Chapter 3
The Racial Discrimination Act

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3.1 Introduction to the RDA

3.1.1 Background and Scope

The RDA was the first Commonwealth unlawful discrimination statute to be enacted and is different in a number of ways from the subsequent SDA, DDA and ADA. 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* ('ICERD').[1]

Unlike the SDA, DDA and ADA,[2] the RDA does not provide a discrete definition of discrimination[3] and then seek to set out specific areas of public life in which that discrimination is made unlawful.[4] Also unlike the SDA, DDA and ADA which contain a wide range of permanent exemptions[5] and a process for applying for a temporary exemption,[6] the RDA contains a limited number of 'exceptions' to the operation of the Act[7] (see 3.3 below).

Section 9(1) contains the central proscription of what is generally referred to as 'direct' race discrimination:

> 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.

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1 Opened for signature 21 December 1965, 660 UNTS 195 (entered into force generally 4 January 1969 and in Australia 30 September 1975).
2 As well as State and Territory anti-discrimination legislation.
3 For example, ss 5-7A of the SDA; ss 5-9 of the DDA; ss 14-15 of the ADA.
4 For example, pt II of the SDA; pt 2 of the DDA; pt 4 of the ADA.
5 See pt II, div 4 of the SDA; pt 2, div 5 of the DDA; pt 4, div 5 of the ADA.
6 See s 44 of the SDA; s 55 of the DDA; s 44 of the ADA.
7 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).

It can be seen that this section 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) provides for what is generally known as 'indirect discrimination':

> 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;
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> 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(1), the RDA also includes specific prohibitions on discrimination in certain areas of public life:[8]

- access to places and facilities;[9]
- land, housing and other accommodation;[10]
- provision of goods and services;[11]
- right to join trade unions;[12] and
- employment.[13]

Discrimination for the purposes of these specific prohibitions is generally made unlawful when a person is treated less favourably than another 'by reason of the first person's race, colour or national or ethnic origin'.

Complaints alleging race discrimination are sometimes considered under both s 9(1) and one of the specific prohibitions.[14]

Section 10 of the RDA also provides for a general right 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,

8 Note that the RDA has been held *not* to have extra-territorial operation: *Brannigan v Commonwealth of Australia* (2000) 110 FCR 566.
9 Section 11.
10 Section 12.
11 Section 13.
12 Section 14.
13 Section 15.
14 See, for example, *Carr v Boree Aboriginal Corp* [2003] FMCA 408.

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'[15] rather than with proscribing the activities or conduct of individuals. As such, a person cannot rely upon s 10 to make a complaint of unlawful discrimination to HREOC. For this reason a detailed consideration of s 10 is beyond the scope of this publication (see, however, 3.1.3 below).

3.1.2 Other Unlawful Acts and Offences

Section 17 of the RDA provides that it is unlawful to incite or to assist the doing of an act of unlawful racial discrimination. It is also unlawful to publish or display an advertisement that indicates an intention to do an act of unlawful racial discrimination.[16]

The RDA does not make it an offence per se to do an act that is made unlawful by the provisions of Part II or Part IIA of the Act.[17] However, part IV sets out various particular offences. For example:

- hindering, obstructing, molesting or interfering with a person exercising functions under the RDA;[18] 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;

15 *Mabo v Queensland* (1988) 166 CLR 186, 230.
16 Section 16.
17 Section 26.
18 Section 27(1).

by reason that the other person:

- has made, or proposes to make a complaint under the RDA or the HREOC Act;
- has furnished, or proposes to furnish any information or documents to a person exercising powers under the RDA or HREOC Act; or
- has attended, or proposes to attend, a conference held under the RDA or HREOC Act.[19]

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 and other Commonwealth Laws

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

First, s 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. Mason J stated as follows in *Gerhardy v Brown*:

> 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.[20]

Section 10(1) also operates to render invalid, by virtue of s 109 of the *Constitution*,[21] State laws that would otherwise operate to discriminate against people of a particular race by denying them rights or freedoms.[22] 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.[23]

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19 Section 27(2).

20 (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).

21 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.'

22 See, for example, *Mabo v Queensland* (1988) 166 CLR 186; *Western Australia v Commonwealth* (1995) 183 CLR 373.

23 (1985) 159 CLR 70, 98-99. See also *Western Australia v Ward* (2002) 213 CLR 1, 100 [107] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

Section 10 has also been used as a basis for challenging Commonwealth laws alleged to deny or impair the enjoyment of rights by members of a particular national origin: see, for example *Macabenta v Minister for Immigration and Multicultural Affairs*[24] and *Sahak v Minister for Immigration and Multicultural Affairs*.[25]

Section 9 of the RDA may also render invalid inconsistent State laws, by virtue of s 109 of the *Constitution*. It should be noted that the enactment of discriminatory State legislation is not itself 'unlawful' under s 9 as the enactment process is not an 'act' for the purposes of that section.[26] 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 Cowbur*n (1926) 37 CLR 466 at 490.[27]

In *Bropho v Western Australia*,[28] RD Nicholson J held that, while ordinarily an applicant claiming racial discrimination must follow the procedures for making complaints to HREOC set out in the HREOC Act, issues as to constitutional validity can be litigated independently of the HREOC Act.[29]

As noted above, such arguments of inconsistency and invalidity are to be distinguished from claims of unlawful discrimination and a detailed consideration of them is beyond the scope of this publication.

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'. [30] While these grounds of discrimination are not defined in the RDA, their meaning has been considered in a number of cases.

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24 (1998) 154 ALR 591.
25 (2002) 123 FCR 514.
26 *Gerhardy v Brown* (1985) 159 CLR 70, 81 (Gibbs CJ), 92-93 (Mason J), 120-121 (Brennan J), 146 (Deane J); *Mabo v Queensland* (1988) 166 CLR 186, 197 (Mason CJ), 203 (Wilson J); 216 (Brennan, Toohey and Gaudron JJ), 242 (Dawson J).
27 Ibid 92-93. See also 121 (Brennan J); 146 (Deane J).
28 [2004] FCA 1209.
29 See further section 6.4 below.
30 In those sections of the RDA that proscribe discrimination in specific areas of public life, the grounds of unlawful discrimination are 'race, colour or national or ethnic origin', omitting the ground of 'descent': see ss 10, 11, 12, 13, 14, 15 and 18C.

(a) Race

Courts have generally taken the view that 'race' as described in anti-discrimination legislation is a broad term and is to be understood in the popular sense rather than as a term of art.[31] In *King-Ansell v Police*[32] ('*King-Ansell*') the New Zealand Court of Appeal rejected a biological test of race which distinguished people in terms of genetic inheritance and stated as follows:

> 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.[33]

The meaning of 'race' was considered in the context of disputes between Aboriginal people in *Williams v Tandanya Cultural Centre.*[34] 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 Kaurna community as to the applicant's links to that community. The alleged acts of discrimination by the first, second, fifth (and, 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.[35]

In *Carr v Boree Aboriginal Corp*,[36] 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'.[37] His Honour concluded that 'the provisions of the RDA apply to all Australians'.[38]

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31 *Ealing London Borough Council v Race Relations Board* [1972] AC 342, 362 (Lord Simon).
32 [1979] 2 NZLR 531.
33 Ibid 542 (Richardson J).
34 (2001) 163 FLR 203.
35 Ibid 209 [21].
36 [2003] FMCA 408.
37 Ibid [9]. The decision does not disclose what the race of the applicant is, other than being 'non-Aboriginal'.
38 Ibid [14]. Note, however the discussion at 2.7.2 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].

(b) Ethnic origin

Religious discrimination is not, per se, made unlawful by the RDA.[39] 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.[40]

Similarly, the House of Lords held in *Mandla v Dowell Lee*[41] 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.

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.[42]

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39 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 of belief: Human Rights and Equal Opportunity Commission, *Isma – Listen: National consultations on eliminating prejudice against Arab and Muslim Australians* (2004), 129.

40 [1979] 2 NZLR 531, 543.

41 [1983] 2 AC 548.

42 Ibid 562.

In *Miller v Wertheim*,[43] 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"'[44] 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.[45]

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 amended the RDA by introducing Part IIA 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 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.[46]

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43 [2002] FCAFC 156.

44 Ibid [14]. See also *Jones v Scully* (2002) 120 FCR 243, 271-73 [110]-[113] and *Jones v Toben* [2002] FCA 1150, [101], where it was also found, in the context of complaints of racial vilification under pt IIA of the RDA, that Jews in Australia are a group of people with a common 'ethnic origin' for the purposes of the RDA.

45 [2002] FCAFC 156, [13].

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

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.[47]

(c) National origin

The meaning of 'national origin' was considered in *Australian Medical Council v Wilson*[48] ('*Siddiqui*'), with Sackville J holding that it 'does not simply mean citizenship'.[49] His Honour cited with approval Lord Cross in *Ealing London Borough Council v Race Relations Board,*[50] 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.
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> ... 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.[51]

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.[52]

The Full Federal Court in *Macabenta v Minister of State for Immigration and Multicultural Affairs*[53] ('*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.[54] The Full Court held that the phrase 'race, colour or national or ethnic origin' in s 10 of the RDA should bear the same meaning in the RDA as

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47 See, for example, the UK decisions of *Tariq v Young* (Employment Appeals Tribunal 24773/88, unreported) and *Nyazi v Rymans Limited* (Employment Appeals Tribunal 6/88, unreported). 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.

48 (1996) 68 FCR 46.

49 Ibid 75. Note that Black CJ and Heerey J did not specifically consider the meaning of 'national origin'.

50 [1972] AC 342.

51 Ibid 365 (Lord Cross), cited in *Australian Medical Council v Wilson* (1996) 68 FCR 46, 75.

52 (1996) 68 FCR 46, 75.

53 (1998) 90 FCR 202.

54 Ibid 210-11. See also *Ebber v Human Rights and Equal Opportunity Commission* (1995) 129 ALR 455.

it bears 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'.[55]

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).[56]

In *Commonwealth v McEvoy*,[57] 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'.[58] 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, with the result that Mr Stamatov was found to be 'uncheckable' and was therefore refused employment. His Honour held:

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55 (1998) 90 FCR 202, 209-10. 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 of State for Immigration and 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'.

56 (1998) 90 FCR 202, 209-11.

57 (1999) 94 FCR 341.

58 Ibid 352 [34].

> The evidence ... was clear that the elements of checkability which caused Mr Stamatov's background to be uncheckable concerned checks with security 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.[59]

The same approach was taken by Merkel J in *De Silva v Minister for Immigration*[60] (emphasis in original):

> 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.[61]

Merkel J's decision was upheld on appeal[62] and followed by Raphael FM in *AB v New South Wales Minister for Education and Training*.[63] 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'.[64]

3.2.2 Direct Discrimination under the RDA

Section 9(1) contains the central proscription of what is generally referred to as 'direct' race discrimination:

> 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.

As noted above (see 3.1.1), ss 11-15 of the RDA also proscribe discrimination (both direct and indirect) in particular fields of public life.

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59 Ibid 352 [35].
60 [1998] 95 FCA.
61 Ibid 18.
62 *De Silva v Minister for Immigration* (1998) 89 FCR 502.
63 [2003] FMCA 16.
64 Ibid [13]-[14]. Note, however, 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.

From the above definition, three elements can be identified:

1. a distinction, exclusion, restriction or preference;[65]
2. based on race, colour, descent or national or ethnic origin (see 3.2.2(a) below);
3. 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 (see 3.2.4 below).

Two aspects of the second element identified, 'based on' race etc, are now considered: causation and intention to discriminate and drawing inferences of racial discrimination.

(a) Causation 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. Those sections prohibiting discrimination in designated areas of public life provide that unlawful discrimination occurs when a relevant act is done 'by reason of' race or other of the related grounds.[66]

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.

The extent to which the expressions 'based on' and 'by reason of' as used in the RDA require an intention or motive to discriminate, and the possible differences between these expressions, has been the subject of varying judicial interpretations.

In *Australian Medical Council v Wilson*,[67] Sackville J reviewed Australian authorities in relation to other anti-discrimination statutes[68] and concluded 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'.[69]

In *Macedonian Teachers' Association of Victoria Inc v Human Rights and Equal Opportunity Commission*[70] ('*Macedonian Teachers*'), Weinberg J also considered the meaning of the words 'based on' in s 9(1) of the RDA. His Honour suggested

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65 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, 76-77.

66 See ss 11-15. 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.

67 (1996) 68 FCR 46.

68 *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).

69 (1996) 68 FCR 46, 74.

70 (1998) 91 FCR 8.

that the expression 'based on' 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.[71]

After extensively considering Australian and international authorities,[72] Weinberg J found that the relevant test imputed by the words 'based on' was one of 'sufficient connection' rather than 'causal nexus'.[73] 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'.[74] His Honour noted further that proof of a motive to discriminate is not necessary.[75]

The High Court in *Purvis v New South Wales (Department of Education and Training)*[76] considered the expression 'because of' in the DDA.[77] 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.[78]

This appears to be consistent with the approach of Weinberg J in *Macedonian Teachers* to those expressions. However, it remains to be seen whether the distinction drawn by his Honour between the expression 'based on' and the other formulations appearing in the RDA, SDA and DDA will be ascribed significance in future cases.

In *Trindall v NSW Commissioner of Police*,[79] the applicant, a man of 'mixed Aboriginal/African race', asserted that unreasonable restrictions were placed upon his employment by reason of his inherited condition known as 'sickle cell trait'. In addition to a claim of disability discrimination, he also alleged direct racial discrimination. The applicant claimed that sickle cell trait particularly affects black Africans and therefore that he had been subjected to an employment condition which constituted a restriction based on race, impairing his right to work.[80] Driver FM rejected the allegation of racial discrimination, stating as follows:

> 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 backgrounds, including persons of various Mediterranean

71 Ibid 29.
72 Ibid 24-41.
73 Ibid 33.
74 Ibid. 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].
75 (1998) 91 FCR 8, 34, 40-1.
76 (2003) 202 ALR 133.
77 See 4.2 on the DDA.
78 (2003) 202 ALR 133, 138 [14] (Gleeson CJ), 171-2 [166] (McHugh and Kirby JJ), 187 [236] (Gummow, Hayne and Heydon JJ).
79 [2005] FMCA 2.
80 Ibid [4].

> 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.[81]

(b) 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.[82]

In *Murray v Forward*,[83] HREOC was asked to draw inferences of racial discrimination from conduct of the respondent said to be based on an acceptance of racial stereotypes. In particular it was alleged that views had been formed as to the inadequate literacy of the complainant which 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.[84]

In *Sharma v Legal Aid Queensland*[85] ('*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.[86]

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81 Ibid [183].
82 See Jonathon Hunyor, 'Skin-deep: Proof and Inferences in Racial Discrimination in Employment' (2003) 25 *Sydney Law Review* 537. See also *Batzialas v Tony Davies Motors Pty Ltd* [2002] FMCA 243; *Chau v Oreanda Pty Ltd* [2001] FMCA 114.
83 Unreported, HREOC, Sir Ronald Wilson, 10 September 1993.
84 Ibid 4.
85 [2001] FCA 1699.
86 Ibid [63].

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:

> 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.[87]

The Full Federal Court upheld her Honour's decision on appeal[88] 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].[89]

The Court went on to indicate a view that the standard of proof for breaches of the RDA is the 'higher standard' referred to in *Briginshaw v Briginshaw*[90] and that racial discrimination was 'not lightly to be inferred'.[91] The Court continued:

> In a case depending on circumstantial evidence, it is well established that the trier of fact must consider 'the weight which is to be given to the united force of all of the circumstances put together'. One should not put a piece of circumstantial evidence out of consideration merely because an inference does not arise from it alone: *Chamberlain v The Queen [No 2]* (1983 – 1984) 153 CLR 521 at 535. It is the cumulative effect of the circumstances which is important provided, of course, that the circumstances relied upon are established as facts.[92]

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87 Ibid [60].
88 *Sharma v Legal Aid Queensland* [2002] FCAFC 196.
89 Ibid [40].
90 (1938) 60 CLR 336.
91 The suggestion that a 'higher standard' applies in such cases should be treated with caution. For further discussion on the application of the principle in *Briginshaw v Briginshaw* (1938) 60 CLR 336, see 6.1.
92 [2002] FCAFC 196, [41].

Similar issues arose in *Tadawan v South Australia*,[93] a case in which 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).[94]

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.[95]

3.2.3 Indirect Discrimination under the RDA

(a) Background

The RDA was amended in 1990[96] to include, amongst other things, s 9(1A) which states:

> 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;

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93 [2001] FMCA 25. See also *Oberoi v Human Rights and 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].

94 [2001] FMCA 25, [52].

95 Ibid [52]–[59].

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

> 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.

Very 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 to assist in the interpretation of the terms of s 9(1A). Further detail on how these principles have been developed in the context of the SDA and DDA can be found in chapters 4 and 5.[97]

Four elements required to establish indirect discrimination can be identified:

1. a term, condition or requirement is imposed on a complainant (see 3.2.3 (c) below);
2. the term, condition or requirement is not reasonable in the circumstances (see 3.2.3 (d) below);
3. the complainant does not or cannot comply with that term, condition or requirement (see 3.2.3 (e) below); and
4. 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.[98]

(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 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.[99]

However, in *Australian Medical Council v Wilson*[100] ('*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

97 See 4.3 and 5.2.3 respectively.
98 *Australian Medical Council v Wilson* (1996) 68 FCR 46, 62 (Heerey J with whom Black CJ agreed on this issue, 47), 79 (Sackville J).
99 See Race Discrimination Commissioner, *Racial Discrimination Act 1975: A Review: Community Consultation Guide* (1995), 61.
100 (1996) 68 FCR 46.

with the language of the provisions, their legislative history and the preponderance of authority'.[101] This does not, however, prevent applicants from pleading both direct and indirect discrimination in the alternative.[102]

(c) Defining the term, condition or requirement

The words 'term, condition or requirement'[103] 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.[104]

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.[105]

(d) Not reasonable in the circumstances

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 required exam on a number of occasions and, although passing, was not placed within the first 200 candidates, which was the quota set by the AMC at the time (based on a recommendation of the Australian Health Ministers' Conference).

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101 Ibid 55. Black CJ agreed with his Honour's reasoning in this regard, 47. Sackville J expressed the same view, 74.

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

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

104 *Australian Iron and 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), 406-7 (McHugh J); *Daghlian v Australian Postal Corporation* [2003] FCA 759, [110] (Conti J).

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

Dr Siddiqui complained, amongst other things,[106] 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 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. We heard no convincing explanation as to why the quota should not or could not have been imposed in order to limit the number of those admitted to sit for the MCQ. Of course, the quota in that circumstance would be assessed at a higher figure to allow for the expected failure rate in both the MCQ and the clinical examination. Alternatively, we heard no convincing explanation as to why a person who satisfied the minimum standards prescribed for the MCQ but failed to secure a place in the quota should not remain credited, for a reasonable time, with a pass in the MCQ. This would have the result, if the comparative performance test were abandoned in favour of a 'first come, first served' principle, that such a person would maintain a place in the queue for the quota the next time around.[107]

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.[108]

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106 Dr Siddiqui's complaint of *direct* discrimination was dismissed by HREOC at first instance 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: ibid 56. See *Siddiqui v Australian Medical Council* (Unreported, HREOC, Sir Ronald Wilson, Commissioner Hastings, Commissioner Morgan, 7 August 1995), 13.

107 Ibid 16.

108 (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).

Furthermore, 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.[109] The Court approved of the following test of 'reasonableness'[110] articulated by Bowen CJ and Gummow J in *Secretary, Department of Foreign Affairs and Trade v Styles*: [111]

> 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.[112]

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.[113] 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'.[114]

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':

> The practice of medicine requires the possession of a large body of complex knowledge. One way – albeit not necessarily a perfect way or the only way – of selecting the best 200 applicants from a larger number… seeking registration is to take those who have demonstrated the most familiarity with that knowledge. More fundamentally, the selection of the 200 by criteria which are merit-based cannot in my view be regarded as other than logical and understandable.[115]

In *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission*,[116] Sackville J confirmed (in the context of the SDA) that in assessing reasonableness, 'the question is not simply whether the alleged discriminator could have made a "better" or more informed decision'.[117] 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

109 Ibid 62.
110 Ibid 60 (Heerey J, with whom Black CJ generally agreed, 47, and with whom Sackville J agreed on the issue of reasonableness, 79).
111 (1989) 23 FCR 251.
112 Ibid 263.
113 (1996) 68 FCR 46, 60.
114 Ibid 61.
115 Ibid 62 (Heerey J, with whom Black CJ generally agreed, 47, and with whom Sackville J agreed on the issue of reasonableness, 79).
116 (1997) 80 FCR 78.
117 Ibid 113.

> 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.[118]

In *Aboriginal Students' Support and Parents Awareness Committee, Alice Springs v Minister for Education, Northern Territory*,[119] 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 school at another Alice Springs Primary School which were 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 adequately persuaded that the requirement was 'not reasonable'.[120]

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

- whether or not the purpose for which the requirement is imposed could be achieved without the imposition of a requirement that is discriminatory, or by the imposition of a requirement that is less discriminatory in its impact;[121]
- 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;[122]
- the maintenance of good industrial relations;[123]
- relevant policy objectives; [124] and
- the observance of health and safety requirements and the existence of competitors.[125]

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118 Ibid 112.

119 (1992) EOC 92-415.

120 Ibid 78, 968-69. See also discussion by Drummond J in *Ebber v Human Rights & Equal Opportunity Commission* (1995) 129 ALR 455.

121 *Waters v Public Transport Corporation* (1991) 173 CLR 349, 363-64 (Mason and Gaudron JJ), 378 (Brennan J), 395 (Dawson and Toohey JJ).

122 Ibid 378 (Brennan J).

123 Ibid 395 (Dawson and Toohey JJ); *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251, 263-64 (Bowen CJ and Gummow J).

124 *Waters v Public Transport Corporation* (1991) 173 CLR 349, 410 (McHugh J).

125 Ibid 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] FCAFC 197, [115].

(e) Ability to comply with a requirement or condition

It is necessary for an applicant to 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.[126]

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*[127] ('*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.[128]

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 mean 'can in practice' or 'can consistently with the customs and cultural conditions of the racial group'.[129]

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126 (1996) 68 FCR 46, 80. See also Heerey J, 62, with whom Black CJ agreed, 47.

127 [1983] 2 AC 548.

128 Ibid 565.

129 (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, [17]; *Clarke v Catholic Education Office* (2003) 202 ALR 340, 352-53 [49].

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.[130] In applying these provisions, the courts have considered the meaning of the terms 'human rights' and 'fundamental freedoms'.

In *Gerhardy v Brown*,[131] Mason J noted that the rights protected under s 10(1) (and s 9(1)) are not confined to rights of the kind referred to in article 5 of ICERD. His Honour 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 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.[132]

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.[133]

The High Court also considered the meaning of 'right' in *Mabo v Queensland (No. 1)*,[134] 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.[135]

130 See 3.1.1 and 3.1.3 for a discussion of the application of s 10.
131 (1985) 159 CLR 70.
132 Ibid 101, 102.
133 Ibid 125-26.
134 (1988) 166 CLR 186.
135 Ibid 229.

In *Secretary, Department of Veteran's Affairs v P*,[136] 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 and 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 Convention, are fundamental to the individual's existence as a human being.*[137]

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'.[138] 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'.[139]

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136 (1998) 79 FCR 594.

137 Ibid 599-600. In *Ebber v Human Rights and 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.

138 (1998) 79 FCR 594, 600.

139 Ibid 601.

In *Macabenta v Minister of State for Immigration and Multicultural Affairs*[140] ('*Macabenta*'), 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.[141]

In *Australian Medical Council v Wilson*,[142] Heerey J expressed doubt that there existed a right to practise medicine on an unrestricted basis.[143]

In *Hagan v Trustees of the Toowoomba Sports Ground Trust*,[144] 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 and Equal Opportunity Commission*:[145]

> [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 ordinary activities without being treated by others less favourably than persons who do not belong to that racial group…[146]

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

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140 (1998) 154 ALR 591.
141 Ibid 600.
142 (1996) 68 FCR 46.
143 Ibid 59-60, citing *Jamorksi v Attorney-General (Ontario)* (1988) 49 DLR (4th) 426.
144 [2000] FCA 1615.
145 (1995) 129 ALR 455.
146 [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.

> 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.[147]

(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.

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.

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.[148]

Black CJ[149] and Sackville J[150] (Heerey J dissenting)[151] held that it was not necessary for the groups to be compared to have been subject to the same requirement.[152] 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 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.[153]

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

147 [2000] FCA 1615, [42].
148 (1996) 68 FCR 46, 63.
149 Ibid 47.
150 Ibid 80-2.
151 Ibid 63. His Honour stated that the 'two groups compared have to be subject to the *same* term, condition or requirement'.
152 Note that the terms of s 9(1A) of the RDA differ to the terms of other anti-discrimination legislation which requires a comparison of the ability of different groups to comply with the relevant requirement or condition: see for example s 6 of the DDA.
153 (1996) 68 FCR 46, 81.

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.[154]

3.3 Exceptions: Special Measures

The RDA contains very limited exceptions to the operation of the Act,[155] unlike the SDA, DDA and ADA which contain a wide range of permanent exemptions[156] and the mechanism for a person to apply for a temporary exemption.[157] The exception relating to special measures in s 8(1) of the RDA has received the most attention in the case law. This provides as follows:

> 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).

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, provides as follows:

> 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 and that they shall not be continued after the objectives for which they were taken have been achieved.[158]

The High Court first considered the meaning of s 8(1) in *Gerhardy v Brown*.[159] 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

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154 Ibid 82-3 (Sackville J), 48 (Black CJ).

155 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).

156 See pt II, div 4 of the SDA; pt 2, div 5 of the DDA; pt 4, div 4 of the ADA.

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

158 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.

159 (1985) 159 CLR 70.

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):

1. the special measure must confer a benefit on some or all members of a class;
2. membership of this class must be based on race, colour, descent, or national or ethnic origin;
3. 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;
4. 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
5. the special measure must not have achieved its objectives.[160]

The majority of the Court held that the permit provisions of the SA Act satisfied these criteria and therefore qualified as a special measure and were not invalid.[161]

In *Bruch v Commonwealth of Australia*,[162] 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.[163]

In doing so, his Honour found that the five indicia identified by Brennan J were satisfied as follows:

- the ABSTUDY rental assistance scheme confers a benefit on a clearly defined class of natural persons made up of Aboriginal and Torres Strait Islander people;
- that class is based on race;

160 Ibid 133, 140.

161 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.

162 [2002] FMCA 29.

163 Ibid [51].

- 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 yet been achieved.[164]

3.4 Racial Hatred

3.4.1 Background

Racial hatred provisions were introduced into the RDA in 1995.[165] The majority of cases decided under the RDA in recent years have involved consideration of those provisions.

Section 18C of the RDA provides:

> **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:
>
> (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.

164 Ibid [54].

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

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.[166]

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'.[167]

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

- in *McGlade v Lightfoot*,[168] the relevant group was defined as 'an Aboriginal person or a group of Aboriginal persons who attach importance to their Aboriginal culture';[169]
- in *Creek v Cairns Post Pty Ltd*,[170] the group was defined by Kiefel J as 'an Aboriginal mother, or carer of children, residing in the applicant's town';[171] and
- in *Jones v Toben*,[172] 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'.[173]

In *McLeod v Power*,[174] 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 group, being too wide a term.[175] 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.[176] His Honour suggested

166 *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 357 [18]; *Toben v Jones* (2003) 199 ALR 1, 34 [137] (Allsop J).
167 See 3.2.1 above in relation to the interpretation of these terms.
168 (2002) 124 FCR 106.
169 Ibid [46].
170 (2001) 112 FCR 352.
171 Ibid [13].
172 [2002] FCA 1150.
173 Ibid [95]-[96].
174 (2003) 173 FLR 31.
175 Ibid [55].
176 Ibid [59].

that it would be 'drawing a long bow' to include 'whites' as a group protected under the RDA.[177]

In *Kelly-Country v Beers*,[178] 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.[179]

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 expression 'based on' and the terminology contained in the sections which prohibit discrimination in particular areas of public life, namely 'by reason of'.[180]

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*[181] 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.[182] 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.[183] 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'.[184]

Kiefel J held similarly in *Creek v Cairns Post Pty Ltd*[185] ('*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

177 Ibid [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 Newspapers Pty Ltd* (Unreported, HREOC, Sir Ronald Wilson, 15 May 1997).

178 (2004) 207 ALR 421.

179 Ibid 444 [100].

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

181 [2000] FCA 1615.

182 Ibid [16].

183 Ibid [34].

184 Ibid [36].

185 (2001) 112 FCR 352.

may be a matter for enquiry, the intensity of feeling of the person committing the act need not be considered (although it may explain otherwise inexplicable behaviour).[186] The key question is whether 'anything suggests race as a factor' in the relevant act.[187]

In *Jones v Toben*,[188] Branson J adopted the approach of Kiefel J in *Creek v Cairns Post* to the words 'because of' in s 18C(1)(b).[189] 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])[190]

In *Miller v Wertheim*,[191] 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 because:

> 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.[192]

In *McGlade v Lightfoot*,[193] 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.[194]

In *Kelly-Country v Beers*,[195] 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,

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186 Ibid 357 [18].
187 Ibid 359 [28].
188 [2002] FCA 1150.
189 See also Hely J in *Jones v Scully* (2002) 120 FCR 243, 273 [114].
190 [2002] FCA 1150, [99]. Her Honour's approach was approved on appeal in *Toben v Jones* (2003) 199 ALR 1.
191 [2002] FCAFC 156.
192 Ibid [12]-[13].
193 (2002) 124 FCR 106.
194 Ibid 121 [66].
195 (2004) 207 ALR 421.

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'.[196]

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 originator meant no offence by it'.[197] 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.[198]

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.[199] It is not necessary for an applicant to prove that any person was actually offended, insulted, humiliated or intimidated by the conduct.[200]

In *Creek v Cairns Post Pty Ltd*,[201] ('*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 focus of the article was whether the Department's decision was a reaction to the '*Stolen Generation*' report,[202] which had been published earlier that year and had spoken of Aboriginal people having in the past suffered because of their removal 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 a comfortable chair, photographs and books behind them. The photograph

196 Ibid 426 [30].
197 Ibid 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].
198 Ibid 446 [110].
199 *McGlade v Lightfoot* (2002) 124 FCR 106, 116-17 [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, 268-69 [98]-[100]; *Jones v Toben* [2002] FCA 1150, [84].
200 *Jones v Scully* (2002) 120 FCR 243, 269 [99] (Hely J).
201 (2001) 112 FCR 352.
202 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).

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 photograph was obtained by the respondent from a photographic library, having been taken with the consent of the applicant on an earlier occasion in connection with a different story.

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'.[203] 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'.[204]

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:

> 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.[205]

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.[206]

Kiefel J's statement in *Creek v Cairns Post* that conduct must have '[p]rofound 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 *Brohpo v Human Rights and Equal Opportunity Commission*[207] ('*Bropho*').

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203 (2001) 112 FCR 352, 356-57 [16].
204 Ibid 355 [12].
205 Ibid 356 [13].
206 [2002] FCA 1150, [92].
207 (2004) 204 ALR 761, 778 [70]. See also *Kelly-Country v Beers* (2004) 207 ALR 421, 441-442 [88].

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.[208]

(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'. [209]

In *Horman v Distribution Group Limited*[210] ('*Horman*'), 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 which I have accepted that it was used, that it was used in that way with respect to the applicant.[211]

(c) Reasonable victim test

In *McLeod v Power*,[212] Brown FM described the objective test as one of the 'reasonable victim',[213] adopting the analysis of Commissioner Innes in *Corunna v West Australian Newspapers Ltd.*[214] 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

208 (2004) 204 ALR 761, 777 [65].
209 *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].
210 [2001] FMCA 52.
211 Ibid [55].
212 (2003) 173 FLR 31.
213 Ibid 45 [65].
214 (2001) EOC 93-146, 75,465.

> have found the words offensive but not specifically offensive because of the racial implication that Mr McLeod says he found in them.[215]

In *Kelly-Country v Beers*[216] (*'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.[217]

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…[218]

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 further below, 3.4.5(d)).[219]

(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*,[220] 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:

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215 (2003) 173 FLR 31, 46-7 [69].
216 (2004) 207 ALR 421.
217 Ibid 441 [87].
218 Ibid 442 [90]-[92].
219 Ibid 446 [111].
220 [2000] FCA 1615.

> 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.[221]

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'.[222]

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.[223]

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 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.[224]

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221 Ibid [7].

222 Ibid, citing Clarence Major, *Dictionary of Afro-American Slang*, 1970.

223 Ibid [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].

224 (2004) 207 ALR 421, 444 [99].

His Honour concluded as follows:

> 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.[225]

(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.[226]

3.4.6 Otherwise than in Private

Section 18C applies only to acts done 'otherwise than in private'.[227]

Section 18C(2) provides that:

> 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.

Section 18C(3) further provides:

> 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.

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225 Ibid 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 [sic] 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' ([93]).

226 *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].

227 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].

Commissioner Innes in *Korczak v Commonwealth of Australia (Department of Defence)*[228] ('*Korczak*'), observed that it is clear 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.[229]

In both *McMahon v Bowman*[230] and in *Gibbs v Wanganeen*[231] ('*Gibbs*'), 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'.[232] 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'.[233] 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'.[234]

The application in *Gibbs* related to certain comments made in a prison. These were found by Driver FM to be made 'in private'.[235] His Honour considered the Victorian case of *McIvor v Garlick*[236] which addressed the meaning of a public place under the *Summary Offences Act 1966* (Vic). He noted that the case was a material guide to the meaning of the words 'public place' at common law.[237]

In deciding whether a prison is a public place, Driver FM noted that a prison is a closed community to which access and egress are strictly regulated.[238] His Honour suggested that because prisoners live there, it has some of the attributes of a private home[239] and he concluded that it is not in general a public place, although some parts may be a public place depending on the circumstances. Furthermore, 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.[240] 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.[241] Driver FM also referred to the 'quality of

228 Unreported, HREOC, Commissioner Innes, 16 December 1999, extract at (2000) EOC 93-056.
229 Ibid 74,176.
230 [2000] FMCA 3.
231 (2001) 162 FLR 333.
232 Ibid 336 [11].
233 Ibid 336-37 [12].
234 Ibid.
235 Ibid 337-38 [18].
236 [1972] VR 129.
237 (2001) 162 FLR 333, 337 [13].
238 Ibid 337 [14].
239 Ibid 337 [15].
240 Ibid 337 [14].
241 Ibid 337 [17].

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'.[242]

In *McMahon v Bowman*,[243] 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'.[244]

It was not necessary to prove that the people who were present in the street at the time of the incident heard what occurred.[245] In *Chambers v Darley*[246] Baumann FM referred approvingly to this analysis.

In *McGlade v Lightfoot*,[247] 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'.[248] 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'.[249]

In the substantive hearing in that matter,[250] 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'.[251]

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242 Ibid 337-38 [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 of Australia (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], 47-8 [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: 47-8 [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.

243 [2000] FMCA 3.

244 Ibid [26].

245 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.

246 [2002] FMCA 3, [10].

247 [2002] FCA 752.

248 Ibid [26].

249 Ibid [34]. Note, however, that these views were expressed as being provisional and subject to re-consideration at the final hearing of this matter, [37].

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

251 Ibid 116 [38]-[40].

In *Jones v Toben*,[252] 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'.[253] 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 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, led the searcher to one or more of the websites containing the material the subject of the complaint.[254]

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'.[255]

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
>
> 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.[256]

However, in *Bropho v Human Rights and Equal Opportunity Commission*[257] ('*Bropho*'), French J, in obiter comments, suggested that 'the incidence of the

252 [2002] FCA 1150.
253 Ibid [74].
254 Ibid. Her Honour's findings on this point were not challenged on appeal: *Toben v Jones* (2003) 199 ALR 1.
255 *Hobart Hebrew Congregation v Scully* (Unreported, HREOC, Commissioner Cavanough QC, 21 September 2000), extract at (2000) EOC 93-109.
256 *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) 199 ALR 1, 13 [41] (Carr J).
257 (2004) 204 ALR 761.

burden of proof' was not 'a question that should be regarded as settled'.[258] This was based on his Honour's view that s 18D was not 'in substance an exemption'[259] (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 or 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.[260]

In *Kelly-Country v Beers*[261] ('*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.[262]

(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, a complaint was made by the Nyungah Circle of Elders, 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).[263] This was upheld on review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) by RD Nicholson J,[264] 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.[265]

Before the Full Court on appeal from the decision of RD Nicholson J, 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 freedom of speech and expression. Section 18D was therefore 'exemption upon exception'.[266] French J stated:

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258 Ibid 780-81 [75].
259 Ibid 781 [76].
260 Ibid 781-82 [77].
261 (2004) 207 ALR 421.
262 Ibid 448-49 [125].
263 *Corunna v West Australian Newspapers Ltd* (2001) EOC 93-146.
264 *Bropho v Human Rights and Equal Opportunity Commission* [2002] FCA 1510.
265 Ibid [31]. See also the discussion of this issue in *Bryl v Nowra* (Unreported, HREOC, Commissioner Johnston, 21 June 1999), 15-6, extract at (1999) EOC 93-022.
266 (2004) 204 ALR 761, 779-80 [72].

> 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.[267]

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.[268]

In *Kelly-Country*, Brown FM (who did not make reference to the decisions 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.[269]

(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*,[270] 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.[271]

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267 Ibid 780 [73]. The other members of the Court, Lee and Carr JJ, did not express any view on this issue.

268 See for example, Akmeemana and 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.

269 (2004) 207 ALR 421, 447 [116].

270 Unreported, HREOC, Commissioner Johnston, 21 June 1999, extract at (1999) EOC 93-022.

271 Ibid 13.

RD Nicholson J in *Bropho*[272] 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.[273]

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.[274] Carr J expressed his agreement with the primary Judge.[275]

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.[276]

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*

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272 [2002] FCA 1510.

273 Ibid [33], [36].

274 (2004) 204 ALR 761, 785-86 [96] (French J), 795 [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 Limited* (EOD) [2000] NSWADTAP 28.

275 (2004) 204 ALR 761, 803 [178]. Note that special leave to appeal against the decision of the Full Federal Court was refused by the High Court: *Bropho v HREOC & Anor* [2005] HCATrans 9.

276 (2004) 204 ALR 761, 782 [79].

Legal Service Ltd v Jones[277] to the effect that the greater the impact of an act found to be otherwise in breach of s 18C, the more difficult it will be to establish that the particular act was reasonable.[278]

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.
>
> …
>
> … good 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.[279]

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.[280]

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.[281]

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277 [2000] NSW ADT 102.

278 (2004) 204 ALR 761, 795 [139]. Similarly in *Toben v Jones* (2003) 199 ALR 1, 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 view': 13 [44]. 279 (2004) 204 ALR 761, 785-86 [95]-[96].

280 Ibid 787 [101].

281 Ibid 795 [141].

> …
>
> … 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 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.[282]

In *Kelly-Country*, Brown FM acknowledged that 'reasonableness' has 'an overall objective flavour' while 'good faith' is 'more subjective'.[283] 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'.[284]

(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*,[285] 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.'[286] 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).[287]

Moral and ethical considerations, expressive of community standards, are relevant in determining what is reasonable.[288]

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282 Ibid 796 [144].
283 (2004) 207 ALR 421, 450 [131].
284 Ibid.
285 Unreported, HREOC, Commissioner Johnston, 21 June 1999, extract at (1999) EOC 93-022.
286 Ibid 17.
287 Ibid 19.
288 Ibid 17.

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:

> 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.[289]

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.[290]

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.[291]

289 (2004) 204 ALR 761, 782 [80].
290 Ibid 795-96 [142].
291 (2004) 207 ALR 421, 449 [127].

(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'[292] and went on to note that the term 'does seem to be used broadly'.[293] His Honour further stated that '[i]t must be accepted that artistic works cover an infinite variety of expressions of human creativity'.[294]

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'.[295]

(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*.[296] 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.[297]

292 (2004) 204 ALR 761, 770-71 [40].
293 Ibid 788 [104].
294 Ibid 788 [106].
295 (2004) 207 ALR 421, 448 [121].
296 Unreported, HREOC, Commissioner Nader, 2 March 2000.
297 Ibid 28.

(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.*[298] 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 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.[299]

3.4.8 Constitutional Issues

Commissioner Cavanough in *Hobart Hebrew Congregation v Scully*[300] considered whether Part IIA of the RDA infringed upon the constitutional implication of freedom of political communication. He referred to *Lange v Australian Broadcasting Corporation*[301] and *Levy v Victoria.*[302] He 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, bearing in mind the exemptions available, 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*'.[303] The legitimate end included the fulfilment of Australia's international obligations under ICERD, in particular article 4.

Commissioner Cavanough indicated that in construing and applying Part IIA it was necessary to take into account the value given by the common law to freedom of expression as well as the will of Parliament which had balanced this with other values in formulating the provisions of Part IIA.

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298 (2001) 112 FCR 352.
299 Ibid 360 [32].
300 Unreported, HREOC, Commissioner Cavanough QC, 21 September 2000, extract at (2000) EOC 93-109.
301 (1997) 189 CLR 520.
302 (1997) 189 CLR 579.
303 Unreported, HREOC, Commissioner Cavanough QC, 21 September 2000, 12-14, extract at (2000) EOC 93-109.

In *Toben v Jones*,[304] 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'.

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.[305]

304 (2003) 199 ALR 1.
305 (2003) 199 ALR 1, 9-10 [17]-[21] (Carr J), 14 [50] (Kiefel J), 20 [83]-[144] (Allsop J).