

Race Discrimination

Racial Discrimination Act 1975 s 9

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

Race doesn't have to have a biological or ethical meaning, but in itself but can be seen as an intersection or mixture of ones race, descent, ethnicity, religion etc.

1. Standing

- Who can complain? Can A complain on behalf of B

2. Jurisdictional issues

- Where did the act occur?
- 'It is noted NSW has its own legislation regarding this matter, but for the purpose of this hypothetical, I will discuss only the Federal Act'

3. Grounds

- Race RDA -> s 9
 - race, colour, descent or national or ethnic origin
- Racial Vilification -> 18C
 - Note the RDA imposes a positive duty to promote racial tolerance and equality

4. Area (wider scope)

- General - s 9 RDA - political, economic, social, cultural or any other field of public life.
- Employment - s 14 RDA (*Qantas v Gama*) (*Murugesu v Australian Postal Corp*)
- Goods and services - s 13 RDA
- Access to Premises - 11 RDA
- Land and Accommodation - s 12 RDA
- Vilification - s 18C RDA

- Unlawful discrimination as defined by s 9(1) of the RDA requires that a 'distinction, exclusion, restriction or preference' be 'based on' race or other of the related grounds.
- Section 18 of the RDA provides that where an act is done for two or more reasons, and one of the reasons is race (or other ground), the act will be taken to be done by reason of race (or other ground), whether or not this is the dominant or even a substantial reason for doing the act. It is sufficient if race or another ground is simply one of the reasons for doing an unlawful act.
- In addition to s 9(1), ss 11-15 of the RDA prohibit discrimination in specific areas of public life 'by reason of the first person's race, colour or national or ethnic origin' (*Purvis*)
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Differential - general prohibition in s 9 quite independent of an area that we may think of like education, employment etc

- Not limited to automatically find that coverage in a specific area - can claim under different sections; *Illiafi v The Church of Jesus Christ of latter - day Saints Australia*

- Discrimination for the purposes of these specific prohibitions will be unlawful when a person is treated less favourably than another 'by reason of the first person's race, colour or national or ethnic origin'. These sections do not limit the generality of s 9

5. Type

- Is there a requirement? **Yes** (Indirect) No (Direct)
- Can note an argument in the alternative, but apply the stronger
- [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.

Direct Discrimination - (Baird v State of Queensland) s 9(1) RDA

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

- A person did an act;
- The act involved a distinction, exclusion, restriction or preference;
 - Including a racist remark (*Qantas Airways Ltd v Gama*)
- The act was based on race, colour, descent or national or ethnic origin; and
 - Unlawful discrimination as defined by s 9(1) of the RDA requires that a 'distinction, exclusion, restriction or preference' be 'based on' race or other of the related grounds.
 - Section 18 of the RDA provides that where an act is done for two or more reasons, and one of the reasons is race (or other ground), the act will be taken to be done by reason of race (or other ground), whether or not this is the dominant or even a substantial reason for doing the act. It is sufficient if race or another ground is simply one of the reasons for doing an unlawful act.
 - 'based on' has a liberal construction (*Macedonian Teachers' Association of Victoria*)
- The act had the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life

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.

Indirect discrimination - s 9(1A) RDA

The following elements are required to establish indirect discrimination:

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

- A term, condition or requirement is imposed on a complainant
 - The words 'term, condition or requirement' 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.
- The term, condition or requirement is not reasonable in the circumstances
 - 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 (*Styles*)

- The requirement of 'reasonableness' under s 9(1A)(a) of the RDA was considered in *Siddiqui*.
- In *Commonwealth Bank of Australia v HREOC 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'.
- It is true that the fact that there is a reasonable alternative that might accommodate the interests of an aggrieved person does not, of itself, establish that a requirement or condition is unreasonable. The Court must objectively weigh the relevant factors, but these can include the availability of alternative methods of achieving the alleged discriminator's objectives without recourse to the requirement or condition: *Catholic Education Office v Clarke*