.²⁵¹

3.3 Exceptions

3.3.1 Special measures

The RDA contains very limited exceptions to the operation of the Act,²⁵² unlike the SDA, DDA and ADA which contain a wide range of permanent exemptions²⁵³ and the mechanism for a person to apply for a temporary exemption.²⁵⁴ The exception relating to special measures in s 8(1) of the RDA has received the most attention in the case law. Section 8(1) provides:

- (1) This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relation to which sub-section 10(1) applies by virtue of sub-section 10(3).

As set out in s 8(1), the special measures exception does not apply in the circumstances referred to in s 10(3) of the RDA, namely provisions in a law authorizing property owned by Aboriginal persons to be managed by another without their consent or preventing or restricting an Aboriginal person from terminating the management by another person of the Aboriginal person's property.

ICERD provides for special measures in two contexts – in article 1(4) as an exception to the definition of discrimination, and in article 2(2) as a positive obligation on States to take action to ensure that minority racial groups are guaranteed the enjoyment of human rights and fundamental freedoms.

Article 1(4) of ICERD, with which s 8(1) is concerned, states:

- (4) Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups

²⁵⁰ (1996) 68 FCR 46, 81.

²⁵¹ (1996) 68 FCR 46, 82-83 (Sackville J), 48 (Black CJ).

²⁵² See ss 8(1) (special measures); 8(2) (instrument conferring charitable benefits); 9(3) and 15(4) (employment on a ship or aircraft if engaged outside Australia); 12(3) and 15(5) (accommodation and employment in private dwelling house or flat).

²⁵³ See pt II, div 4, SDA; pt 2, div 5 DDA; pt 4, div 4 ADA.

²⁵⁴ See s 44 of the SDA; s 55 of the DDA; s 44 of the ADA.

and that they shall not be continued after the objectives for which they were taken have been achieved.²⁵⁵

(a) Gerhardy v Brown

The High Court first considered the meaning of s 8(1) in *Gerhardy v Brown*.²⁵⁶ The case concerned an alleged inconsistency between South Australian land rights legislation and the RDA. The *Pitjantjatjara Land Rights Act 1981 (SA)* ('the SA Act') vested the title to a large area of land in the north-west of South Australia in the Anangu Pitjantjatjaraku, a body corporate whose members were all persons defined by the SA Act to be Pitjantjatjara. The SA Act provided unrestricted access to the lands for all members, while it was made an offence for non-Pitjantjatjara people to enter the lands without a permit. Robert Brown, who was not Pitjantjatjara, was charged with an offence after entering the lands without a permit. He claimed that restricting his access to the lands was a breach of the RDA and, by reason of s 109 of the *Constitution*, that part of the SA Act was invalid.

The High Court held that whilst the SA Act discriminated on the basis of race, it constituted a special measure within the meaning of s 8(1) of the RDA. Brennan J identified five characteristics to be satisfied in order for a measure to come within s 8(1):

- the special measure must confer a benefit on some or all members of a class;
- membership of this class must be based on race, colour, descent, or national or ethnic origin;
- the special measure must be for the sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and fundamental freedoms;
- the protection given to the beneficiaries by the special measure must be necessary in order that they may enjoy and exercise equally with others human rights and fundamental freedoms; and
- the special measure must not have achieved its objectives.²⁵⁷

Brennan J also considered how to determine whether a measure was for the 'advancement' of the beneficiaries. His Honour stated:

'Advancement' is not necessarily what the person who takes the measure regards as a benefit for the beneficiaries. The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing

²⁵⁵ Article 2(2) of ICERD provides: States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

²⁵⁶ (1985) 159 CLR 70.

²⁵⁷ (1985) 159 CLR 70, 133.

their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them.²⁵⁸

The other members of the Court neither supported nor dismissed Brennan J's views on this point.²⁵⁹ The Court applied the five criteria identified by Brennan J and concluded that the permit provisions of the SA Act satisfied these criteria and therefore qualified as a special measure.²⁶⁰

(b) Applying Gerhardy

In *Bruch v Commonwealth*,²⁶¹ a non-indigenous Australian student claimed that the Commonwealth had unlawfully discriminated against him in contravention of ss 9 and 13 of the RDA by virtue of his ineligibility for ABSTUDY rental assistance benefits. McInnis FM held that the ABSTUDY rental assistance scheme did not cause the Commonwealth to contravene the RDA because it constituted a 'special measure' for the benefit of Indigenous people within the meaning of s 8(1) of the RDA.²⁶²

His Honour found that the five indicia identified by Brennan J were satisfied because:

- the ABSTUDY rental assistance scheme conferred a benefit on a clearly defined class of natural persons made up of Aboriginal and Torres Strait Islander people;
- that class was based on race;
- the sole purpose of the ABSTUDY rental assistance scheme was to ensure the equal enjoyment of the human rights of that class with respect to education;
- the rental assistance component of the ABSTUDY scheme was necessary to ensure that the class improved its rate of participation in education and, in particular, tertiary education; and
- the objectives for which the ABSTUDY rental assistance scheme was introduced had not been achieved.²⁶³

In the matter of *Vanstone v Clark*,²⁶⁴ the Full Court considered whether or not a section of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) ('the ATSIC Act') and a Determination made under it relating to 'misbehaviour' were inconsistent with s 10 of the RDA (see 3.1.3(d) above). The Full Court also considered, in obiter comments, a suggestion by the appellant that a particular provision of the ATSIC Act, insofar as it prevented persons other than Aboriginal persons or Torres Strait Islanders from being appointed as Commissioners, constituted a 'special measure' under s 8 of the RDA. It could not, therefore, be impugned as being racially discriminatory and nor could the Determination made under it relating to misbehaviour.

Weinberg J, with whom Black CJ agreed, held as follows:

²⁵⁸ (1985) 159 CLR 70, 135.

²⁵⁹ See, for example, Wilson J at 113 who refers to the consultation with the beneficiaries of the measure.

²⁶⁰ Subsequent cases have also considered whether legislation that provides for the recognition of land rights or native title amounts to a special measure within s 8(1). See, for example, *Pareroultja v Tickner* (1993) 42 FCR 32; *Western Australia v Commonwealth* (1995) 183 CLR 373.

²⁶¹ [2002] FMCA 29.

²⁶² [2002] FMCA 29, [51].

²⁶³ [2002] FMCA 29 [54].

²⁶⁴ (2005) 147 FCR 299.

The Minister submitted that once it is conceded that s 31(1) is a 'special measure', any limits inherent in or attached to the office designated by that section are part of the special measure, and cannot be separately attacked as racially discriminatory. According to that submission the terms on which a Commissioner can be suspended from office, including the power to specify the meaning of misbehaviour, are part of the terms of that office. In my view, this submission cannot be accepted. It involves a strained, if not perverse, reading of s 8 of the RDA, and would thwart rather than promote the intention of the legislature. If the submission were correct, any provision of an ancillary nature that inflicted disadvantage upon the group protected under a 'special measure' would itself be immune from the operation of the RDA simply by reason of it being attached to that special measure.²⁶⁵

In *Bropho v Western Australia*²⁶⁶ Nicholson J held that the whole of the Reserves Act was a special measure pursuant to s 8 of the RDA.²⁶⁷ His Honour did not consider whether particular elements of the Reserves Act need to be appropriate or adapted to the protective purpose of the special measure or if it is possible for one element of a purported special measure to be separately attacked as racially discriminatory.²⁶⁸

In concluding the Reserves Act was a special measure, Nicholson J considered the list of elements in article 1(4) of the ICERD, as set out by Brennan J in *Gerhardy v Brown*,²⁶⁹ and stated:

- (a) The Act conferred a benefit upon some of the Aboriginal inhabitants who were women and children by removing the manager being the community believed by Government to be the source of failure to protect them and by empowering an Administrator to take steps to remove the threatening environment. The benefit conferred upon them was to establish a system which would enable them to access such protection as they may require in common with the access enjoyed by Aboriginal or non-Aboriginal persons living outside the Reserve. The advancement conferred was the removal of what was reasonably perceived by Government to be the impediment to their equal enjoyment of their human rights and fundamental freedoms.
- (b) The class from which the individuals the subject of the measure came was based on race, namely the Aboriginality of the inhabitants of the Reserve. (This is a different question to whether the Reserves Act contains provisions addressed to both Aboriginal and non-Aboriginal persons or to whether the effect of the Act is disproportional in its impact on Aboriginal persons so as to give rise to indirect discrimination).
- (c) The sole purpose of the Act was to secure adequate advancement of the beneficiaries in order that they could enjoy and exercise equally with others their human rights and fundamental freedoms.
- (d) The enactment occurred in circumstances where the protection given to the beneficiaries by the special measure was necessary in order that they may

²⁶⁵ (2005) 147 FCR 299, 354 [208]-[209].

²⁶⁶ [2007] FCA 519.

²⁶⁷ [2007] FCA 519, [579]-[580].

²⁶⁸ This is in contrast to Nicholson J's approach to s 10 where he stated: 'I have difficulty in being invited to make a judgment on whether the Reserves Act was discriminatory in globo. This is for two reasons. First, both ss 9 and 10 of the RDA apply with respect to a particular human right. Second, as s10 applies in relation not only to the laws as a whole but also to the provisions of the law, attention should be directed to the specific provisions of the Reserves Act in reaching a view whether, in relation to a particular human right, there is not any inconsistency with the RDA. There are a variety of provisions in the Reserves Act. This is not a case where the law under scrutiny is of such uniform effect it can be addressed globally'. [2007] FCA 519, [312].

²⁶⁹ 159 CLR 70, 133.

enjoy and exercise equally with others their human rights and fundamental freedoms.²⁷⁰

His Honour noted that a large number of the women living on the Reserve did *not* agree with the enactment of the Reserves Act and had made their objection known in an open letter to the Premier of Western Australia.²⁷¹ However, Nicholson J held that the wishes of the beneficiaries of a purported special measure were not necessarily a relevant factor in determining whether something was a special measure. The contrary view expressed by Brennan J in *Gerhardy v Brown* was not, in Nicholson J's view, supported by the other members of the High Court in that case and was therefore not followed.²⁷²

On appeal, the Full Federal Court found it was unnecessary to consider whether this aspect of Nicholson J's reasoning was correct.²⁷³

3.3.2 Reasonable justification

In *Bropho v Western Australia*,²⁷⁴ Nicholson J found that in considering whether an allegation of racial discrimination can be established, regard can be had to the reasonableness of the enactment in question.²⁷⁵

The approach of Nicholson J differs from the approach of the High Court in *Gerhardy v Brown* where the Court accepted that all differential treatment was *prima facie* discriminatory unless it was saved as a special measure.²⁷⁶

In *Gerhardy v Brown*, the Solicitor-General for South Australia submitted, in the context of s 9 of the RDA, that there is no discrimination 'when there is an objective or reasonable justification in the distinction, exclusion, restriction or preference. For there to be discrimination the distinction or differentiation must be arbitrary, invidious or unjustified'.²⁷⁷

That submission was not upheld and was specifically rejected by two members of the Court.²⁷⁸ Questions of proportionality and reasonableness were not relevant to the Court's consideration of s 10(1) in *Gerhardy v Brown*. Subsequent decisions of the High Court and Federal Court have not included considerations of reasonableness and proportionality in their analysis of s 10 or s 9(1) of the RDA.²⁷⁹

On appeal, in *Bropho v State of Western Australia*, the Full Federal Court took a different approach to Nicholson J to the question of proportionality and reasonableness.²⁸⁰ Instead of incorporating a general test of proportionality into the

²⁷⁰ [2007] FCA 519, [579].

²⁷¹ [2007] FCA 519, [570].

²⁷² [2007] FCA 519, [569].

²⁷³ *Bropho v State of Western Australia* [2008] FCAFC 100. Note that the submissions of HREOC as intervener argued that Nicholson J's reasoning was in error on this issue: see <http://www.humanrights.gov.au/legal/submissions_court/intervention/bella_bropho.html>

²⁷⁴ [2007] FCA 519.

²⁷⁵ [2007] FCA 519, [544]-[551].

²⁷⁶ This aspect of the Court's reasoning has been the subject of academic commentary: see Sarah Pritchard, 'Special Measures', in *Racial Discrimination Act 1975: A Review*, Race Discrimination Commissioner, 1995; Wojciech Sadurski, 'Gerhardy v Brown v The Concept of Discrimination: Reflections on the Landmark Case that Wasn't', (1986) 11 *Sydney Law Review* 5.

²⁷⁷ (1985) 159 CLR 70, 72.

²⁷⁸ (1985) 159 CLR 70, 113-114 (Wilson J), 131 (Brennan J).

²⁷⁹ See, for example, *Western Australia v Ward* (2002) 213 CLR 1; *Jango v Northern Territory* (2006) 152 FCR 150; *Mabo v Queensland* (1988) 166 CLR 186.

²⁸⁰ [2008] FCAFC 100.

application of s 10, the Court considered whether the rights that were subject to interference had been legitimately limited. They concluded that the ‘the right to occupy and manage the land conferred by the statute was subject to the contingency that the right would be removed or modified if its removal or modification was necessary to protect vulnerable members of the community’.²⁸¹ The Court also stated:

We accept that it will always be a question of degree in determining the extent to which the content of a universal human right is modified or limited by legitimate laws and rights recognized in Australia. We also emphasize that these observations are not intended to imply that basic human rights protected by the RD Act can be compromised by laws which have an ostensible public purpose but which are, in truth, discriminatory. However we doubt very much that this is such a case.²⁸²

On this basis, the Court held that s 10 did not invalidate the Reserves Act because the property rights in question were not absolute.²⁸³ Therefore, it was not inconsistent with s 10 to limit property rights in accordance with the legitimate public interest to protect the safety and welfare of women and children residing at the Reserve.²⁸⁴

3.4 Racial Hatred

3.4.1 Background

Racial hatred provisions were introduced into the RDA in 1995.²⁸⁵ The majority of cases decided under the RDA in recent years have involved consideration of those provisions.

Section 18C of the RDA provides:

18C Offensive behaviour because of race, colour or national or ethnic origin

- (1) It is unlawful for a person to do an act, otherwise than in private, if:
- (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
 - (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

Note: Subsection (1) makes certain acts unlawful. Section 46P of the *Human Rights and Equal Opportunity Commission Act 1986* allows people to make complaints to the Human Rights and Equal Opportunity Commission about unlawful acts. However, an unlawful act is not necessarily a criminal offence. Section 26 says that this Act does not make it an offence to do an act that is unlawful because of this Part, unless Part IV expressly says that the act is an offence.

- (2) For the purposes of subsection (1), an act is taken not to be done in private if it:

²⁸¹ [2008] FCAFC 100, [82].

²⁸² [2008] FCAFC 100, [82].

²⁸³ [2008] FCAFC 100, [83].

²⁸⁴ [2008] FCAFC 100, [82]-[83].

²⁸⁵ *Racial Hatred Act 1995* (Cth), commenced 13 October 1995.

- (a) causes words, sounds, images or writing to be communicated to the public; or
- (b) is done in a public place; or
- (c) is done in the sight or hearing of people who are in a public place.

(3) In this section:

public place includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

3.4.2 Significance of term racial hatred

Although the term ‘racial hatred’ appears in the heading in Part IIA of the RDA, the term does not appear in any of the provisions under this heading. It has been held that an applicant is not required to prove that the impugned behaviour had its basis in ‘racial hatred’ in order to establish a breach of Part IIA.²⁸⁶

3.4.3 Persons to whom the provisions apply

Section 18C(1) of the RDA operates to protect a person or group of a particular ‘race, colour or national or ethnic origin’.²⁸⁷

It is not necessary to establish that all people in a racial group may be offended by the acts the subject of complaint. It will be sufficient to show that a particular group may reasonably be affected by the conduct. For example:

- in *McGlade v Lightfoot*,²⁸⁸ the relevant group was defined as ‘an Aboriginal person or a group of Aboriginal persons who attach importance to their Aboriginal culture’;²⁸⁹
- in *Creek v Cairns Post Pty Ltd*,²⁹⁰ the group was defined as ‘an Aboriginal mother, or carer of children, residing in the applicant’s town’;²⁹¹ and
- in *Jones v Toben*,²⁹² the subset of people was defined as ‘members of the Australian Jewish community vulnerable to attacks on their pride and self-respect by reason of youth, inexperience or psychological vulnerability’.²⁹³

In *McLeod v Power*,²⁹⁴ the applicant, a Caucasian prison officer, complained that the respondent, an Aboriginal woman, had abused him in terms including ‘you fucking white piece of shit’ and ‘fuck you whites, you’re all fucking shit’. Brown FM stated that the term ‘white’ did not itself encompass a specific race or national or ethnic

²⁸⁶ *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 357 [18]; *Toben v Jones* (2003) 129 FCR 515, 549 [137] (Allsop J).

²⁸⁷ See 3.2.1 above in relation to the interpretation of these terms.

²⁸⁸ (2002) 124 FCR 106.

²⁸⁹ (2002) 124 FCR 106, 117 [46].

²⁹⁰ (2001) 112 FCR 352.

²⁹¹ (2001) 112 FCR 352, 356 [13].

²⁹² [2002] FCA 1150.

²⁹³ [2002] FCA 1150, [95]-[96].

²⁹⁴ (2003) 173 FLR 31.

group, being too wide a term.²⁹⁵ Brown FM also found that the term ‘white’ was not itself a term of abuse and noted that white people are the dominant people historically and culturally within Australia and not in any sense an oppressed group, whose political and civil rights are under threat.²⁹⁶ His Honour suggested that it would be ‘drawing a long bow’ to include ‘whites’ as a group protected under the RDA.²⁹⁷

In *Kelly-Country v Beers*,²⁹⁸ Brown FM held that, when considering the material of a comedian which circulated throughout the country generally, the appropriate group for the purposes of the assessment required by s 18C(1) was ‘ordinary Aboriginal people within Australian society’. His Honour stated that it was not appropriate to otherwise place any geographical limitation on the group.²⁹⁹

3.4.4 Causation and intention to offend

Section 18C(1)(b) requires that the offending act must be done ‘because of’ the race, colour or national or ethnic origin of the complainant or some or all of the people in the relevant group. This wording differs from that in s 9(1) which uses the expressions ‘based on’ and ss 11-15 which uses ‘by reason of’.³⁰⁰

Section 18B provides that the complainant’s race, colour or national or ethnic origin need not be the dominant or substantial reason for the act.

Drummond J held in *Hagan v Trustees of the Toowoomba Sports Ground Trust*³⁰¹ that s 18C(1)(b) implies that there must be a causal relationship between the reason for doing the act and the race of the ‘target’ person or group.³⁰² His Honour also held that s 18C(1)(b) should not be interpreted mechanically. It should be applied in light of the purpose and statutory context of s 18C – namely, as a prohibition of behaviour based on racial hatred.³⁰³ Drummond J concluded, after examining the Second Reading Speech of the RDA, that ‘it would give s 18C an impermissibly wide reach to interpret it as applying to acts done specifically in circumstances where the actor has been careful to avoid giving offence to a racial group who might be offended’.³⁰⁴

Kiefel J held similarly in *Creek v Cairns Post Pty Ltd*³⁰⁵ (*‘Creek v Cairns Post’*) that s 18C(1)(b) requires a consideration of the reason for the relevant act. However, her Honour held that the reference in the heading of Part IIA to ‘behaviour based on racial hatred’ does not create a separate test requiring the behaviour to have its basis in actual hatred of race. Sections 18B and 18C establish that the prohibition will be breached if the basis for the act was the race, colour, national or ethnic origin of the other person or group. Whilst the reason for the behaviour may be a matter for enquiry, the intensity of feeling of the person committing the act need not be

²⁹⁵ (2003) 173 FLR 31, 43 [55].

²⁹⁶ (2003) 173 FLR 31, 44 [59].

²⁹⁷ (2003) 173 FLR 31, 44 [62]. See, however, *Carr v Boree Aboriginal Corporation* [2003] FMCA 408, in which Raphael FM found that the first respondent had unlawfully discriminated against the applicant in her employment and had dismissed her for reasons ‘which were to do with her race or non-Aboriginality’, [9]. Raphael FM stated that ‘the provisions of the RDA apply to all Australians’, [14]. See also *Bryant v Queensland Newspaper Pty Ltd* [1997] HREOCA 23.

²⁹⁸ (2004) 207 ALR 421.

²⁹⁹ (2004) 207 ALR 421, 444 [100].

³⁰⁰ See ss 11-15. The issue of causation generally under the RDA is discussed at 3.2.2(a)(iii) and 3.2.2(b) above.

³⁰¹ [2000] FCA 1615.

³⁰² [2000] FCA 1615, [16].

³⁰³ [2000] FCA 1615, [34].

³⁰⁴ [2000] FCA 1615, [36].

³⁰⁵ (2001) 112 FCR 352.

considered (although it may explain otherwise inexplicable behaviour).³⁰⁶ The key question is whether ‘anything suggests race as a factor’ in the relevant act.³⁰⁷

In *Jones v Toben*,³⁰⁸ Branson J adopted the approach of Kiefel J in *Creek v Cairns Post* to the words ‘because of’ in s 18C(1)(b).³⁰⁹ Branson J considered the material before her which, amongst other things, conveyed the imputation that there was serious doubt that the Holocaust occurred. Her Honour found that it was ‘abundantly clear that race was a factor in the respondent’s decision to publish the material’.

The material includes many references to Jews and events and people characterised as Jewish. It is particularly concerned with the Holocaust and with the conduct of German forces during World War II, matters of particular importance to Jewish people. It is, in my view, plainly calculated to convey a message about Jewish people (see *Jones v Scully* per Hely J at [116] - [117]).³¹⁰

In *Miller v Wertheim*,³¹¹ the Full Federal Court held that a speech made by the first respondent may have been reasonably likely, in all the circumstances, to offend a small part of the Orthodox Jewish community. However, this did not, in itself, satisfy the requisite causal relationship of s 18C:

The group and its members were criticised in the speech because of their allegedly divisive and destructive activities, and not because the group or its members were of the Jewish race, of Jewish ethnicity or because they were persons who adhered to the practices and beliefs of orthodox Judaism.³¹²

In *McGlade v Lightfoot*,³¹³ an interview was reported in a newspaper in which the respondent made comments that were alleged to breach the racial hatred provisions. Carr J found that

the evidence establishes that the respondent’s act was done because of the fact that the persons about whom the respondent was talking were of the Australian Aboriginal race or ethnic origin ... there could be no other reason for the respondent’s statements than the race or ethnic origin of the relevant group of people.³¹⁴

In *Kelly-Country v Beers*,³¹⁵ Brown FM considered the performance of a comedian who portrays an Aboriginal character ‘King Billy Cokebottle’ for the duration of his routine, much of which involves jokes with no specific racial element. In doing so, the respondent applies black stage make-up, has an unkempt white beard and moustache as well as ‘what appears to be a white or ceremonial ochre stripe across his nose and cheek bones... [and] a battered, wide brimmed hat, of a kind often associated with Australian, particularly Aboriginal people, who live in a rural or outback setting’.³¹⁶

His Honour noted that ‘the intention of the person perpetrating the act complained of is not relevant... an act that would otherwise be unlawful is not excused if its

³⁰⁶ (2001) 112 FCR 352, 357 [18].

³⁰⁷ (2001) 112 FCR 352, 359 [28].

³⁰⁸ [2002] FCA 1150.

³⁰⁹ See also Hely J in *Jones v Scully* (2002) 120 FCR 243, 273 [114].

³¹⁰ [2002] FCA 1150, [99]. Her Honour’s approach was approved on appeal in *Toben v Jones* (2003) 129 FCR 515.

³¹¹ [2002] FCAFC 156.

³¹² [2002] FCAFC 156, [12]-[13].

³¹³ (2002) 124 FCR 106.

³¹⁴ (2002) 124 FCR 106, 121 [66].

³¹⁵ (2004) 207 ALR 421. The Acting Race Discrimination Commissioner was granted leave to appear as amicus curiae in this matter. HREOC’s submissions are available at

<http://www.hreoc.gov.au/legal/submissions_court/amicus/kelly_country.html>.

³¹⁶ (2004) 207 ALR 421, 426 [30].

originator meant no offence by it'.³¹⁷ However, his Honour suggested that the portrayal of the character 'King Billy Cokebottle' was not an act done 'because of' race:

I have some difficulty in reaching the conclusion that Mr Beers performs his act because of Aboriginal people any more than I could conclude that Barry Humphries assumes the character of Edna Everage because of women in Moonee Ponds... King Billy Cokebottle is a vehicle for his particular style of comedic invention.³¹⁸

In *Silberberg v The Builders Collective of Australia Inc*³¹⁹ the applicant, who was Jewish, alleged a breach of the racial hatred provisions of the RDA in respect of two postings on an internet discussion forum. The claim was brought against the individual who posted the relevant postings, as well as against the incorporated association which hosted the forum as part of its website.

Gyles J held that it was reasonably likely that a person of the applicant's ethnicity would have been offended, insulted, humiliated or intimidated by the messages. Accordingly, his Honour upheld the complaint against the individual respondent and ordered a restraint against him publishing the same or similar material.³²⁰

In relation to the website host, his Honour held that the failure to remove material 'known to be offensive' within a reasonable time would breach s 18C(1)(a).³²¹ However, his Honour found that the evidence in this case did not establish that the failure to remove the message was connected to the race or ethnic origin of the applicant. His Honour stated:

there is substance to the argument that the failure to remove the offensive material has not been shown to have any relevant connection with race or ethnic origin of the applicant or indeed any other Jewish person as required by s 18C(1)(b) of the Act. The failure of the unidentified administrator to remove the Second Message on and after 1 July 2006 was the clearest case of failure to act. I cannot conclude that such failure was attributable, even in part, to the race or ethnic origin of the applicant. If Dwyer is accepted, the message should have been removed if its offensive nature was understood. However, failure to do so is just as easily explained by inattention or lack of diligence. Drawing the necessary causal connection would be speculation rather than legitimate inference. The same reasoning would be more obviously applicable to the systematic failure to monitor and remove offensive postings. Absent the necessary causal connection there is no breach of Pt IIA by the Collective.³²²

Gyles J therefore found the organisation had not acted unlawfully by allowing the offensive material to be copied, or by failing to delete it from the website promptly.

³¹⁷ (2004) 207 ALR 421, 441 [85]. Note, however, that his Honour's decision suggests that intention *is* relevant to determining the meaning and offensiveness of a particular act: 446 [111], 446 [114].

³¹⁸ (2004) 207 ALR 421, 446 [110].

³¹⁹ [2007] FCA 1512.

³²⁰ [2007] FCA 1512, [37].

³²¹ [2007] FCA 1512, [34].

³²² [2007] FCA 1512, [35].

3.4.5 Reasonably likely to offend, insult, humiliate or intimidate

(a) Objective standard

The test of whether a respondent's act was 'reasonably likely in all the circumstances to offend, insult, humiliate or intimidate another person or a group of people' is an objective one.³²³ It is not necessary for an applicant to prove that any person was actually offended, insulted, humiliated or intimidated by the conduct.³²⁴

In *Creek v Cairns Post Pty Ltd*³²⁵ ('*Creek v Cairns Post*'), the respondent had published an article concerning the decision by the Queensland Department of Family Services, Youth and Community Care to place a young Aboriginal girl in the custody of the applicant, a relative of the child's deceased mother and guardian of the child's two brothers. The child had previously been in the foster care of a non-Aboriginal family. The article focused on whether the Department's decision was a reaction to the 1997 '*Stolen Generation*' report,³²⁶ which had spoken of the suffering of Aboriginal people as a result of the past practice of removing Indigenous children from their families.

The basis for the complaint was the photographs which accompanied the story. The photograph of the non-Aboriginal couple showed them in their living room with photographs and books behind them. The photograph of the applicant showed her in a bush camp with an open fire and a shed or lean-to in which young children could be seen. The respondent obtained the photograph (which had been taken on an earlier occasion in relation to a different story) from a photographic library.

The applicant complained that the photograph portrayed her as a primitive bush Aboriginal and implied that this was the setting in which the child would have to live. In reality the applicant at all relevant times lived in a comfortable, four-bedroom brick home with the usual amenities. The bush camp was four hours drive from the residence of the applicant and was used by her and her family principally for recreational purposes.

Kiefel J held that the act in question must have 'profound and serious effects, not to be likened to mere slights'.³²⁷ Her Honour noted that the nature or quality of the act in question is tested by the *effect* which it is reasonably likely to have on another person of the applicant's racial or other group. Kiefel J stated that the question to be determined is whether the act in question can, 'in the circumstances be regarded as reasonably likely to offend or humiliate a person in the applicant's position'.³²⁸

Although rejecting the application on the basis that the publication was not 'motivated by considerations of race', Kiefel J held that a reasonable person in the position of the applicant would

³²³ *McGlade v Lightfoot* (2002) 124 FCR 106, 116-117 [43]; *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615; *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 355 [12]; *Jones v Scully* (2002) 120 FCR 243, 268-269 [98]-[100]; *Jones v Toben* [2002] FCA 1150, [84]; *Obieta v NSW Department of Education and Training* [2007] FCA 86 [223]; *Silberberg v Builders Collective of Australia Inc* [2007] FCA 1512, [21].

³²⁴ *Jones v Scully* (2002) 120 FCR 243, 269 [99].

³²⁵ (2001) 112 FCR 352.

³²⁶ Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997).

³²⁷ (2001) 112 FCR 352, 356-357 [16].

³²⁸ (2001) 112 FCR 352, 355 [12].

feel offended, insulted or humiliated if they were portrayed as living in rough bush conditions in the context of a report which is about a child's welfare. In that context it is implied that that person would be taking the child into less desirable conditions. The offence comes not just from the fact that it is wrong, but from the comparison which is invited by the photographs.³²⁹

In relation to the comments made by Kiefel J that the act in question must have 'profound and serious effects, not to be likened to mere slights', Branson J in *Jones v Toben* stated that she did not understand Kiefel J to have intended that a 'gloss' be placed on the ordinary meaning of the words in s 18C:

Rather, I understand her Honour to have found in the context provided by s 18C of the RDA a legislative intent to render unlawful only acts which fall squarely within the terms of the section and not to reach to 'mere slights' in the sense of acts which, for example, are reasonably likely to cause technical, but not real, offence or insult (see also *Jones v Scully* per Hely J at [102]). It would be wrong, in my view, to place a gloss on the words used in s 18C of the RDA.³³⁰

Kiefel J's statement in *Creek v Cairns Post* that conduct must have 'profound and serious effects not to be likened to mere slights' to be caught by the prohibition in s 18C was cited with approval by French J in *Bropho v Human Rights & Equal Opportunity Commission*.³³¹ French J also stated, in obiter comments:

The act must be 'reasonably likely' to have the prohibited effect. Judicial decisions on s 18C(1) do not appear to have determined whether the relevant likelihood is a greater than even probability or a finite probability in the sense of a 'real chance'. It might be thought that the threshold of unlawfulness should be defined by reference to the balance of probabilities rather than a lesser likelihood having regard to [the] character of s 18C as an encroachment upon freedom of speech and expression.³³²

(b) Subjective effect on applicant

Evidence of the subjective effect on the applicant of an impugned act may be relevant and is admissible in determining whether a respondent's act was 'reasonably likely in all the circumstances to offend, insult, humiliate or intimidate another person or a group of people'. However, it is 'not determinative in answering the question'.³³³

In *Horman v Distribution Group Ltd*,³³⁴ the applicant submitted that the use of the word 'wog' in relation to the applicant and others was offensive and discriminatory to the applicant. There was evidence that the applicant used the word herself with respect to another employee. This did not, however, disqualify the applicant from the protection of s 18C. Raphael FM stated:

the very words used indicated that when she used them she intended to insult [the other employee]. It follows from this that she believed that the word 'wog' could be used in an insulting manner, and I am prepared to find that in the instances in

³²⁹ (2001) 112 FCR 352, 356 [13].

³³⁰ [2002] FCA 1150, [92].

³³¹ (2004) 135 FCR 105, 123. See also *Kelly-Country v Beers* (2004) 207 ALR 421, 441-442 [88].

³³² (2004) 135 FCR 105, 124 [70].

³³³ *McGlade v Lightfoot* (2002) 124 FCR 106, 117 [44]; *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615, [28]; *Jones v Scully* (2002) 120 FCR 243, 269 [99]-[100].

³³⁴ [2001] FMCA 52.

which I have accepted that it was used, that it was used in that way with respect to the applicant.³³⁵

(c) Reasonable victim test

In *McLeod v Power*,³³⁶ Brown FM described the objective test as one of the ‘reasonable victim’,³³⁷ adopting the analysis of Commissioner Innes in *Corunna v West Australian Newspapers Ltd.*³³⁸ In that case, the applicant, a Caucasian prison officer, complained that the respondent, an Aboriginal woman, had abused him in terms including ‘you fucking white piece of shit’ and ‘fuck you whites, you’re all fucking shit’ upon being refused entry to the prison for a visit. Brown FM found as follows:

The abuse, although unpleasant and offensive, was not significantly transformed by the addition of the words ‘white’ or ‘whites’. These words are not of themselves offensive words or terms of racial vilification. This is particularly so because white or pale skinned people form the majority of the population in Australia... I believe that a reasonable prison officer would have found the words offensive but not specifically offensive because of the racial implication that Mr McLeod says he found in them.³³⁹

In *Kelly-Country v Beers*³⁴⁰ (*‘Kelly-Country’*), the applicant, an Aboriginal man, complained of vilification in relation to a comedy performance (see 3.4.4 above). The applicant described himself as an ‘activist’. Brown FM stated that:

it is possible that such an activist may search out material for the purpose of being offended and so may be regarded as being unduly susceptible or even an agent provocateur in respect of the material complained of... A mere slight or insult is insufficient. This is the so-called ‘reasonable victim’ test.³⁴¹

His Honour also noted that in applying the ‘reasonable victim’ test it is necessary to be informed by community standards and consider the context in which the communication is made:

In applying the reasonable victim test, it is obviously necessary to apply a yardstick of reasonableness to the act complained of. This yardstick should not be a particularly susceptible person to be aroused or incited, but rather a reasonable and ordinary person and in addition should be a reasonable person with the racial, ethnic or relevant attributes of the complainant in the matter.

....

[A] joke about a historically oppressed minority group, which is told by a member of a racially dominant majority, may objectively be more likely to lead to offence. As a result, a joke told by an Aboriginal person about other Aboriginal people may not be so likely to transgress the provisions of the RDA, because the teller of the joke itself and its subject are not in a situation of power imbalance, but are each members of the same subset of disadvantaged people...³⁴²

³³⁵ [2001] FMCA 52, [55].

³³⁶ (2003) 173 FLR 31.

³³⁷ (2003) 173 FLR 31, 45 [65].

³³⁸ (2001) EOC 93-146.

³³⁹ (2003) 173 FLR 31, 46-47 [69].

³⁴⁰ (2004) 207 ALR 421.

³⁴¹ (2004) 207 ALR 421, 441 [87].

³⁴² (2004) 207 ALR 421, 442 [90]-[92].

His Honour concluded, however, on the evidence that the act complained of was not unlawful as ‘no reasonable Aboriginal person, who was not a political activist’ would have been insulted, humiliated or intimidated by it (see below 3.4.5(d)).³⁴³

(d) Context

Context is an important consideration in determining whether a particular act breaches s 18C. For example, in *Hagan v Trustees of the Toowoomba Sports Ground Trust*,³⁴⁴ Drummond J considered whether or not the use of the word ‘nigger’ was offensive to Indigenous people in the naming of the ‘ES “Nigger” Brown Stand’. His Honour stated:

There can be no doubt that the use of the word ‘nigger’ is, in modern Australia, well capable of being an extremely offensive racist act. If someone were, for example, to call a person of indigenous descent a ‘nigger’, that would almost certainly involve unlawfully racially-based conduct prohibited by the [RDA]. I say ‘almost certainly’ because it will, I think, always be necessary to take into account the context in which the word is used, even when it is used to refer to an indigenous person.³⁴⁵

Drummond J suggested that the use of the word ‘nigger’ *between* Australian Indigenous people would be *unlikely* to breach the RDA. His Honour cited the views of Clarence Major, to the effect that the use of the word ‘nigger’ between black people in the USA could be considered ‘a racial term with undertones of warmth and goodwill – reflecting, aside from the irony, a tragicomic sensibility that is aware of black history’.³⁴⁶

In the case before Drummond J, it was significant that ‘nigger’ was the accepted nickname of ES Brown who was being honoured in the naming of the stand. In this context, His Honour found that the word had ceased to have any racist connotation.³⁴⁷

In *Kelly-Country*, considerations of context played an important part in the reasoning of Brown FM who held that the performance of the respondent in the character of ‘King Billy Cokebottle’ (see 3.4.4 above), did not contravene s 18C of the RDA. His Honour noted the significance of the fact that Aboriginal people had been ‘the subject of racial discrimination and prejudice throughout the European settlement of Australia’. He continued:

However, the setting of the particular communication or act complained of must also be analysed. A statement by an Australian Senator to a journalist employed by a nationally circulating newspaper is clearly different to a joke exchanged between two friends in the public bar of a hotel. The former has a clear political context and the latter is an exchanged act of entertainment. Mr Beers’ act and tapes are designed to be entertaining for members of a paying audience, which has a choice whether or not to attend the performances or buy the tapes concerned. They do not

³⁴³ (2004) 207 ALR 421, 446 [111].

³⁴⁴ [2000] FCA 1615.

³⁴⁵ [2000] FCA 1615, [7].

³⁴⁶ [2000] FCA 1615, [7], citing Clarence Major, *Dictionary of Afro-American Slang*, 1970.

³⁴⁷ [2000] FCA 1615, [27]. His Honour also noted evidence from witnesses of Aboriginal descent that neither they, nor members of the broader Toowoomba Aboriginal community, were, in fact, offended by the use of the word in this context. Drummond J further took into account the fact that the allegedly offensive word had been displayed for 40 years and there had never been any objection to it prior to the relevant complaint, [28]-[29]. As noted above, the United Nations Committee on the Elimination of Racial Discrimination subsequently found that certain articles of ICERD had been violated: *Hagan v Australia*, Communication No. 26/2002: Australia 14/04/2003. CERD/C/62/D/26/2002, [7.1]-[8].

have an explicit political content. Clearly, the jokes told by Mr Beers are not intended to be taken literally. However, any joke by its nature, has the potential to hold at least someone up to scorn or ridicule. Accordingly, there may be situations when a joke does objectively incite racial hatred.³⁴⁸

His Honour concluded:

I accept that Mr Beers' act and tapes are vulgar and in poor taste. I also accept that Aboriginal people are a distinct minority within Australian society and so objectively more susceptible to be offended, insulted, humiliated and intimidated because of their disadvantaged status within Australian society. However, Mr Beers' act is designed to be humorous. It has no overt political context and the nature of the jokes or stories within it are intended to be divorced from reality. The act is not to be taken literally or seriously and no reasonable Aboriginal person, who was not a political activist, would take it as such.

King Billy Cokebottle himself does not directly demean Aboriginal people, rather he pokes fun at all manner of people, including Aboriginal people and indeed in many of his stories, Aboriginal people have the last laugh. I do not think that an Aboriginal person, who had paid expecting to hear a ribald comedic performance, would believe that the subject of either the act itself or the recorded tapes was to demean Aboriginal people generally.³⁴⁹

In *Campbell v Kirstenfeldt*,³⁵⁰ Mrs Campbell, an Aboriginal woman, alleged that her neighbour, who was white, abused her and called her names on six separate occasions. These names included 'nigger', 'coon', 'black mole', 'black bastards' and 'lying black mole cunt'. She was also told to 'go back to the scrub were you belong'. The Court held all six incidents contravened s 18C of the RDA. The respondent was ordered to make a written apology and damages were awarded to Mrs Campbell.

(e) Truth or falsity of statement not determinative of offensiveness

The truth or falsity of a statement is not determinative of whether the relevant conduct is rendered unlawful by s 18C of the RDA. A true statement can nevertheless be offensive in the relevant sense.³⁵¹

3.4.6 Otherwise than in private

Section 18C applies only to acts done 'otherwise than in private'.³⁵²

Section 18C(2) provides that:

- (2) For the purposes of subsection (1), an act is taken not to be done in private if it:
 - (a) causes words, sounds, images or writing to be communicated to the public; or
 - (b) is done in a public place; or
 - (c) is done in the sight or hearing of people who are in a public place.

³⁴⁸ (2004) 207 ALR 421, 444 [99].

³⁴⁹ (2004) 207 ALR 421, 446 [111]-[112]. See also his Honour's comments as to the nature of a comedy performance: 'Humour to be effective must often sting and insult. It would, in my view, be unreasonable and necessary consequence of the Racial Discrimination Act for all humour, especially stand-up humour, to be rendered anodyne and innocuous by virtue of the provisions of the Act', 443 [93].

³⁵⁰ [2008] FMCA 1356.

³⁵¹ *Jones v Toben* [2002] FCA 1150, [89]; *Jones v Scully* (2002) 120 FCR 243, 270 [104]; *Creek v Cairns Post* (2001) 112 FCR 352, 355 [6].

³⁵² As for the other elements of s 18C, the onus is on the applicant to prove that the relevant act was done 'otherwise than in private': see *Gibbs v Wanganeen* (2001) 162 FLR 333, 335 [7].

Section 18C(3) further provides:

(3) In this section:

public place includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

Commissioner Innes in *Korczak v Commonwealth (Department of Defence)*³⁵³ (*'Korczak'*), observed that the focus in s 18C is on the nature of the act, rather than its physical location per se: an act does not need to have occurred in a 'public place' for it to satisfy the requirement that the act has occurred 'otherwise than in private'. The Commissioner stated that, reading the RDA as a whole, the phrase 'otherwise than in private' should be read consistently with the broad concept of 'public life' that appears in s 9 of the RDA and article 5 of ICERD.³⁵⁴

In both *Gibbs v Wanganeen*³⁵⁵ (*'Gibbs'*) and *McMahon v Bowman*,³⁵⁶ the FMC cited with approval the decision of Commissioner Innes in *Korczak* for the proposition that the act must be done otherwise than in private, but need not be done 'in public'.

Driver FM in *Gibbs* noted that s 18C(2) of the RDA 'is inclusive but not exhaustive of the circumstances in which an act is to be taken as not being done in private'.³⁵⁷ His Honour took a broad interpretive approach to the provision, stating that '[t]he legislation is remedial and its operation should not be unduly confined'.³⁵⁸ His Honour suggested that it was 'not possible for Parliament to stipulate all circumstances where a relevant act is to be taken as not being done in private'.³⁵⁹

Driver FM found certain comments made in a prison were made 'in private'.³⁶⁰ In doing so, his Honour considered the Victorian case of *McIvor v Garlick*³⁶¹ which addressed the meaning of a public place under the *Summary Offences Act 1966* (Vic) and noted that the case was a material guide to the meaning of the words 'public place' at common law.³⁶²

He also noted that a prison is a closed community to which access and egress are strictly regulated.³⁶³ His Honour suggested that because prisoners live there, it has some of the attributes of a private home³⁶⁴ and he concluded that it is not in general a public place, although some parts may be a public place depending on the circumstances. Further, it is possible that an act done within a prison may be done otherwise than in private, depending upon the circumstances, even if done in a place that is not a public place.³⁶⁵ For example, an act may take place there otherwise than in private if members of the public, meaning 'persons other than prisoners or correctional staff', were actually present in the area at the place where the act occurred, when it occurred, or at least within earshot.³⁶⁶ Driver FM also referred to the

³⁵³ Unreported, HREOC, Commissioner Innes, 16 December 1999 (extract at (2000) EOC 93-056).

³⁵⁴ Unreported, HREOC, Commissioner Innes, 16 December 1999 (extract at (2000) EOC 93-056, 74,176)

³⁵⁵ (2001) 162 FLR 333.

³⁵⁶ [2000] FMCA 3.

³⁵⁷ (2001) 162 FLR 333, 336 [11].

³⁵⁸ (2001) 162 FLR 333, 336-337 [12].

³⁵⁹ (2001) 162 FLR 333, 336-337 [12].

³⁶⁰ (2001) 162 FLR 333, 337-338 [18].

³⁶¹ [1972] VR 129.

³⁶² (2001) 162 FLR 333, 337 [13].

³⁶³ (2001) 162 FLR 333 337 [14].

³⁶⁴ (2001) 162 FLR 333 337 [15].

³⁶⁵ (2001) 162 FLR 333 337 [14].

³⁶⁶ (2001) 162 FLR 333, 337 [17].

‘quality of the conversation’. His Honour noted that ‘the exchange was intended by the respondent to be a private one’ and concluded that the statements were not made ‘otherwise than in private’.³⁶⁷

In *McMahon v Bowman*, words shouted across a laneway between one house and another were taken to be in the sight or hearing of people in a public place for the purpose of s 18C(2)(c) as it would be ‘reasonable to conclude that they were spoken in such a way that they were capable of being heard by some person in the street if that person was attending to what was taking place’.³⁶⁸ It was not necessary to prove that the people who were present in the street at the time of the incident heard what occurred.³⁶⁹

In *McGlade v Lightfoot*,³⁷⁰ Carr J held, in dismissing an application by the respondent for summary dismissal, that it was ‘reasonably arguable’ that the act of a politician giving an interview to a journalist and ‘using the words complained of was an act which caused the same words to be communicated to the public’.³⁷¹ Moreover, Carr J held that ‘[t]he same applies, in my view, to the subsequent ‘picking up’ by a local newspaper of the original article published in a national newspaper’.³⁷²

In the substantive hearing in that matter,³⁷³ Carr J found that the respondent had, in giving an ‘on the record’ interview with a journalist, ‘deliberately and intentionally engaged in conduct, the natural consequence of which was the publication of his words’ and accordingly that the comments were made ‘otherwise than in private’.³⁷⁴

It has also been held that the distribution of leaflets to people in a certain area, including placement of material in their letterboxes, was an act done ‘otherwise than in private’.³⁷⁵

In *Jones v Toben*,³⁷⁶ Branson J held that the ‘placing of material on a website which is not password protected is an act which, for the purposes of the RDA, is taken not to be done in private’.³⁷⁷ In that case the respondent had placed material on the internet which was found to be anti-Semitic. Her Honour stated that her conclusion as to the public nature of the relevant act was supported by the fact that a search of the World

³⁶⁷ (2001) 162 FLR 333, 337-338 [18]. In *McLeod v Power* (2003) 173 FLR 31, Brown FM cited with approval the decision in *Gibbs v Wanganeen* (2001) 162 FLR 333 and the analysis in *Korczak v Commonwealth (Department of Defence)* (Unreported, HREOC, Commissioner Innes, 16 December 1999 (extract at (2000) EOC 93-056)), in drawing a distinction between the nature of an act and where it takes place: 45 [65], 47-48 [72]-[73]. His Honour held that, depending upon the circumstances, an act can occur in a public place but nevertheless be in a context such that it is not ‘otherwise than in private’. In that case, abuse delivered by the respondent in a public place (outside a prison in an area where other visitors may have been present) was found not to be covered by s 18C. Relevant to his Honour’s decision was the fact that the respondent was not ‘playing to the grandstand’ and had intended the conversation to be a private one: 47-48 [70]-[73]. Note, however, that Brown FM’s decision on this point appears to be inconsistent with the terms of s 18C(2)(b) which provides that ‘an act is taken not to be done in private if it ... is done in a public place’. For acts done in a public place the intentions of the actor are arguably not relevant.

³⁶⁸ [2000] FMCA 3, [26].

³⁶⁹ Raphael FM based this view on other cases dealing with ‘public place’ in a summary offences context: *R v James Webb* [1848] 2 C & K 933 as applied in *Purves v Inglis* [1915] 34 NZLR 1051. In *Chambers v Darley* [2002] FMCA 3, [10] Baumann FM referred approvingly to the analysis of Raphael FM.

³⁷⁰ (2002) 124 FCR 106.

³⁷¹ (2002) 124 FCR 106, [26].

³⁷² (2002) 124 FCR 106, [34]. Note, however, that these views were expressed as being provisional and subject to re-consideration at the final hearing of this matter, [37].

³⁷³ *McGlade v Lightfoot* (2002) 124 FCR 106.

³⁷⁴ *McGlade v Lightfoot* (2002) 124 FCR 106, 116 [38]-[40].

³⁷⁵ *Hobart Hebrew Congregation v Scully* (Unreported, HREOC, Commissioner Cavanough QC, 21 September 2000 (extract at (2000) EOC 93-109)).

³⁷⁶ [2002] FCA 1150.

³⁷⁷ [2002] FCA 1150, [74].

Wide Web using terms such as ‘Jew’, ‘Holocaust’ and ‘Talmud’, which were likely to be used by a member of the Jewish community interested in Jewish affairs, lead the searcher to one or more of the websites containing the material the subject of the complaint.³⁷⁸ The decisions in *Jones v Toben*³⁷⁹ (at first instance) and in *Toben v Jones*³⁸⁰ (on appeal) were followed in *Jeremy Jones v The Bible Believers’ Church*³⁸¹ (see 3.4.7(c)(i) below) and *Silberberg v Builders Collective of Australia*³⁸² (discussed at 3.4.4).

In *Campbell v Kirstenfeldt*,³⁸³ Lucev FM held that incidents where a man called his neighbour names, including ‘niggers’, ‘coons’, ‘black mole’, ‘black bastards’ and ‘lying black mole cunt’, were not taken to be done in private. The Court found that the incidents:

- occurred over a neighbourhood fence; or
- were at least capable of being heard between one property and another; or
- were capable of being heard in public because they were said to people either on a public footpath or in a public reserve; or
- given that each of the houses faced onto a footpath and road, capable of being heard in a public place, being either the footpath, or the road or the park reserve.

Lucev FM said exchanges in these circumstances were not made in private, but exchanges heard by the complainant and members of her family, people who were not members of her family, or ‘generally capable of being heard in neighbourhood’.³⁸⁴

3.4.7 Exemptions

Section 18D of the RDA provides for the following exemptions from the prohibition on racial hatred in s 18C:

18D Exemptions

Section 18C does not render unlawful anything said or done reasonably and in good faith:

- (a) in the performance, exhibition or distribution of an artistic work; or
- (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
- (c) in making or publishing:
 - i) a fair and accurate report of any event or matter of public interest; or

³⁷⁸ [2002] FCA 1150, [74]. Her Honour’s findings on this point were not challenged on appeal: *Toben v Jones* (2003) 129 FCR 515.

³⁷⁹ [2002] FCA 1150.

³⁸⁰ (2003) 129 FCR 515.

³⁸¹ [2007] FCA 55.

³⁸² [2007] FCA 1512, [19].

³⁸³ [2008] FMCA 1356.

³⁸⁴ [2008] FMCA1356, [29].

- (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

(a) Onus of proof

The weight of authority suggests that the respondent bears the onus of proving the elements of s 18D.³⁸⁵

However, in *Bropho v Human Rights & Equal Opportunity Commission*³⁸⁶ ('*Bropho*'), French J, in obiter comments, suggested that 'the incidence of the burden of proof' was not 'a question that should be regarded as settled'.³⁸⁷ This was based on his Honour's view that s 18D was not 'in substance an exemption'³⁸⁸ (see further 3.4.7(b) below). French J concluded by suggesting that any burden on a respondent may only be an evidentiary one:

If the burden of proof does rest upon the person invoking the benefit of s 18D, then that burden would plainly cover the proof of primary facts from which assessments of reasonableness and good faith are to be made. But the process of making such assessments is not so readily compatible with the notion of the burden of proof.³⁸⁹

In *Kelly-Country v Beers*³⁹⁰ ('*Kelly-Country*'), the issue of the onus of proof was not explicitly raised, but Brown FM appears to have accepted that the onus of proof is on a respondent to satisfy s 18D.³⁹¹

(b) A broad or narrow interpretation?

The question of whether the exemptions to racial hatred in s 18D should be broadly or narrowly construed was considered in *Bropho*. In that matter, the Nyungah Circle of Elders claimed that a cartoon published in the West Australian newspaper breached s 18C as being offensive to Aboriginal people. At first instance, Commissioner Innes found that the cartoon fell within the exemption for artistic works in s 18D(a).³⁹² This was upheld on review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) by RD Nicholson J,³⁹³ who held that s 18D should be broadly interpreted:

There is ... nothing in either the explanatory memorandum or second reading speech reference to which is permissible within the provisions of s 15AB of the *Acts Interpretation Act 1901* (Cth) to suggest that the exemption provisions in s 18D should be read other than in a way which gives full force and effect to them.³⁹⁴

On appeal, French J agreed with the broad approach to the exemptions in s 18D. His Honour reasoned that s 18C was, in fact, an exception to the general principle recognised in international instruments and the common law that people should enjoy

³⁸⁵ *Jones v Scully* (2002) 120 FCR 243, 276 [127]-[128]; *McGlade v Lightfoot* (2002) 124 FCR 106, 121 [68]-[70]; *Jones v Toben* [2002] FCA 1150, [101]; this point was not challenged on appeal: *Toben v Jones* (2003) 129 FCR 515, 528 [41] (Carr J).

³⁸⁶ (2004) 135 FCR 105.

³⁸⁷ (2004) 135 FCR 105, 126-127 [75].

³⁸⁸ (2004) 135 FCR 105, 127 [76].

³⁸⁹ (2004) 135 FCR 105, 128 [77].

³⁹⁰ (2004) 207 ALR 421.

³⁹¹ (2004) 207 ALR 421, 448-449 [125].

³⁹² *Corunna v West Australian Newspapers Ltd* (2001) EOC 93-146.

³⁹³ *Bropho v Human Rights & Equal Opportunity Commission* [2002] FCA 1510.

³⁹⁴ [2002] FCA 1510, [31]. See also the discussion of this issue in *Bryl v Nowra* [1999] HREOCA 11 (extract at (1999) EOC 93-022).

freedom of speech and expression. Section 18D was therefore ‘exemption upon exception’.³⁹⁵ French J stated:

Against that background s 18D may be seen as defining the limits of the proscription in s 18C and not as a free speech exception to it. It is appropriate therefore that s 18D be construed broadly rather than narrowly.³⁹⁶

An alternative construction has been advanced by many Australian commentators who have argued that the breadth of the exemptions undermines the protection afforded by the racial hatred provisions and that a broad interpretation of the exemptions is contrary to the presumption that exemptions in beneficial legislation should be construed narrowly rather than broadly.³⁹⁷

In *Kelly-Country*, Brown FM (who did not make reference to the decision in *Bropho* on this issue) held that as part of remedial legislation, the exemption in s 18D should be narrowly construed:

Essentially, those who would incite racial hatred or intolerance within Australia should not be given protection to express their abhorrent views through a wide or liberal interpretation of the exceptions contained within section 18D. A broad reading of the exemptions contained in section 18D could potentially undermine the protection afforded by the vilification provisions contained in section 18C of the RDA.³⁹⁸

(c) Reasonably and in good faith

(i) *Objective and subjective elements*

Courts have approached ‘reasonableness’ and ‘good faith’ as separate elements of the exemption in s 18D. It appears that whether an act is done ‘reasonably’ will be answered by reference to the objective circumstances of the act, whereas ‘good faith’ requires a consideration of the intention of the respondent.

In *Bryl v Nowra*,³⁹⁹ Commissioner Johnston stated that good faith was a subjective element and that the absence of good faith required

conduct that smacks of dishonesty or fraud; in other words something approaching a deliberate intent to mislead or, if it is reasonably foreseeable that a particular racial or national group will be humiliated or denigrated by publication, at least a culpably reckless and callous indifference in that regard. Mere indifference about, or careless lack of concern to ascertain whether the matters dealt with in the artistic work reflect the true situation, is not capable of grounding an adverse finding of bad faith for the purposes of section 18D.⁴⁰⁰

³⁹⁵ (2004) 135 FCR 105, 125 [72].

³⁹⁶ (2004) 135 FCR 105, 125 [73]. The other members of the Court, Lee and Carr JJ, did not express any view on this issue.

³⁹⁷ See, for example, S Akmeemana and M Jones, *Fighting Racial Hatred in Racial Discrimination Act 1975: A Review* (1995); Eastman, ‘Drafting Racial Vilification Laws: Legal and Policy Issues’ (1995) *Australian Journal of Human Rights* 285; Solomon, ‘Problems in Drafting Legislation Against Racist Activities’ (1995) *Australian Journal of Human Rights* 265.

³⁹⁸ (2004) 207 ALR 421, 447 [116].

³⁹⁹ *Bryl v Nowra* [1999] HREOCA 11 (extract at (1999) EOC 93-022).

⁴⁰⁰ [1999] HREOCA 11

RD Nicholson J in *Bropho v Human Rights & Equal Opportunity Commission*⁴⁰¹ appeared to disagree with that formulation and suggest that the test required by s 18D was purely an objective one:

I do not consider that a commissioner applying s 18D is required to inquire into the actual state of mind of the person concerned. That is not to say evidence of such state of mind may not be relevant. It is to say that the focus of inquiry dictated by the words involves an objective consideration of all the evidence and not solely a focus on the subjective state of mind of the person doing the act or making the statement in question.

....

The characterisation of the use of the good faith requirement in conjunction with the reasonableness requirement as requiring the objective approach precludes the possibility of the application of the requirement for a respondent to a complaint to positively establish its state of mind in that respect as a necessary part of the evidence.⁴⁰²

However, on appeal to the Full Court, both French and Lee JJ held that the expression ‘reasonably and in good faith’ required a subjective and objective test.⁴⁰³ Carr J expressed his agreement with the primary Judge.⁴⁰⁴

On the objective test of ‘reasonableness’, French J noted the relevance of proportionality:

There are elements of rationality and proportionality in the relevant definitions of reasonably. A thing is done ‘reasonably’ in one of the protected activities in par (a), (b) and (c) of s 18D if it bears a rational relationship to that activity and is not disproportionate to what is necessary to carry it out. It imports an objective judgment. In this context that means a judgment independent of that which the actor thinks is reasonable. It does allow the possibility that there may be more than one way of doing things ‘reasonably’. The judgment required in applying the section, is whether the thing done was done ‘reasonably’ not whether it could have been done more reasonably or in a different way more acceptable to the court. The judgment will necessarily be informed by the normative elements of ss 18C and 18D and a recognition of the two competing values that are protected by those sections.⁴⁰⁵

Lee J stated that reasonableness can only be judged against the possible degree of harm that a particular act may cause. His Honour cited, with apparent approval, the decision of the NSW Administrative Decisions Tribunal in *Western Aboriginal Legal Service Ltd v Jones*⁴⁰⁶ to the effect that the greater the impact of an act found to be

⁴⁰¹ [2002] FCA 1510.

⁴⁰² [2002] FCA 1510, [33], [36].

⁴⁰³ (2004) 135 FCR 105, 132-133 [96]-[102] (French J), 142 [141] (Lee J). Note that Lee J was in dissent as to the result of the appeal. It appears, however, that his approach to the legal issues in the case is substantially consistent with that of French J. A similar approach was taken by the NSW Administrative Decisions Tribunal in *Western Aboriginal Legal Service v Jones* (2000) NSWADT 102, considering s 20C(2)(c) of the *Anti-Discrimination Act 1977* (NSW), which includes the words ‘done reasonably and in good faith’. The Tribunal held that ‘good faith’ implies a state of mind absent of spite, ill-will or other improper motive, [122]. Note that this decision was set aside on appeal on the basis of procedural issues relating to the identity of the complainant: *Jones v Western Aboriginal Legal Service Ltd* (EOD) [2000] NSWADTAP 28.

⁴⁰⁴ (2004) 135 FCR 105, 149 [178]. Note that special leave to appeal against the decision of the Full Federal Court was refused by the High Court: *Bropho v Human Rights & Equal Opportunity Commission* [2005] HCATrans 9.

⁴⁰⁵ (2004) 135 FCR 105, 128 [79].

⁴⁰⁶ [2000] NSWADT 102.

otherwise in breach of s 18C, the more difficult it will be to establish that the particular act was reasonable.⁴⁰⁷

On the question of ‘good faith’, French J held that s 18D

requires a recognition that the law condemns racial vilification of the defined kind but protects freedom of speech and expression in the areas defined in pars (a), (b) and (c) of the section. The good faith exercise of that freedom will, so far as practicable, seek to be faithful to the norms implicit in its protection and to the negative obligations implied by s 18C. It will honestly and conscientiously endeavour to have regard to and minimise the harm it will, by definition, inflict. It will not use those freedoms as a ‘cover’ to offend, insult, humiliate or intimidate people by reason of their race or colour or ethnic or national origin.

....

[G]ood faith may be tested both subjectively and objectively. Want of subjective good faith, ie seeking consciously to further an ulterior purpose of racial vilification may be sufficient to forfeit the protection of s 18D. But good faith requires more than subjective honesty and legitimate purposes. It requires, under the aegis of fidelity or loyalty to the relevant principles in the Act, a conscientious approach to the task of honouring the values asserted by the Act. This may be assessed objectively.⁴⁰⁸

His Honour continued:

Generally speaking the absence of subjective good faith, eg dishonesty or the knowing pursuit of an improper purpose, should be sufficient to establish want of good faith for most purposes. But it may not be necessary where objective good faith, in the sense of a conscientious approach to the relevant obligation, is required. In my opinion, having regard to the public mischief to which s 18C is directed, both subjective and objective good faith is required by s 18D in the doing of the free speech and expression activities protected by that section.⁴⁰⁹

Lee J adopted a similar approach:

The question whether publication was an act done in good faith must be assessed, in part, by having regard to the subjective purpose of the publisher but overall it is an objective determination as to whether the act may be said to have been done in good faith, having due regard to the degree of harm likely to be caused and to the extent to which the act may be destructive of the object of the Act.⁴¹⁰

....

Having regard to the context provided by the Act, the requirement to act in good faith imposes a duty on a person who does an act because of race, an act reasonably likely to inflict the harm referred to in s 18C, to show that before so acting that person considered the likelihood of the occurrence of that harm and the degree of harm reasonably likely to result. In short the risk of harm from the act of publication must be shown to have been balanced by other considerations. The words “in good faith” as used in s 18D import a requirement that the person doing

⁴⁰⁷ (2004) 135 FCR 105, 142 [141]. Similarly in *Toben v Jones* (2003) 129 FCR 515, Carr J held that the appellant had not acted ‘reasonably and in good faith’ in publishing material expressing views about the Holocaust, and stated: ‘In the context of knowing that Australian Jewish people would be offended by the challenge which the appellant sought to make, a reasonable person acting in good faith would have made every effort to express the challenge and his views with as much restraint as was consistent with the communication of those views’: 528 [44].

⁴⁰⁸ (2004) 135 FCR 105, 131-132 [95]-[96] (French J).

⁴⁰⁹ (2004) 135 FCR 105, 133 [101].

⁴¹⁰ (2004) 135 FCR 105, 142 [141].

the act exercise prudence, caution and diligence, which, in the context of the Act would mean due care to avoid or minimize consequences identified by s 18C.⁴¹¹

In *Kelly-Country*, Brown FM acknowledged that ‘reasonableness’ has ‘an overall objective flavour’ while ‘good faith’ is ‘more subjective’.⁴¹² His Honour found that the respondent’s comedy performance (see 3.4.4 above) was done ‘in good faith’. His Honour accepted the evidence of the respondent that he ‘personally does not intend to hold Aboriginal people up as objects of mockery or contempt’ and means ‘no particular spite towards Aboriginal people and, indeed, many people of indigenous background have enjoyed his performances’.⁴¹³

In *Jeremy Jones v The Bible Believers’ Church*⁴¹⁴ the Court rejected the respondent’s submission that material published on the internet denying the existence of the Holocaust had been published in good faith, noting that the deliberate use of provocative and inflammatory language together with a careless disregard for the effect of such language upon the people likely to be hurt by it was a clear indication of a lack of good faith on the respondent’s behalf. Conti J cited with approval the statement by French J in *Bropho v Human Rights & Equal Opportunity Commission* that the expression ‘reasonably and in good faith’ required a subjective and objective test.⁴¹⁵

(ii) Context and artistic works

The nature of the artistic work and the context of the impugned act within it may also be relevant to an assessment of its reasonableness.

In *Bryl v Nowra*,⁴¹⁶ Commissioner Johnston stated that in drawing a line between what is reasonable, and what is not, when publishing and performing a play, a judge ‘should exercise a margin of tolerance and not find the threshold of what is unreasonable conduct too readily crossed.’⁴¹⁷ The conflict between artistic license, as a form of freedom of expression, and political censorship requires that a judge take

a fairly tolerant view in determining what is reasonable or not. Topics like the Holocaust can be the subject of comedy, as in the film ‘Life is Beautiful’, even if offensive to some Jewish survivors of concentration camps who see it as trivialising the horror of that situation. In many instances marked differences of opinion may be engendered, as in the case of the painting by Andres Serrano ‘Piss Christ’ (as to which see *Pell v Council of Trustees of the National Gallery of Victoria* [1997] 2 VR 391).⁴¹⁸

Moral and ethical considerations, expressive of community standards, are relevant in determining what is reasonable.⁴¹⁹

In *Bropho*, French J similarly noted that the context in which an act is performed will be relevant in determining its reasonableness, offering the following example:

⁴¹¹ (2004) 135 FCR 105, 143 [144].

⁴¹² (2004) 207 ALR 421, 450 [131].

⁴¹³ (2004) 207 ALR 421, 450 [131].

⁴¹⁴ [2007] FCA 55.

⁴¹⁵ [2007] FCA 55, [49] citing French J in *Bropho v Human Rights & Equal Opportunity Commission* (2004) 135 FCR 105, 132-133 [96], [102].

⁴¹⁶ [1999] HREOCA 11 (extract at (1999) EOC 93-022).

⁴¹⁷ [1999] HREOCA 11 (extract at (1999) EOC 93-022).

⁴¹⁸ [1999] HREOCA 11 (extract at (1999) EOC 93-022).

⁴¹⁹ [1999] HREOCA 11 (extract at (1999) EOC 93-022).

The publication of a genuine scientific paper on the topic of genetic differences between particular human populations might, for one reason or another, be insulting or offensive to a group of people. Its discussion at a scientific conference would no doubt be reasonable. Its presentation to a meeting convened by a racist organisation and its use to support a view that a particular group of persons is morally or otherwise ‘inferior’ to another by reason of their race or ethnicity, may not be a thing reasonably done in relation to par (b) of s 18D.⁴²⁰

Also relevant to questions of context, Lee J considered whether or not the publication of a range of views could effectively counter-balance the publication of an offensive view. His Honour stated:

Contemporaneous, or prior, publication of anodyne material would not, in itself, make an act of publication done because of race and involving racially offensive material, an act done reasonably and in good faith. A publisher of a catholic range of opinions could not rely upon past publication of diverse material to show that it acted reasonably and in good faith by publishing, because of race, a work or material that is offensive, insulting, humiliating or intimidating to persons of that race, if it acts without regard to whether the act of publication would cause the harm the Act seeks to prevent, and does not attempt to show how the risk of harm from the otherwise prohibited act, was counterbalanced, or outweighed, by matters showing the act to have been done reasonably and in good faith.⁴²¹

In *Kelly-Country*, Brown FM considered the application of the exemption in s 18D to the comedy performance of the non-Aboriginal respondent, in which he portrayed an apparently Aboriginal character ‘King Billy Cokebottle’ (see 3.4.4 above) and stated:

In the particular context of this case, I bear in mind that Mr Beers was appearing as the character of King Billy Cokebottle, who in many ways is a grotesque caricature. As such, the character has more licence than a politician or social commentator to express views. In the context of a stand-up comedy performance, the offence implicit in much of Mr Beers’ material does not appear to me to be out of proportion. I do not believe that there is a high degree of gratuitous insult, given that the comedic convention of stand-up is to give offence or make jokes at the expense of some member or members of the community. In this regard, the character does not use slang terms, which are likely to give particular offence to any particular ethnic or racial group. In my view, Mr Beers keeps his performance within the constraints and conventions of stand-up comedy and when viewed objectively, it is reasonable.⁴²²

(d) Section 18D(a): artistic works

French J in *Bropho* considered the coverage of the term ‘artistic work’ in s 18D(a). It was accepted in that case that a cartoon was an ‘artistic work’. His Honour noted that the Commissioner who had first heard the matter ‘appeared to accept... that the term did not require a distinction to be made between “real” and “pseudo” artistic works’⁴²³ and went on to note that the term ‘does seem to be used broadly’.⁴²⁴ His Honour further stated that ‘[i]t must be accepted that artistic works cover an infinite variety of expressions of human creativity’.⁴²⁵

⁴²⁰ (2004) 135 FCR 105, 128 [80].

⁴²¹ (2004) 135 FCR 105, 128 [80], 142 [142].

⁴²² (2004) 207 ALR 421, 449 [127].

⁴²³ (2004) 135 FCR 105, 114 [40].

⁴²⁴ (2004) 135 FCR 105, 134 [104].

⁴²⁵ (2004) 135 FCR 105, 134 [106].

In *Kelly-Country*, Brown FM had no doubt that a comedy performance fell within the term ‘artistic works’, noting that the explanatory memorandum makes specific reference to ‘comedy acts’.⁴²⁶

(e) Section 18D(b): Statement, publication, debate or discussion made or held for any genuine academic, artistic, scientific purpose or other genuine purpose in the public interest

This exemption was considered in *Walsh v Hanson*.⁴²⁷ In that case complaints were brought against Ms Pauline Hanson and Mr David Etteridge, of the One Nation Party, in relation to an allegedly racist book. Commissioner Nader dismissed the complaints, partly on the basis that the statements in the book were not made because of the race, colour or national or ethnic origin of the complainants, but rather because of a perception that the Aboriginal community as a whole was being unfairly favoured by governments and courts. By way of obiter comments, Commissioner Nader added:

If I happen to be wrong on that score, it is clear from what I have said that section 18D would operate to exempt the respondents. I have said enough to indicate that, being part of a genuine political debate, whether valid or not, the statements of the respondents must be regarded as done reasonably and in good faith for a genuine purpose in the public interest, namely in the course of a political debate concerning the fairness of the distribution of social welfare payments in the Australian community.⁴²⁸

In *Jeremy Jones v The Bible Believers’ Church*,⁴²⁹ the applicant claimed that the respondent discriminated against Jewish people by publishing on the Bible Believers’ Church website a denial (amongst other things) of the existence of the Holocaust. The respondent claimed an exemption under s18D of the RDA (‘acts done reasonably and in good faith’) arguing that matters about which the complaints had been made formed part of an academic or public interest discussion in relation to ‘Zionist’ policies and practices. Conti J dismissed the claim, holding:

I have not been able to identify, much less rationalise, however, the existence of any such discussion in the context of the present proceedings and of the conduct complained of by the application which has led thereto.⁴³⁰

(f) Section 18D(c): Fair and accurate reports in the public interest and fair comment on matter of public interest where comment is a genuinely held belief

What will constitute a ‘fair and accurate report’ for the purposes of s 18D was considered by Kiefel J in *Creek v Cairns Post Pty Ltd*.⁴³¹ Her Honour suggested, in obiter, that defamation law was a useful guide in applying s 18D(c):

[s 18D], by the Explanatory Memoranda, is said to balance the right to free speech and the protection of individuals. The section has borrowed words found in defamation law. I do not think the notion of whether something is in the public interest is to be regarded as in any way different and here it is made out. For a

⁴²⁶ (2004) 207 ALR 421, 448 [121].

⁴²⁷ Unreported, HREOC, Commissioner Nader, 2 March 2000.

⁴²⁸ Unreported, HREOC, Commissioner Nader, 2 March 2000, 28.

⁴²⁹ [2007] FCA 55.

⁴³⁰ [2007] FCA 55, [63].

⁴³¹ (2001) 112 FCR 352.

comment to be 'fair' in defamation law it would need to be based upon true facts and I take that to be the meaning subscribed to in the section. What is saved from a requirement of accuracy is the comment, which is tested according to whether a fair-minded person could hold that view and that it is genuinely held. Subpar (c)(i), upon which the respondent would rely, incorporates both the concepts of fairness and accuracy. It is the latter requirement that the photographs cannot fulfil if they are taken as a 'report' on the living conditions pertaining to the applicant.⁴³²

3.5 Victimization

Section 27(2) of the RDA prohibits victimisation in the following manner;

- (2) A person shall not:
- (a) refuse to employ another person;
 - (b) dismiss, or threaten to dismiss, another person from the other person's employment;
 - (c) prejudice, or threaten to prejudice, another person in the other person's employment; or
 - (d) intimidate or coerce, or impose any pecuniary or other penalty upon, another person;
by reason that the other person:
 - (e) has made, or proposes to make, a complaint under this Act or the *Human Rights and Equal Opportunity Commission Act 1986*;
 - (f) has furnished, or proposes to furnish, any information or documents to a person exercising or performing any powers or functions under this Act or the *Human Rights and Equal Opportunity Commission Act 1986*; or
 - (g) has attended, or proposes to attend, a conference held under this Act or the *Human Rights and Equal Opportunity Commission Act 1986*.

Penalty for an offence against subsection (2):

- (a) in the case of a natural person—\$2,500 or imprisonment for 3 months, or both; or
- (b) in the case of a body corporate—\$10,000.

A breach of s 27(2) may give rise to civil and/or criminal proceedings.⁴³³ Whilst s 27(2) is contained within Part IV of the RDA that deals with offences, an aggrieved person may bring a civil action for a breach of s 27(2) because the definition of 'unlawful discrimination' in s 3 of the HREOC Act specifically includes conduct that is an offence under s 27(2) of the RDA.

There is limited case law concerning s 27(2).⁴³⁴ However, the provision is in similar terms to s 94 of the SDA and s 42 of the DDA, discussed at 4.8 and 5.6 respectively.

⁴³² (2001) 112 FCR 352, 360 [32].

⁴³³ See, for example, *Ellenbogen v Federated Municipal & Shire Council Employees Union of Australia* (1989) EOC 92-252.

⁴³⁴ See, for example, *Shaikh v Campbell & Nivona Pty Ltd* [1998] HREOCA 13; *L v Quall* [1998] HREOCA 27; *Hassan v Hume* [2004] FCA 886.

3.6 Vicarious Liability

An employer can be held vicariously liable for the actions of an employee or agent if during the course of their employment they carry out an act that would be unlawful under Part II⁴³⁵ or IIA of the RDA.⁴³⁶ To avoid liability the employer has to show that all reasonable steps have been taken to prevent the employee or agent from doing the act.⁴³⁷

In *Gama v Qantas Airways Ltd (No 2)*⁴³⁸ Qantas was held to be vicariously liable for actions of its employees in discriminating against another employee, Mr Gama, on the basis of his race and disability. Statements made towards Mr Gama that he looked ‘like a Bombay taxi driver’ and walked up the stairs ‘like a monkey’ were found to amount to unlawful racial discrimination. Qantas was found to be vicariously liable for each of these incidents on the basis that the remarks were made by, or in the presence of, a supervisor of Mr Gama and therefore condoned.

However, Mr Gama’s claim that Qantas was vicariously liable for the actions of its employees in denying or limiting his access to the opportunities for promotion was unsuccessful. While Raphael FM found there ‘was a general culture inimical to persons’ of certain racial backgrounds, he found there was insufficient evidence to persuade him that there were systemic problems at Qantas or a culture in Mr Gama’s workplace leading to the denial of his applications for promotion.⁴³⁹

As discussed above at 3.2.2(a)(ii), the above findings of Raphael FM were upheld on appeal to the Full Federal Court.⁴⁴⁰ One of Qantas’ grounds of appeal submitted that the following passage by Raphael FM misapplied s 18A of the RDA:

I am satisfied that whilst Mr Hulskamp may not have made the ‘walk up the stairs’ remark he was the senior employee and he condoned the making of the remark in a way which would place liability on Qantas pursuant to s 18A.⁴⁴¹

Qantas argued that this effectively treated the failure of an employer to take reasonable steps to prevent unlawful discrimination as a separate ground of liability of itself, rather than as a defence to liability. The Full Court agreed in principle with Qantas’ submission, noting:

It is not prima facie unlawful to fail to take steps to prevent discrimination. Rather, s 18A operates to excuse a respondent from liability imposed via s 18A(1) if reasonable steps were taken to prevent its employee or agent from doing the act which would otherwise attract that liability. On its proper construction s 18A would not make Qantas liable for ‘condoning’ a remark made by an unidentified person.⁴⁴²

⁴³⁵ Section 18A(1).

⁴³⁶ Section 18E(1).

⁴³⁷ See ss 18A(2), 18E(2).

⁴³⁸ [2006] FMCA 1767. For further discussion of this case see Christine Fougere, ‘Vicarious liability for race and disability discrimination in the workplace’, (2007) 45(3) *Law Society Journal*, 37.

⁴³⁹ [2006] FMCA 1767, [97].

⁴⁴⁰ [2008] FCAFC 69. His Honour’s findings in relation to disability discrimination, however, were overturned: [84]-[92]. HREOC was granted leave to appear as intervener in the appeal. HREOC’s submissions are available at <http://www.humanrights.gov.au/legal/submissions_court/intervention/qantas_v_gama.html> and <http://www.humanrights.gov.au/legal/submissions_court/intervention/gama.html>.

⁴⁴¹ [2006] FMCA 1767, [78].

⁴⁴² [2008] FCAFC 69, [81] (French and Jacobson JJ, with whom Branson J generally agreed, [122]).

However, the Court went on to note that Qantas had not relied on the defence under s 18A(2), so Raphael FM's comments in relation to that defence were of no consequence to his findings on liability. The appeal ground therefore failed.⁴⁴³

In *House v Queanbeyan Community Radio Station*⁴⁴⁴ a community radio station was found vicariously liable for the racially discriminatory action of its board members in refusing the membership applications of two Aboriginal women.

⁴⁴³ [2008] FCAFC 69, [83].

⁴⁴⁴ [2008] FMCA 897.