TYPES OF DISCRIMINATION RECOGNISED BY AUSTRALIAN LAW

DIRECT DISCRIMINATION

- **Direct discrimination** occurs when a person receives less favourable treatment, as a result of the possession of a particular attribute, than would someone else in the same circumstances, who does not possess that attribute.

Elements:

- **less favourable treatment**
- **"on the ground of", "by reason of", "because of" – less favourable treatment must have occurred because of that attribute**
- **possession of a protected ground or attribute**
- **in circumstances that are the same or not materially different – the comparator must be in the same circumstances as, or circumstances that are not materially different from those of the person alleging discrimination**
- **Example – female worker getting paid less**
  - **getting paid less**
  - **protected attribute – gender; she is female**
  - **comparator – men, same job, works as long hours**

Less Favourable Treatment

- **Test for determining unfavourable treatment - treated contrary to their interests – problem with this test is that it's too inclusive – e.g. an employee requests 1mil salary, contrary to financial interests and thus unfavourable according to this test**

Comparative nature of requirement

- **Behaviour that may not be inherently objectionable may nonetheless be discriminatory, because it involves less favourable treatment (and so be objectionable for that reason)**
- **Behaviour is inherently objectionable, may not be discriminatory**
- **Barnes v Costle 561 F 2d 983 (1977), 990, n. 55 – sexual harassment on the job**

  Facts
  - Barnes's job was abolished when she resisted her supervisor's sexual advances

- A female employee of the Environmental Protection Agency claimed sexual harassment where, despite her refusals, her male superior repeatedly solicited her to join him for social activities
- In addition, he repeatedly made sexual remarks to her, and suggested that her employment status would benefit if she had an affair with him
- The supervisor fired her in retaliation for her refusals

Issue

Decision

- Sexual harassment violated Title VII
- The Court of Appeals reasoned that the supervisor would not have made sexual advances and solicited her participation in sexual activity "but for her womanhood." Thus, there was a prima facie case that Title VII had been violated
- The court rejected the argument that sexual harassment is not sex discrimination, ruling that the statutory prohibition of sex discrimination in employment is not limited to characteristics peculiar to one gender or to situations in which less than all employees of the claimant's gender are affected
- The court found that the harassment was a condition of employment because Barnes lost her job as a result of refusing her supervisor's advances
- **The court reasoned that the sexual harassment constituted discrimination based on gender because the supervisor imposed upon her job tenure a condition that he would not have imposed on a man**

- **Equality**
  - **The conception of equality underpinning laws prohibiting direct discrimination is entirely formal and relative**
  - **While equality will be achieved if two or more parties are treated equally well, it is also achieved if they are treated equally badly**
  - **Accordingly, the legal prohibitions on direct discrimination can be complied just as much by the removal of a benefit from a privileged group as by the conferral of a benefit on a disadvantaged group**
  - **See Palmer v Thompson**
- **Palmer v Thompson (1971) 403 US 217, 91 S Ct 1940, 1941-1943**

  Facts
  - The city maintained segregated swimming pools while it desegregated the zoo, public golf courses and parks. The city decided to close all pools instead of desegregating them. Some of the black citizens then filed suit to force the city to reopen the pools as desegregated facilities.

  Issues

- Is this closing of swimming pools state action that denies Equal Protection to the black citizens in the community?
- Is proof of discriminatory purpose sufficient for a law to be declared unconstitutional?

Decision

- An official governmental action that denies access to public facilities to all citizens does not violate the Equal Protections Clause of the United States Constitution (Constitution)
- A city may choose to close pools for any reason. The Supreme Court of the United States (Constitution) has never held an act unconstitutional solely because of the motivations of the men who voted for it
- **Dissent** - A state may not avoid integration by eliminating all of its public services such as school, parks or pools. It may not close facilities for the purpose of "perpetuating or installing apartheid." A state may discontinue any of its municipal services, but it may not do so for the purpose of perpetuating or installing apartheid or because it finds life in a multiracial community difficult or unpleasant. It was argued that closing public services has a disproportional impact on the poor (who don't have their own pools). In addition, Jackson's actions send the message that protests and lawsuits come with a high price, thereby stifling free speech.
- **The decision to close the pools affected all citizens equally and though it may have been racially motivated, no one group was more disadvantaged than another as a result**
- For a law to be declared unconstitutional under the Equal Protection clause, there must be adequate evidence of both discriminatory impact and discriminatory purpose
    - It is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment
    - There is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters; it could just be passed again with different express reasons
    - Thus, proof of discriminatory impact is also required; here, blacks and whites were affected in the same way.
- **The basic rule illustrated by this case is that in order for a facially-neutral law to be a violation of the Equal Protection Clause, racial discrimination by the State must contain two elements**
    - **A racially disproportionate impact and**
    - **Discriminatory motivation on the part of the state actor**

Ascertaining whether there is less favourable treatment

- **Commonwealth v HR&EOC (Dopking No 1) [1993] FCA 547, per Black CJ (para 17), Lockhart J (paras 1-6) and Wilcox J (paras 18-23)**

  Facts

  - A male member of the armed forces complained to the Commission that he had been discriminated against on the basis of his single status in not being provided with a housing benefits which were provided to married couples
  - They sought to receive certain allowances to cover costs associated with their posting. These allowances were only available to a 'member with a family' which was defined to mean a member normally residing with: (a) the spouse of the member; (b) a child; (c) where the member is widowed, unmarried or permanently separated, or where the member's spouse is invalided – a person acting as a guardian or housekeeper to a child; (d) any other person approved by an approving authority. The complainants' applications for the allowances were rejected on the ground that they were members without family
  - Section 6(1) of the SDA defines direct discrimination on the ground of marital status

    (1) For the purposes of this Act, a person (in this subsection referred to as the discriminator) discriminates against another person (in this subsection referred to as the aggrieved person) on the ground of the marital status of the aggrieved person if, by reason of:

    (a) the marital status of the aggrieved person; or

    (b) a characteristic that appertains generally to persons of the marital status of the aggrieved person; or

    (c) a characteristic that is generally imputed to persons of the marital status of the aggrieved person

    the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of a different marital status.

  Issues

  Decision by HREOC

  - HREOC found that this amounted to direct discrimination on the ground of marital status
  - The respondent argued that the allowance was denied not because of the complainants' marital status, but because they were not part of a household including a person within the definition of 'family'. This argument was rejected by Sir Ronald Wilson, who held:
    - In my opinion [the respondent's argument] neglects to mark the significance of paragraphs (b) and (c) of section 6(1). It is not only 'marital status' to which

regard must not be had, but also 'a characteristic that appertains generally to or is generally imputed to persons of the marital status' of the complainant. Not being part of a 'household' is a characteristic that pertains generally to persons of single status, thereby as a matter of generality rendering single persons ineligible to receive the allowance. In the present case, that characteristic of not being part of a household attached to Mr Dopking, thereby rendering him ineligible to receive the allowance.

Decision by Full Court of the Federal Court

- Rejected HREOC approach
- **It was not the marital status of the person who was treated more favourably that determined the more favourable treatment. HPSEA was available to any member of the Defence Force having a person normally residing with them who fell within the definition of ``family'' in cl 2 of the determination and who accompanied the member to the relevant posting**
- **Wilcox J - a claim of less favourable treatment does not fail simply because someone other than the person alleging discrimination might actually have preferred the treatment offered by the alleged discriminator**
- **"[W]here there are both advantages and disadvantages of [different types] of treatment, whether one alternative is more or less favourable than the other will usually be a matter of personal preference".**
- **But only if a reasonable person, in the position of the person alleging discrimination, *might* have thought that she was treated less favourably**
- **Lockhart J stated:**
    - In this case s 6(1) requires the comparison to be made between Mr Dopking as a person with the characteristic mentioned in para (b) or (c) of subs (1) and a person of a different marital status. There is no extension of that other person's marital status for the purposes of the section. In other words, the comparison is not made with a person having a characteristic that appertains generally to or is generally imputed to persons of another marital status; it is made with a person of a different marital status – for example a married person.
    - The reason why a member of the Defence Force is... treated more favourably than others is because the member is accompanied by a person who normally resides with him or her and falls within the extended definition of 'family'. It is not the marital status of the person ... that determines the more favourable treatment, but the fact that, whatever that person's marital status is, he or she

has one or more ‘family’ members normally residing with him or her who in fact accompanies the member to the new posting

- **Eligibility requirements did not operate discriminatively against persons by reason of marital status because single persons who resided with "family" were also eligible**

- **Wilcox J** also favoured a ‘narrow’ view of s 6(1), requiring a comparison between - the treatment of an aggrieved person having a particular marital status (or characteristic which appertains generally, or is perceived to appertain generally, to persons of a particular marital status) and the treatment accorded to persons having a different marital status, without reference to the characteristics that generally appertain, or are imputed, to that marital status. **Second respondent suffered indirect discrimination because higher proportion of married persons were naturally eligible for HPSEA compared to single people. Whether there was breach of the Act depended on whether was reasonable in circumstances. Married members were not entitled to allowance simply because they were married. Eligibility turned on whether members, married or single, had "family' normally residing with them. As such, indirect discrimination was reasonable in circumstances of case**
- **Per Black J (dissenting) -** Married persons, by virtue of very nature of marital status, already had "family" and eligibility for allowance depended on exercise of choice as to whether to live together. On the other hand, was impossible for single persons such as second respondent to qualify for allowance without either changing marital status or acquiring "family". This lack of choice afforded to single persons operated discriminatively against second respondent. Similarly, de facto spouses were naturally in position to fulfil "family" requirements for eligibility for HPSEA, whereas single persons were not in such a position. Was by virtue of marital status that second respondent was treated less favourably. Respondent was not in error in deciding that appellant had engaged in conduct unlawful under the Act.
    - The terms of the determination placed a barrier in the path of an aggrieved single person without a ``family'' who sought HPSEA, but placed no such barrier in the path of a person of the different marital status of being married or of the different marital status of being the de facto spouse of another person. In this way Mr Dopking was by reason of a characteristic appertaining generally to persons of his marital status treated less favourably in circumstances that were the same or were not materially different from the way in which the Commonwealth would treat a person of different marital status.

Must it be intended that there be less favourable treatment?

- **No**

Must there be an actual comparator?

- **No, can rely on a hypothetical comparator – are you treated differently than a male that WOULD HAVE been treated?**
- **Boehringer Ingelheim Pty Ltd v Reddrop [1984] 2 NSWLR 13, 19-20**

  Facts
  - Concerned discrimination on the ground of marital status
  - The complainant (the respondent in the appeal) had applied for a job with a pharmaceutical company (respondent to the original complaint and appellant in the appeal)
  - This application was unsuccessful, and the complainant claimed that the company had discriminated against her on ground of marital status and/or sex under the Anti-Discrimination Act, 1977 (NSW)
  - The complaint was based on the fact that the company had refused to employ her, despite having ranked her as the best of the applicants, because her husband was employed by a rival company in the pharmaceuticals industry
  - The Equal Opportunity Tribunal decided in favour of the complainant with respect to the claim of marital status discrimination but held that there was no sex discrimination

  Issues

  Decision
  - On appeal, the Court of Appeal held that there was also no marital status discrimination
  - The relationship status ground does not extend to cover discrimination based on the identity or situation of one's spouse and that it was limited to discrimination against a person 'simply because they are married and for no other reason'.
  - All the members of the Court took the view that the meaning of discrimination on the ground of "marital status" did not extend "to embrace the identity or situation of the spouse"
  - Mahoney P himself expressly rejected the first implication, saying, "I do not think [the] view should be accepted [that] there would be discrimination within the sub-section only where the ground for different treatment of the complainant was, and was only, his marital status".27 In other words his Honour regarded discrimination which results from an application of mixed criteria as falling within the proscriptions of the Act
- **Haines v Leeves (1978) 8 NSWLR 442, 471**

  Facts

  Issues

  Decision

- **An alternate approach to less favourable treatment - Cf Equal Opportunity Act 2010 (Vic), s 8 – direct discrimination**

  (1) Direct discrimination occurs if a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute.

  Examples

  - An employer advises an employee that she will not be trained to work on new machinery because she is too old to learn new skills. The employer has discriminated against the employee by denying her training in her employment on the basis of her age
  - A real estate agent refuses an African man's application for a lease. The real estate agent tells the man that the landlord would prefer an Australian tenant. The real estate agent has discriminated against the man by denying him accommodation on the basis of his race.

  (2) In determining whether a person directly discriminates it is irrelevant

  (a) whether or not that person is aware of the discrimination or considers the treatment to be unfavourable;

  (b) whether or not the attribute is the only or dominant reason for the treatment, provided that it is a substantial reason

A Protected Ground or Attribute

- In order to be unlawful, the discrimination must be based on one of the grounds or attributes set out in the legislation
- **Cf Equal Opportunity Act 2010 (Vic), s 6 – attributes -** The following are the attributes on the basis of which discrimination is prohibited in the areas of activity set out in Part 4

  (a) Age

  (b) Breastfeeding

  (c) employment activity

  (d) gender identity

  (e) disability

  (f) industrial activity

  (g) lawful sexual activity

  (h) marital status

  (i) parental status or status as a carer

  (j) physical features

  (k) political belief or activity

(l) Pregnancy

(m) Race

(n) religious belief or activity

(o) Sex

(p) sexual orientation

(q) an expunged homosexual conviction

(r) personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes

- Generally appertaining and generally imputed characteristics
  - Australian anti-discrimination law does not just forbid discrimination against people on the basis that the people possess particular attributes.
  - It is illegal to discriminate against someone with a particular attribute, on the basis of characteristics that do, in fact, *generally appertain* to people with the attribute in question
  - It is also illegal to discriminate against someone with a particular attribute on the basis of characteristics that are generally imputed to those with the attributes in question
- Generally appertaining characteristics
  - Arguments in favour of prohibiting discrimination on the basis of generally appertaining characteristics:
    - if it were otherwise, very easy to defeat claims of discrimination on the basis of particular attributes;
    - in many cases we disapprove of differential treatment on the basis of the generally appertaining characteristics, in themselves.
  - **Dopking No 1**
- **Characteristics:**
- **Commonwealth v HR&EOC (Dopking No 1) [1993] FCA 547, per Wilcox J (paras 7-11)**
  - D who was single was denied accommodation/financial assistance (cf married couples)
  - An appertaining characteristic of being single is that you don't live with your family but the judge here simply asserts that it is rare for unmarried people to live with their families.
- **Must the alleged discriminator have thought that the characteristic was related to a protected attribute?**
- Generally appertaining (as opposed to imputing) characteristics – see Kapoor
- **Kapoor v Monash University (2002) 4 VR 483 496-497, [2001] VSCA 247, paras 41-47**

Facts

- K said that her contract has not been renewed because she was socially served – this was a characteristic that generally pertained to Indian Hindus of a specific cast – a characteristic which generally appertained to people of her race

Issues

Decision

- **In order for a person to discriminate on the basis of a generally appertaining characteristic the alleged discriminator herself must mentally connect the characteristic with the forbidden attribute. Here, although Monash thought K was socially served, they hadn't associated that with her race. They hadn't thought she was socially served because of her race; rather, thought she was a socially reserved individual**
- **Must draw a link between generally appertaining characteristic and protected attribute**
- Victorian Court of Appeal ruled against an academic who had successfully complained of race discrimination when her contract to teach an Aboriginal Orientation course was not renewed because of the University's wrong assumption that she was unsuitable because of her 'reserved disposition,' a characteristic of her race (Indian) and religion (she was a Brahman Hindu)
- The Court said that though it was wrong, the University did not know that her 'disposition' was a characteristic of her race and religion and because there was no causal relationship between treating her less favourably and her 'race' it was not unlawful discrimination. The 'reason' for discrimination was an uninformed if not ignorant assumption about her competence.
- The preferable construction of s 17(4)(a) of the 1984 Act and s 7(2)(b) of the EO 1995 Act that regard must be had to to the substantial reason for the conduct and whether it was race related

- Arguments in support of the position that there must be a mental connection:
  - Without such a connection there is no discrimination on the basis of a protected attribute
  - However, that does not address the issue that we may disapprove of discrimination on the basis of the generally pertaining characteristic itself
- Generally imputed characteristics - Arguments in support of such a mental connection in the case of generally imputed characteristics:
  - Putting issues of protected attributes to one side, we do not generally disapprove of people being treated differently on the basis, *in themselves*, of the characteristics that tend to be imputed

- We only object when the alleged discriminator draws a mental link between a generally imputed characteristic and a protected attribute

"On the Ground Of", "By Reason Of", "Because Of"

- The less favourable treatment must have occurred on the ground of, or by reason of, the protected attribute or related characteristic
- Age discrimination act – 'because of'
- Sex discrimination act – 'by reason of'
- Disability discrimination act – 'on the ground of'
- Some difference between each of the three phrases

Relevance of Motive

- Must the alleged discriminator's according of the less favourable treatment have been *motivated* by the complainant's possession of the protected attribute?
- It is well established that the expression 'because of' requires a causal connection between the disability and any less favourable treatment accorded to the aggrieved person. It does not, however, require an intention or motive to discriminate
- The "true basis" approach provides an excuse of "pure motive" even in cases "where the respondent was clearly influenced by the complainant's protected attribute when making the decision in question" (Rees, Rice and Allan)
- It should be enough for an act to have occurred on the ground of a complainant's protected attribute, if the complainant's protected attribute played a *necessary role* in the complainant's *reasoning regardless* of if there is a non-discriminatory motive
    - Purpose of legislation would be undermined if otherwise discriminatory acts can be defended by defendant pointing to an underlying non-discriminatory motive like in Purvis
    - **But in the exam if there is a non-discriminatory motive, say that pursuant to observations of the high court, no discrimination on the ground of/because of – however, unsatisfactory, an alternative approach is whether** complainant's protected attribute played a *necessary role* in the complainant's *reasoning* **…. And if we adopt that approach then we find that…**
- Unconscious discrimination
- **R v Birmingham County Council, ex p Equal Opportunities Commission [1989] AC 1155, 1190-1191, 1193**

  Facts

- Birmingham only provided 360 grammar school places for girls, and 540 for boys; there were more places available for boys than girls in selected entry schools
- Girl who applied would be treated less favourably than a boy by virtue of being a girl because there were less places for girls so she would have to perform very well to get selected
- At first instance, the EOC won. The Court of Appeal upheld this
- The Council appealed, arguing it had not shown that selective education was better than non-selective education as a precondition to showing less favourable treatment, and in any case the Council had no intention or motivation to discriminate

Arguments

- The Equal Opportunities Commission argued that s 23(1) of the Sex Discrimination Act 1975 obligated Birmingham City Council "not to discriminate on grounds of sex". Yet, Birmingham City Council discriminated "against girls in the provision of grammar school education by treating girls less favourably on the ground of sex"
- The Council argued that under s 8 of the Education Act 1944 it was not part of the "function" of a local education authority to provide selective schools. Consequently, 'failure to provide selective schools was neither an act nor a deliberate omission within s 23' of the Sex Discrimination Act 1975

Issues

Decision

- Lord Goff dismissed the council's appeal, saying first that it did not need to be shown that selective education was 'better', just that girls were not being given the same opportunities. Second, it is enough that there is less favourable treatment and the '**intention or motive of the defendant to discriminate, though it may be relevant so far as remedies are concerned… is not a necessary condition to liability.'** That would be a bad idea because then 'it would be a good defence for an employer to show that he discriminated against women not because he intended to do so but (for example) because of customer preference, or to save money, or even to avoid controversy.'
- The council, as local education authority, had discriminated against girls
- In order to show discrimination on the ground of gender under the 1975 Act, it is not necessary to show an intention or motive to discriminate. The Council had provided more grammar school places for boys than for girls, and plainly it knew that it had done so. It had not intended to discriminate against the girls but in fact it had done so. Whether treatment is less favourable is to be determined objectively. It is not enough that a claimant believes it to be less favourable

- Here, whatever may have been the intention or motive of the council, nevertheless it is because of their sex that the girls in question receive less favourable treatment than the boys, and so are the subject of discrimination under the Act of 1975
- "[T]he council's provision of more places for boys than girls in selective secondary education treated girls 'less favourably' than boys within the meaning of s. 1(1)(a) of the Sex Discrimination Act."
- "In order to establish that there was less favourable treatment of girls by reason of their having been denied the same opportunities as boys, it was not necessary for the Commission to show that selective education is 'better' than non-selective education. It is enough that, by denying the girls the same opportunity as the boys, the council was depriving them of a choice which was valued by them, or at least by their parents, and which (even though others may take a different view) is a choice obviously valued, on reasonable grounds, by many others."
- "There is discrimination within the meaning of s. 1(1)(a) of the Sex Discrimination Act if there is less favourable treatment on the ground of sex, in other words if the relevant girl or girls would have received the same treatment as the boys but for their sex. The intention or motive of the defendant to discriminate is not a necessary condition to liability. If the council's submission were correct, it would be a good defence for an employer to show that he discriminated against women not because he intended to do so, but, for example, because of customer preference, or to save money, or even to avoid controversy."

- **Australian Iron & Steel v Banovic [1989] HCA 56, paras 10, 11**

  Facts

  - The case involved a group of women, predominantly from non-English speaking backgrounds, who had been employed in non-traditional work at Port Kembla with Australian Iron & Steel ('AIS'). Soon after being employed, the women lost their jobs as a result of the application of the 'last on first off' rule when there was a downturn in the economy - adopted to terminate the employment of employees on the grounds of redundancy
  - The 'last on-first off' rule is an example of such a rule as the women had only recently been employed by AIS. As they had waited a long time before being employed, proportionately more women than men were entrenched. The requirement with which an ironworker needed to comply to avoid dismissal was to have commenced employment prior to a specified date
  - Australian Iron & Steel applied its "last on-first off" policy and the group terminated on the basis of redundancy was largely female employees

- A retrenchment policy of "last on-first off" had the effect of adversely affecting women because the company had only begun to employ women after many years of only employing men in the iron and steel industry. Therefore, the last-on first-off policy for retrenching workers adopted by the company discriminated against women.

Issues

Decision

- It is not necessary, in order that there be direct discrimination, that there be a motive to discriminate. Rather, it is necessary to look at the "true basis" of the discriminatory act (Deane and Gaudron JJ).
- Defendant's retrenchment policies of "last on, first off" constituted discrimination on the basis of sex in violation of the Anti-Discrimination Act 1977 (NSW) which prohibits imposition of a condition with which a substantially higher proportion of one sex can comply than the other sex
- Although the retrenchment itself applied to about the same proportion of members of both sexes, the court reasoned that, because the defendant had engaged in discrimination in hiring in the past, fewer women than men were employed in positions of seniority immune from retrenchment than would have otherwise been the case, and thus **indirect discrimination** had occurred. It concluded that retrenchment policies that kept alive the effects of past employment discrimination constituted, themselves, sex discrimination
- At first glance, the policy did not appear to be problematic, however, the practice was deemed to be discriminatory because of the previous employment policies of Australian Iron & Steel. Each woman who had applied for a job with Australian Iron & Steel had been placed on a waiting list for employment - some waited more than three years to be appointed. Men who applied for roles at the same time had little or no waiting period. In regards to the "last on-first off" policy, Justices Deane and Gaudron of the High Court held "that the condition or requirement was unreasonable in that it operated to keep alive the effects of past discrimination on the ground of sex."

- **Waters v Public Transport Corporation [1991] HCA 49, paras 17-21**

Facts

- The complainants had various physical or intellectual disabilities and relied on the assistance of tram conductors and railway station assistants in order to travel on public transport. They would have found it 'exceedingly difficult, if not impossible'(25) to use a new system of public transport ticketing proposed by the respondent. The new system involved the removal and/or reduction of numbers of conductors and station assistants, coupled with the introduction of mechanised ticketing systems. After finding that the proposal was discriminatory, the Victorian Equal Opportunity Board ordered that the

respondent discontinue the new ticketing system and refrain from implementing the 'driver-only' tram proposal. The orders were upheld by the High Court.

Issues

Decision

- The High Court found that the removal of conductors from trams indirectly discriminated against people with disabilities. The court found that requiring people to use trams without conductors was an unreasonable requirement condition or practice of using the service (and one that the complainants were unable to comply with). The requirement that trams be used without conductors provided a barrier to people with disabilities accessing tram services
- **Mason CJ and Gaudron J, with whom Deane J agreed**, clearly stated their preference for an interpretation of s. 17(1) and (5) which did not require proof of motive or intention to discrimination
- Only **McHugh J** considered that intention was relevant in proving direct discrimination. He found that the words 'on the ground of' and 'by reason of' in s. 17(1) required a causal connection between the discriminatory act and the status or private life of the victim, but added that 'if the discriminator would have acted in the way which he or she did, irrespective of the factor . . . then he or she had not discriminated', a conclusion with which surely nobody could disagree
- Reasonable in the circumstances - Brennan J provided a more detailed examination of the application of the reasonableness test in determining whether a condition, requirement or practice is "*reasonable in the circumstances*". According to his Honour, consideration must first be given to whether it is reasonable to impose the requirement or condition "*in order to perform the activity or complete the transaction*". Secondly, regard must be had to whether the transaction or activity could be performed without imposing a requirement that is discriminatory. Brennan J went on to state that the relevant factors to be taken into account as part of the exercise of considering the relationship of the requirement to the transaction or the activity include
    - The effectiveness of the requirement
    - The efficiency of the requirement
    - The convenience of the requirement; and
    - The cost of not imposing the discriminatory requirement or substituting another requirement
- The High Court considered the provisions of the Equal Opportunity Act 1984 (Vic). Section 17(1) of that Act defined discrimination as including, relevantly, less favourable treatment ‘on the ground of the status’ of a person, ‘status’ being defined elsewhere in that Act to include disability. **Mason CJ and Gaudron J** held - It would,

in our view, significantly impede or hinder the attainment of the objects of the Act if s 17(1) were to be interpreted as requiring an intention or motive on the part of the alleged discriminator that is related to the status or private life of the person less favourably treated. It is enough that the material difference in treatment is based on the status or private life of that person, notwithstanding an absence of intention or motive on the part of the alleged discriminator relating to either of those considerations

- The objects of the legislation would be "significantly" impeded if the legislation were interpreted as requiring "an intention or motive on the part of the alleged discriminator that is related to the status or private life of the person less favourably treated"
- It is enough "that the material difference in treatment is *based on* the status or private life of that person (Mason CJ and Gaudron J)

- [21] - There is some force in the suggestion that the expressions "on the ground of the status" and "by reason of the private life" in s 17(1) look to an intention or motive on the part of the alleged discriminator that is related to the status or private life of the other person: see Department of Health v Arumugam [1988] VR 319, per Fullagar J at 327. However, the principle that requires that the particular provisions of the Act must be read in the light of the statutory objects is of particular significance in the case of legislation which protects or enforces human rights. In construing such legislation the courts have a special responsibility to take account of and give effect to the statutory purpose: Ontario Human Rights Commission v Simpsons-Sears Ltd, at 547; see also Street, at CLR 487, 566. In the present case, the statutory objects, which are stated in the long title to the Act, include, among other things, "to render unlawful certain Kinds of Discrimination, to promote Equality of Opportunity between persons of different status". It would, in our view, significantly impede or hinder the attainment of the objects of the Act if s 17(1) were to be interpreted as requiring an intention or motive on the part of the alleged discriminator that is related to the status or private life of the person less favourably treated. It is enough that the material difference in treatment is based on the status or private life of that person, notwithstanding an absence of intention or motive on the part of the alleged discriminator relating to either of those considerations. A material difference in treatment that is so based sufficiently satisfies the notions of "on the ground of" and "by reason of".

- **Purvis v New South Wales (2003) HCA 62, paras 234-236, 13, 14**

  Facts

  - The appellant in that matter alleged that his foster son ('the student') was discriminated against on the ground of his disability when he was expelled from a school run by the respondent
  - The student suffered from behavioural problems and other disabilities resulting from severe brain injury sustained when he was six or seven months old. He was permanently

excluded from his school because of incidents of 'acting out' which included verbal abuse and incidents involving kicking and punching

- The appellant claimed that the respondent had discriminated against the student by subjecting him to a 'detriment' in his education and by suspending and eventually excluding him from the school because of his misbehaviour

Arguments

- The applicant argued that attention must be paid to the particular characteristic of the complainant which in fact led to the decision or action of which complaint is made. It was sufficient if the particular characteristic were the fact of, or an aspect of, the complainant's disability. Applying either test, the motive or intention of the discriminator in taking the aggrieved person's disability into account was irrelevant, however benign that motive or intention might be
- The State asserted that the underlying reason for exclusion of the appellant was not his disability but the genuine threat that he considered that the respondent posed to other pupils and teachers

Issues

- What was the true basis of decision to expel child?
- Daniel's violent behaviour which counts as a part of his disability would plainly have featured in principal's reasoning in his decision to expel Daniel? Concerned that if he didn't get expelled, his harmful behaviour would endanger safety of other students
- Harmful/violent behaviour is a manifestation of his disability
- Disability certainly played a necessary party in principal's reasoning to expel him
- Is it discriminatory – disability played a part in the reasoning but ultimate concern was safety of other students

Decision

- **Lecturer argues that his disability was a necessary part of principal's reasoning in expelling daniel, thus it was made because of/on the ground of his disability BUT court departs from this view - said no discrimination if there is a non-discriminatory motive**
- **McHugh and Kirby JJ** concluded that - while it is necessary to consider the reason why the discriminator acted as he or she did, it is not necessary for the discriminator to have acted with a discriminatory motive. Motive is ordinarily the reason for achieving an object. But one can have a reason for doing something without necessarily having any particular object in mind
    - It is necessary to look at the "true basis" of the respondent's decision (Gleeson CJ) or the "real reason" for it (McHugh and Kirby JJ)

- Motive may nevertheless be relevant to determining whether or not an act is done 'because of' disability. **Gummow, Hayne and Heydon JJ stated** - we doubt that distinctions between motive, purpose or effect will greatly assist the resolution of any problem about whether treatment occurred or was proposed 'because of' disability. Rather, the central questions will always be – why was the aggrieved person treated as he or she was? If the aggrieved person was treated less favourably was it 'because of', 'by reason of', that person's disability. Motive, purpose, effect may all bear on that question. But it would be a mistake to treat those words as substitutes for the statutory expression 'because of'.
- It appears to be accepted that a 'real reason' or 'true basis' test is appropriate in determining whether or not a decision was made 'because of' a person's disability. **McHugh and Kirby JJ** appeared to adopt the Banovic approach. Their Honours stated that the appropriate test is not a 'but for' test, which focuses on the consequences for the complainant, but one that focuses on the mental state of the alleged discriminator and considers the 'real reason' for the alleged discriminator's act. Their Honours held that the mere assertion of a ground which is not the protected attribute (such as the health, safety and welfare of others, as argued by counsel for the State) will not prevent the act from being discriminatory if the true basis for the act in question is the protected attribute (the disability). Like Gummow, Hayne and Heydon JJ, McHugh and Kirby JJ considered that the causation question is resolved by examining the reason for the alleged discriminator's actions: 'was the disability a reason for the treatment suffered? Their Honours said that in answering this question, 'while it is necessary to consider the reason why the discriminator acted as he or she did, it is not necessary for the discriminator to have acted with a discriminatory motive.
- **Gleeson CJ** similarly inquired into the 'true basis' of the impugned decision. In that case, the antisocial and violent behaviour which formed part of the student's disability had caused his expulsion from the school. **Gleeson CJ held** - The fact that the pupil suffered from a disorder resulting in disturbed behaviour was, from the point of view of the school principal, neither the reason, nor a reason, why he was suspended and expelled ... If one were to ask the pupil to explain, from his point of view, why he was expelled, it may be reasonable for him to say that his disability resulted in his expulsion. However, ss 5, 10 and 22 [of the DDA] are concerned with the lawfulness of the conduct of the school authority, and with the true basis of the decision of the principal to suspend and later expel the pupil. In the light of the school authority's responsibilities to the other pupils, the basis of the decision cannot fairly be stated by observing that, but for the pupil's disability, he would not have engaged in the conduct that resulted in his suspension and expulsion. The expressed and genuine basis of the principal's

decision was the danger to other pupils and staff constituted by the pupil's violent conduct, and the principal's responsibilities towards those people

- **Callinan J** did not express an opinion regarding the Banovic approach or the proper role of motive or intention.
- There was disagreement as to whether the motives of the alleged discriminator should be taken into account in determining whether that person has discriminated against another because of the latter's disability. Gummow, Hayne and Heydon JJ thought that motive was at least relevant. Gleeson CJ thought that motive was relevant and, perhaps, could be determinative. McHugh and Kirby JJ thought motive was not relevant. All agreed, however, that it is necessary to ask why the alleged discriminator took the action against the alleged victim.
- A majority of the Court emphasised the need to focus on the language of the DDA. Three judges discussed the need to search for the 'true basis' of the decision. Two judges expressly confirmed the irrelevance of the motive or intention of the alleged discriminator. Three judges doubted the utility of distinctions between motive, purpose and effect. While two judges held that the stated basis of the decision in Purvis — the safety of other pupils and staff — was not the true basis of the decision, one judge accepted that it was. And one judge expressed no opinion.
- The judges therefore used different language to describe the test for determining whether discrimination was 'on the ground of' the disability. However, it is submitted that the effect of the Court's decision is that the tribunal must search for the reason for the discrimination and that motive and intention are irrelevant. The inquiry is about the real reason for the treatment; it answers the question of why the person was treated as they were. In this sense, the reason for the discrimination is the same thing as the basis, true basis or true reason for the discrimination.

Knowledge of protected attribute

- **The alleged discriminator must have known that the person alleging discrimination possessed the attribute in respect of which discrimination is alleged**
- **Tate v Radin [2000] FCA 1582, paras 51-69**

  Facts
  - Involved the expulsion of a person with a psychiatric disorder from his cricket club on account of behaviour related to the disorder
  - Tate was a Vietnam veteran who suffered from Post-Traumatic Stress Disorder. This caused him to behave in an unacceptably aggressive way leading to his expulsion from a cricket club after he was not selected for a team. The club had no knowledge of his

disorder and had not asked him to undertake duties which were not reasonable. The court found it had not discriminated against him

Issues

Decision

- **Wilcox J** determined that, as the club was unaware of Tate's psychiatric disability/condition, it could not have engaged in discriminatory behaviour because of it - However, there is no evidence that any member of the committee realised that Mr Tate had a psychological disability. Mr Rafin said he was unaware of this. The other committee members who gave evidence were not asked about it. Mr Tate does not claim to have disclosed to the club that he suffered any psychological disability. That being so, it seems impossible to say the club discriminated against Mr Tate on the ground of his psychological disability
- **Psychiatric illness might not be visible (cf a broken arm)**

Problems of Proof

- Discrimination law is part of the civil law. Accordingly, the normal standard of proof is the balance of probabilities.
- However, this standard may be variable depending on the context - Briginshaw v Briginshaw
- In some cases, more will be required to persuade the court, on the balance of probabilities, of a particular matter, than it will normally be the case
- One such circumstance is where the allegation connotes that the respondent has acted with "grave moral delinquency".
- Where the Briginshaw standard applies, indirect evidence, especially, may not be sufficient
- **Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336, 362**

  Facts

  - Divorce case back when divorce was fault-based
  - Mr B claimed Mrs B committed adultery but he didn't have direct evidence, he had indirect (circumstantial) evidence
  - Saw Mrs B check into a hotel by a man other than her husband (indirect evidence, have to draw inferences)

  Issues

  Decision

  - In civil matters, standard of proof is BoP but in some cases, more will be required to persuade the court, on the balance of probabilities, of a particular matter, than it will normally be the case
  - One such circumstance is where the allegation connotes that the respondent has acted with "grave moral delinquency" – this was the case here

- Thus, merely circumstantial evidence given here was not sufficient to prove Mrs B had committed adultery
- Analogise with the reasonable person test - reasonable person is higher if person has special skills
- This case is the accepted authority for the level of certainty to which allegations, in investigations, should be substantiated. It guides the interpretation of section 140 of the *Evidence Act*
- **Dixon J** - *Fortunately ... at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved.The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inference. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency ... It is often said that such an issue as fraud must be proved "clearly", "unequivocally", "strictly" or "with certainty" ... This does not mean that some standard of persuasion is fixed intermediate between the satisfaction beyond reasonable doubt required upon a criminal inquest and the reasonable satisfaction which in a civil issue may, not must, be based on a preponderance of probability. It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained."*
- His Honour in this case was concerned with the appropriate standard of proof in respect of individual allegations of material fact, rather than with the standard of persuasion appropriate to be adopted in respect of all allegations made in a particular civil proceeding.
- Of most importance to us, his Honour did not purport to identify any particular standard; rather he made plain that before accepting the truth of evidence of a particular allegation, the tribunal should give consideration to the nature of the allegation and the likely consequences which will follow should it be accepted. His Honour made the observation that the common law had not developed a third standard of proof; it acknowledges only the two standards – the criminal standard of beyond reasonable doubt and the civil standard of on the balance of probabilities or reasonable satisfaction.

- At common law, no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that was attained or established independently of the nature and consequence of the fact or facts to be proved.
- The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.
- Here, although the criminal standard of proof did not apply, a finding of adultery would have had grave consequences for the wife. Accordingly, the evidence had to be scrutinised to ensure it was clear and compelling. The only evidence of the wife's adultery was her own admission that she had kissed another man, and hearsay that she had slept with him. This evidence did not meet the threshold laid down by the court. The appeal was dismissed.

- To the extent that this Briginshaw standard applies to discrimination law cases, it can make it very difficult for a person alleging discrimination to establish that there has in fact been discrimination on the basis of a protected ground
    - Most often, there won't be direct evidence that some discriminated against another on the basis of a protected attributed
- **Department of Health v Arumugam [1988] VR 319, 330-331**

  Facts
    - Dr A applied for position but did not get job. He argued he was discriminated on the basis of his race. Here, serious allegations made against highly qualified medical people (i.e. discrimination, rejected best man on the basis that better qualified man was of different species) thus Briginshaw standard applied
    - **If court not prepared to draw an inference, then very hard for applicant**
    - Involved a complaint of race discrimination in a medical appointment
    - Dr Arumugam had no direct evidence of discrimination and relied upon being the best qualified person for the position, and asked the then Victorian Equal Opportunity Board to draw an inference that the reason he was not appointed was his race
    - The Board upheld Dr Arumugam's complaint
    - Two prominent and highly qualified medical practitioners holding positions of trust, whose task it was to select the most qualified person for public office where medical competence was required, were accused of using racist criteria in carrying out a selection process. That case required for its determination a finding of "deliberate" discrimination against one section of the community in order to favour another. His

Honour considered that such a conclusion would, if found to be true, be deserving of wide condemnation for such a lack of probity in office, and in such a case the Briginshaw principle would apply

Issues

Decision

- **Fullagar J** applied the Briginshaw test, "requiring the degree of satisfaction to be up to the seriousness of the allegations in all the circumstances"
- However, on appeal, the Victorian Supreme Court overturned the decision. **Fullagar J** found that it was not open to the Board to infer race discrimination even though the Board had found that Dr Arumugam was qualified for the job and had rejected the explanation offered by the respondent
- His Honour said - *If all that is proved, by inference or otherwise, in the absence of explanation, is less than all the elements of proof required for the complaint to succeed, neither a total absence of explanation nor a non-acceptance of an explanation can by itself provide an element of proof required … The fact that the occurrence of racial discrimination may often be difficult to prove cannot justify 'convicting' on something less than proof*
- The respondent is not required to tender any evidence to refute the complaint or offer an explanation for their behaviour. The Victorian Supreme Court said that an inference cannot be drawn from the respondent's failure to explain a decision. Therefore, the respondent can remain silent, forcing the complainant to discharge their burden and, if they do not, the respondent can make a 'no case' submission.
- **Fullagar J** said that an accusation of race discrimination was a serious matter and 'not lightly to be inferred.

- Does the Briginshaw standard apply in all cases in which discrimination is alleged?
  - **Sharma v Queensland Legal Aid** - yes, at least in all cases of racial discrimination
  - **Victoria v Macedonian Teachers' Association** - no, the Briginshaw standard only applies when there is an intention to discriminate – **lecturer said this is the better view**
- **Sharma v Queensland Legal Aid [2002] FCAFC 196, para 40**

  Facts
  - Involved a claim of discrimination in employment
  - Involved alleged discrimination in recruitment for senior legal positions, the complainant alleged that racially discriminatory conduct could be inferred from 'the known existence of racism' combined with the fact that the decision to appoint people to senior legal positions was 'made between people of different races'

- The Federal Court held that it should be wary of 'presuming the existence of racism', but that nonetheless, in some cases, statistical evidence illustrating a high rate of failure of people 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. However, this was not such a case.

Issues

Decision

- The decision of the Federal Court in that case was upheld by the Full Federal Court on appeal. The Full Court agreed that in appropriate cases inferences of discrimination might be able to be drawn saying that, 'it may be unusual to find direct evidence of racial discrimination', especially where an employer's motivation not to employ someone is subconscious. However, again, the court reiterated that such inferences are not to be made lightly, reflecting the reluctance of courts to draw inferences of racial discrimination in the absence of direct evidence
- An accusation of race discrimination was a serious matter and 'not lightly to be inferred
- The Full Federal Court said **'the standard of proof for breaches of the RDA is the higher standard referred to in Briginshaw v Briginshaw'**
- Sharma had failed to prove that any less favourable treatment which he experienced was because of race
- It is for the applicant who complains of racial discrimination to make out his or her case on the balance of probabilities

- **Victoria v Macedonian Teachers Association (1999) 91 FCR 47, 50-51, [1999] FCA 1287, paras 1-4, 10-21**
- Facts
  - Dispute over use of word 'Macedonian'

  Issues

  Decision
  - Serious allegations were not being made here
  - Not motivated by racial backgrounds, motivation was to stop violent outbursts
  - In this case the complainants did not make, and did not need to make, any "serious allegations" against the respondent
  - In the present case it is not necessary to make a finding of "deliberate" discrimination against one section of the community in order to favour another section, and the probity of the Victorian government is not in issue. The mere finding that a government has contravened a provision of an anti-discrimination statute without considering the circumstances in which the contravention occurred is not, in our view, sufficient to attract the Briginshaw test. We disagree with his Honour's conclusion that the absence

of intention to discriminate does not significantly diminish the gravity of any such finding. As the first respondent submits, there are many examples of governments being held to have discriminated unlawfully against individuals or groups of individuals without resort to the principle in Briginshaw

- **Qantas Airways Limited v Gama [2008] FCAFC 69, paras 123-130, 135**

  Facts

  - Gama, an engineer from Goa, made a variety of allegations of race and disability discrimination against Qantas. These included derogatory remarks (ie. 'You look like a Bombay taxi driver' or references to him walking upstairs 'like a monkey') as well as denial of training and promotions because of his race and/or disability
  - At first instance many of Mr Gama's allegations failed, although his allegations regarding the derogatory remarks were accepted and held to constitute discrimination on the grounds of his race and, in relation to the 'monkey' comment, his disability as well

  Issues

  Decision

  - On appeal, the Full Federal Court upheld the findings of race discrimination, accepting that isolated racist remarks can constitute an act of discrimination even in the absence of any further work-related detriment
  - Consistent with the submissions of HREOC as intervener, the Full Court accepted that discrimination proceedings should be approached like any other type of civil claim, rather than from a starting point of presumed 'seriousness' in the Briginshaw sense. **Branson J**, who delivered the lead judgment on the Briginshaw issue, observed - *...references to, for example, 'the Briginshaw standard' or 'the onerous Briginshaw test' and, in that context, to racial discrimination being a serious matter not lightly to be inferred, have a tendency to lead a trier of facts into error. The correct approach to the standard of proof in a civil proceeding in a federal court is that for which s 140 of the Evidence Act provides. It is an approach which recognises, adopting the language of the High Court in Neat Holdings, that the strength of the evidence necessary to establish a fact in issue on the balance of probabilities will vary according to the nature of what is sought to be proved – and, I would add, the circumstances in which it is sought to be proved*

- **Evidence Act 1995 (Cth), s 140 – civil proceedings; standard of proof**

  (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities

  (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:

- the nature of the cause of action or defence; and
- the nature of the subject-matter of the proceeding; and
- the gravity of the matters alleged

In Circumstances that are the Same or Not Materially Different

- The comparator, the hypothetical person without the attribute in question who would have received better treatment, must have been in circumstances that are the same or not materially different from those of the person alleging discrimination
- Purpose: to ensure that like is being compared with like and that the person against whom discrimination is alleged does not have in fact a good reason for the different treatment
- May it be plausibly argued that the comparator, by virtue of not having the protected attribute, is not in "circumstances that are the same as or not materially different from those of the person alleging discrimination"? No - e.g. male saying that female employee not in same circumstances as him because she is a girl
- Dopking No 1 - The court: It "would fatally frustrate the purposes of the Act if matters which it expressly identifies as constituting unacceptable bases for differential treatment…could be seized upon as rendering the overall circumstances materially different"
- **Commonwealth v HR&EOC (Dopking No 1) (1993) 46 FCR 191, 208-209, [1993] FCA 547, per Black CJ (para 11), Lockhart J (para 30), Wilcox J (paras 13-17)**

  Facts

  Issues

  Decision

INDIRECT DISCRIMINATION

- Indirect discrimination occurs when a requirement, condition or practice, which on its face appears to be neutral, in effect has a disproportionate impact on a particular group of people who are protected under the Act. Such a requirement may be "fair in form and intention but discriminatory in impact and outcome" **(Styles)**
- Elements:
  - The alleged discriminator must have imposed a condition or requirement that must be satisfied if a benefit is to be obtained;
  - The condition or requirement has the effect of disadvantaging people with the relevant protected attribute
  - The condition or requirement must not be reasonable in the circumstances; and
  - The particular aggrieved person – the particular person alleging discrimination – must not be able to comply with the condition or requirement

- **EO Act s 9 – indirect discrimination**

(1) Indirect discrimination occurs if a person imposes, or proposes to impose, a requirement, condition or practice—

(a) that has, or is likely to have, the effect of disadvantaging persons with an attribute; and

(b) that is not reasonable

(2) The person who imposes, or proposes to impose, the requirement, condition or practice has the burden of proving that the requirement, condition or practice is reasonable

(3) Whether a requirement, condition or practice is reasonable depends on all the relevant circumstances of the case, including the following—

(a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the requirement, condition or practice

(b) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the requirement, condition or practice

(c) the cost of any alternative requirement, condition or practice

(d) the financial circumstances of the person imposing, or proposing to impose, the requirement, condition or practice

(e) whether reasonable adjustments or reasonable accommodation could be made to the requirement, condition or practice to reduce the disadvantage caused, including the availability of an alternative requirement, condition or practice that would achieve the result sought by the person imposing, or proposing to impose, the requirement, condition or practice but would result in less disadvantage

(4) In determining whether a person indirectly discriminates it is irrelevant whether or not that person is aware of the discrimination

Examples

(1) A store requires customers to produce photographic identification in the form of a driver's licence before collecting an order. This may disadvantage a person with a visual impairment who is not eligible to hold a driver's licence. The store's requirement may not be reasonable if the person with a visual impairment can provide an alternative form of photographic identification

(2) An advertisement for a job as a cleaner requires an applicant to speak and read English fluently. This may disadvantage a person on the basis of his or her race. The requirement may not be reasonable if speaking and reading English fluently is not necessary to perform the job

- **Griggs v Duke Power Co. 401 US 424 (1971), 429 – 432**

Facts

- Duke Power's Dan River plant had a policy that blacks were allowed to work only in its Labor department, which constituted the lowest-paying positions in the company
- The company added the requirement of a high school diploma for its higher paid jobs
- The plaintiffs in the case, the employees, argued that those requirements did not measure a person's ability to perform a particular job or category of jobs and were

instead attempts to get around laws forbidding discrimination in the workplace. The workers argued that, because of the inferior segregated education available to blacks in North Carolina, a disproportionate number of African Americans were rendered ineligible for promotion, transfer, or employment.

- Defendant had a policy requiring that applicants for certain jobs have a high school diploma (i.e. high school graduates) and a certain score on an intelligence test. These requirements disparately impacted African American applicants on the basis of their race
- When employment requirements have a disparate impact on minorities and are not related to successful job performance, they violate Title VII of the Civil Rights Act of 1964 even when there is no discriminatory intent.

Issues

Decision

- **The tests given by Duke Power were artificial and unnecessary and that the requirements for transfer had a disparate impact on blacks. Furthermore, the court ruled that, even if the motive for the requirements had nothing to do with racial discrimination, they were nonetheless discriminatory and therefore illegal. In its ruling, the Supreme Court held that employment tests must be "related to job performance."**
- A much smaller proportion of African Americans than Americans of European descent would satisfy these conditions as they received inferior education in segregated schools, much less likely to have finished high school and further because of bad education received, they perform less well than the test prescribed by the company than European American descendants
- Condition/requirement imposed – high school graduate and intelligence test
- Disadvantaged African Americans
- Reasonable in the circumstances? Lack of test or high school diploma does not affect performance of job
- Aggrieved person unable to comply? Here, yes did not perform well on test
- The company's employment requirements did not pertain to applicants' ability to perform the job, and so were discriminating against black employees
- Title VII of the 1964 Civil Rights Act requires employers to promote and hire based on a person's ability to perform the job, not an abstract evaluation of the person's credentials. The ruling effectively forbids employers from using arbitrary tests—such as those for measuring IQ or literacy—to evaluate an employee or a potential employee, a practice that some companies at the time were using as a way to get around rules that forbid outright racial discrimination

- The Court declared that the practices of Duke Power Co. affected African Americans disproportionately, as they were less likely to have a high school diploma and had a lower average score in the tests at issue. In cases where employment practices have a disproportionate effect on minority groups the Court held it was for businesses to demonstrate and prove that such practices were necessary and had no ulterior motive. This case marked the inauguration of the concept of disparate impact (or indirect discrimination) into anti-discrimination law discourse
- The Supreme Court ruled that under Title VII of the Civil Rights Act of 1964, if such tests disparately impact ethnic minority groups, businesses must demonstrate that such tests are "reasonably related" to the job for which the test is required Title VII of the Civil Rights Act prohibits employment tests (when used as a decisive factor in employment decisions) that are not a "reasonable measure of job performance," regardless of the absence of actual intent to discriminate
- Since the aptitude tests involved, and the high school diploma requirement, were broad-based and not directly related to the jobs performed, Duke Power's employee transfer procedure was found by the Court to be in violation of the Act
- *On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. Both were adopted, as the Court of Appeals noted, without meaningful study of their relationship to job performance ability. Rather, a vice-president of the Company testified, the requirements were instituted on the Company's judgment that they generally would improve the overall quality of the workforce. The evidence, however, shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily, and make progress in departments for which the high school and test criteria are now used. The promotion record of present employees who would not be able to meet the new criteria thus suggests the possibility that the requirements may not be needed even for the limited purpose of preserving the avowed policy of advancement within the Company. In the context of this case, it is unnecessary to reach the question whether testing requirements that take into account capability for the next succeeding position or related future promotion might be utilized upon a showing that such long-range requirements fulfill a genuine business need. In the present case, the Company has made no such showing.*

Elements:

- **Requirement or condition**
- **With which a substantially higher proportion of people without the attribute in question are able to comply**
- **Which is not reasonable in the circumstances**
- **And with respect to which the aggrieved person is unable to comply**

Identifying the requirement or condition

- Broadly, the words "requirement, condition or practice" include any policies, rules or practices which may appear neutral, but have a discriminatory effect in practice. The requirement need not be explicit nor specific but the effect of it must be clear.
- Often there is no intention or even awareness of the person implementing the policy or practice of its discriminatory effect on a particular individual or group
- "Requirement or condition" has been interpreted broadly by the courts to include:
    - the requirement to enter a place of employment via stairs (impacts disabled employees)
    - the requirement to wear certain clothing to work (impacts employees with religious beliefs or of a particular sex); and
    - the requirement to work full-time (impacts parents/carers)
- **Existence of a condition - substance v form**
    - The court will look at the substance of a matter to determine whether there is a condition is the requisite kind, rather than just the form
    - E.g. Australian Iron and Steel Pty Ltd v Banovic
- **Australian Iron and Steel Pty Ltd v Banovic (1989) 168 CLR 165, 185, 195-7, [1989] HCA 56, per Dawson J (paras 1, 10,11), Mc Hugh J, (paras 10-17)**

  Facts
    - Operated steel works
    - Retrenchment of staff – 'last on, first off'
    - Benefit here is keeping the job

  Issues

  Decision
    - McHugh – company imposed a requirement on staff members that staff had to have started working before 6th January 1981
    - **185 -** *Upon principle and having regard to the objects of the Act, it is clear that the words "requirement or condition" should be construed broadly so as to cover any form of qualification or prerequisite demanded by an employer of his employees. Nevertheless, it is necessary in each particular instance to formulate the actual requirement or condition with some precision. It is not, I think, enough in the present case simply to see the requirement or condition for continued employment as being contained within the principle of "last on, first off". That principle was applied within defined limits and it is necessary to incorporate them in the requirement. Thus, it was accepted upon both sides in this Court that the requirement was that, for an ironworker to remain in employment once retrenchments had begun in November 1982, he or she must have commenced employment before 6 January 1981*
    - **195-7 -** *The condition was formulated in various ways, but in general terms the parties accepted that A.LS. had required of its employees as a condition of continued employment after*

retrenchments commenced that he or she had commenced employment with the company before 30 September 1980 or, alternatively, 6 January 1981. In my opinion, this course of authority justified the parties in accepting that A.I.S. had required each of its employees to comply with the condition that to remain in employment after retrenchments began he or she must have commenced work before 6 January 1981.

- Compliance may be required even if the requirement or condition is not made explicit: it is sufficient if a requirement or condition is implicit in the conduct which is said to constitute discrimination
- **Dawson J** observed that, upon principle and having regard to the objects of the Act, the words "requirement or condition" in the comparable provision in the Anti-Discrimination Act should be construed broadly so as to cover any form of qualification or prerequisite, although the actual requirement or condition in each instance should be formulated with some precision. In that case, the use of the "last on, first off" principle in putting off redundant employees was held to impose a requirement or condition that an employee should have commenced employment before a certain date in order to retain his or her employment

- Content of the condition – form v operation in practice
- **Department of Foreign Affairs and Trade v Styles.** The court:
  - the concept of indirect discrimination, as given effect by anti-discrimination legislation is concerned not with form and intention but with the impact or outcome of certain practices
  - accordingly, if the court limited itself to looking at the formal terms of a condition, it would be acting contrary to legislative intent
  - the correct approach is to look at the way in which formal criteria operate in practice in the particular case in question
- **Department of Foreign Affairs and Trade v Styles (1989) 23 FCR 251, 257-8, [1989] FCA 342, paras 5-12, 26-31**

  Facts
  - S applied for transfer to a job at a position one level above her Australian Public Service Classification (APS)
  - A departmental circular indicated (among other things) that “preference will be given to officers who apply for positions at their substantive APS classification”. A man who had the substantive classification for the position was appointed.
  - After she was turned down for the transfer in favour of a candidate with the same APS as the job for which she was applying, she charged that she had been discriminated against on the basis of sex in violation of section 5(2) of the Sex Discrimination Act

- She noted that the defendant had a policy of giving preference in hiring to candidates with the same APS as the job for which they were applying, and that in this case this amounted to discrimination because far more men than women had an APS equivalent to that of the job in question
- She pointed to section 5(2) of the Sex Discrimination Act, which labels as discrimination the act of requiring a person to comply with a condition with which a substantially higher proportion of persons of the opposite sex comply or are able to comply
- Department issued circular seeking applications for transfers
- Ms Styles applied and was unsuccessful
- She was a level A1 (lowest level) employee
- A1 employees can apply but A2 employees would be given preference
- She argued in practice, that applicant would be a level A2 employee – proportion of females that could satisfy that requirement was significantly less than those of males, the requirement discriminated indirectly against females

Issues

Decision

- Although the condition at issue was one with which a substantially higher proportion of persons of the opposite sex could comply, nonetheless, discrimination had not occurred because it was a "reasonable condition."
- It noted that the condition was based on merit and conformed to the precept of fairness. It concluded that in the circumstances of the case the fairness of hiring the person best qualified for a job outweighed any discriminatory impact
- Primary judge held that there was a "requirement or condition", within the statutory meaning, in the insistence that prospective appointees be A2 Grade, or be not less than A2 Grade, or (alternatively formulated) that they be of the same substantive grade as the relevant posting. The appellant contends that this is not a "requirement or condition" because it did not operate as an absolute bar to selection. We agree with the learned primary judge that something falling short of an absolute bar to selection may be a "requirement or condition"
- In this statutory context, something falling short of an absolute bar to selection may be a “requirement or condition”. A “requirement or condition” means a stipulation which must be satisfied if there is to be a practical (and not merely a theoretical) chance of selection. In practical effect there was a “requirement or condition” that the applicant for transfer to the position be at the same substantive level as the position advertised.

- The benefit v conditions or requirements for the obtaining of the benefit

    - To what extent might what is claimed by the person alleging discrimination to be a condition or requirement for obtaining a benefit (eg a service) be in fact just part of the benefit itself?
- Waters v Public Transport Corporation
- Dawson and Toohey JJ:
    - in order for something to be a requirement or condition in relation to a matter it must be separate from that matter.
    - whether such a requirement or condition is in fact separate from the matter to which it relates will depend upon how the matter is described, and how the requirement or condition is characterized.
    - given that the purpose of anti-discrimination legislation is to help people who have been subject to discrimination, the court should be very slow in accepting a definition of a service which incorporates as part of that service what would otherwise be a requirement or condition of the provision of that service
- Dawson and Toohey JJ (cont'd)
    - certainly such a definition should not be accepted where, as is the case here, a service previously provided is continued, but with alterations that might be characterized as the imposition of different requirements
- Brennan J (in dissent):
    - describing the withdrawal of conductors from modern trams as the imposition of a requirement or condition that passengers travel without a conductor strained the language of the statute.
    - the language of the statute was strained because the supposed requirement or condition was not in truth a term on which the service was performed but was rather a feature of the service itself.
    - the difficulty encountered by disabled people who wished to use the modern trams arose simply because the services fell short of their needs.
    - if such shortfalls in a service can be characterized as a requirement or condition imposed by the person performing the service, anti-discrimination legislation becomes a charter for the minimum standards of service – and that is not the purpose of anti-discrimination legislation
- **Waters v Public Transport Corporation (1991) 173 CLR 349, 360-362, 393-394, 406-408 cf 376-8, [1991] HCA 49 per Mason CJ and Gaudron J (paras 13, 22-29), Dawson and Toohey JJ (paras 23-25), McHugh J (paras 21-23); but cf Brennan J (paras 10-14)**

  Facts

  Issues

  Decision

- Getting rid of conductors was a condition
- The removal of conductors from trams indirectly discriminated against people with disabilities. The court found that requiring people to use trams without conductors was an unreasonable requirement condition or practice of using the service (and one that the complainants were unable to comply with). The requirement that trams be used without conductors provided a barrier to people with disabilities accessing tram services
- **Mason CJ and Gaudron J**
    - It was found by the Board that the removal of conductors involved the imposition of a requirement or condition that "the [c]omplainants ... use trams without the assistance of conductors". On appeal, it was held by Phillips J. that "for the Corporation simply to remove conductors from some of its trams does not involve, in any ordinary use of language, the 'imposition' of some 'requirement or condition' on either the travelling public generally or the [c]omplainants in particular".
    - Compliance may be required even if the requirement or condition is not made explicit: it is sufficient if a requirement or condition is implicit in the conduct which is said to constitute discrimination
- **Dawson and Toohey JJ**
    - The withdrawal of conductors from trams imposed a requirement or condition that passengers travel on trams without the assistance of a conductor
    - The requirements or conditions which it identified could not be complied with by the appellants but could be complied with by those who did not suffer the appellants' impairments, that is, they could be complied with by a substantially higher proportion of persons of a different status
- **McHugh J**
    - The provision of trams without conductors was imposing a requirement or condition on persons using those trams
- **Cf Brennan J**
    - In my opinion, the only relevant requirement or condition imposed by the Corporation in this case was that a person using the service should have acquired and should validate a scratch ticket or pay a penalty fare
    - *The difficulty encountered by disabled people who wished to use the modern trams arose simply because the services available fell short of their needs. If such shortfalls in a service can be transformed into a requirement or condition imposed by the person performing the service, the Act becomes a charter of the minimum standards of service which a person performing the service must provide or at least maintain to cater for*

the needs of the disabled. That is not the purpose of the Act. If a shortfall in a service or the withdrawal of a service is characterized as a requirement or condition imposed by the person performing the service, the Board must assume responsibility for determining whether the shortfall or withdrawal is "reasonable" (35). If "reasonable" in s. l7(5)(c) be held to import consideration of the cost of enhancing the service to eliminate the shortfall or to restore the service withdrawn, the responsibility for deciding the level of service to be provided would effectively pass from the performer of the service to the Board though the Board has no fiscal responsibility for providing the service. Whether that situation would be conducive to the interests of impaired persons is a matter of speculation. In the present case, the Board ordered the Corporation to "refrain from implementing the driver-only tram proposal". The form of the order is open to objection as failing to restrain specific conduct which might have been found to amount to the refusal of a service or the imposition of a requirement or condition but, more significantly, it purports to order the Corporation to maintain a level of staffing for its trams as the means of maintaining the services needed by disabled people. I find no basis in the Act for an order compelling the performer of a service to retain or employ staff to maintain the level of service previously provided.

- New South Wales v Amery. The court:
  - It is incorrect to stipulate that there is only one job, that of teacher. Rather, being a "casual teacher" is an entirely different job from being a "permanent teacher".
  - But it makes no sense to say that it is a condition of being a permanent teacher – and therefore of being paid as a permanent teacher – that you have to work as a permanent teacher. Because being a permanent teacher is the job. It can't be a condition that you have to resign from a role and go to another role to obtain a benefit
- **New South Wales v Amery (2006) 226 ALR 196, 214-216, 225-230, [2006] HCA 14 per Gummow, Hayne and Crennan JJ (paras 71-82); but cf Kirby J (paras 124-144)**

  Facts
  - The policy and practice of the Department of Education and Training (New South Wales) was to restrict pay scales for "temporary" teachers to level 8 of the permanent scale, thereby excluding non-permanent teachers from the highest levels of pay
  - The applicants were employed by the Department of Education and Training as temporary teachers and claimed that their lower salary levels as compared with permanent staff was discriminatory under the Anti-Discrimination 1977
  - School teachers who were employed on a casual basis – paid a lower rate than those employed on a permanent basis – applicants argued they were subject to indirect discrimination – in order to be paid higher rates, teachers had to work as permanent teachers than causal teachers
  - Argued condition was that you must be a permanent teacher

Arguments

- The applicants claimed that the policy of the Department of Education and Training of restricting the pay of temporary staff meant that they were underpaid considering the duties which they performed (which were for all practical purposes the same as those undertaken by permanent staff) and the seniority they had established as employees. Further, they contended that the policy was discriminatory towards women for the reason that the applicants had previously been employed as permanent staff at the higher levels of remuneration but had resigned in order to undertake to family responsibilities. The applicants felt that they had effectively been precluded from achieving permanent status again because of the limitations that family responsibilities had put on travel and career. The applicants claimed that the policy impacted women in a discriminatory way as many more women were affected by this policy than men as family commitments tended to make some female teachers less mobile.

Issues

- What was the "requirement or condition" imposed by the Department for the purposes of s.24(1)(b) of the ADA; and
- Was any such requirement or condition "reasonable"?

Decision

- Different pay scales for casual and permanent New South Wales teachers were not unlawfully discriminatory
- What was the "requirement or condition" imposed?
    - The respondents alleged that the requirement or condition was to "have permanent status",5 permanent status being a condition of access to the higher salary levels.
    - **Gleeson CJ** - in identifying the requirement or condition, the conduct of the Department had to be differentiated from that of the parliament in creating a dualist teaching service, and the Industrial Relations Commission in imposing differential pay scales in the award, as it was only the Department's conduct which was sought to be impugned by the respondents. The question that therefore had to be answered was what was the relevant conduct of the Department in imposing the requirement of permanency? His Honour agreed with Beazley JA in the NSW Court of Appeal that the relevant conduct of the Department was its practice of not paying above-award wages to temporary teachers engaged in the same work as their permanent colleagues. His Honour said that it was in this sense that the Department "required" the respondents to comply with a condition of having a permanent status in order to have access to the higher salary levels

- **Gummow, Hayne and Crennan JJ -** Having regard to the significantly different conditions imposed on permanent and temporary employees under the *Teaching Act*, the respondents were not employed as "teachers" but as "casual [or temporary] teachers". This rendered the alleged requirement or condition incongruous.
- **Cf Kirby J -** Kirby J rejected the approach adopted by Gummow, Hayne and Crennan JJ as being "narrow and antagonistic" and inconsistent with the beneficial and purposive approach required to be taken to remedial legislation such as the ADA. In particular, his Honour suggested that their approach to the characterisation of the respondents' employment gives "considerable scope [to] employers to circumvent ... [the ADA] ... All that is required in order to do so is for an employer to adopt the simple expedient of defining narrowly the 'employment' that is offered"

- **Was the requirement reasonable?**
  - **Gleeson J** held that it was not unreasonable for pay rates of temporary and permanent staff to be different. In reaching this conclusion, he considered that the issue was not necessarily the actual teaching undertaken by permanent and temporary staff, but more widely, the greater deployability and re-deployability of permanent staff, which could justify a greater pay award. Further, he found that the incidents of employment of permanent staff were quite different from those of casual staff. The question of reasonableness was not about whether the *teaching* work of a temporary teacher has the same value as a permanent teacher's, but "whether, having regard to their respective conditions of employment, it is reasonable to pay one less than the other"
  - In considering the issue of reasonableness, the Court seemed also to take into account the practicality of an alternative policy. The Court reasoned that making "over-award payments" to some teachers would have been a matter of considerable managerial and industrial significance. Further, it would be practically impossible that the Department should make over-award payments only to women, or to teachers whose family commitments make it difficult for them to submit to the full conditions of permanent appointment. The first option would discriminate against men. The second option would involve setting up criteria that would be difficult to formulate, and to apply in practice. The Court held that it would not be possible to limit the practice of making "over-award payments" to one particular class of teacher only (that is, the class of "supply casuals" which the applicants belonged to)

The groups to be compared – the 'disadvantaging' element

- A significantly lower proportion of people with the protected attribute, than of those without the protected attribute, can comply with the requirement
- **By reference to whom are the proportions determined?**
    - When we are seeking to ascertain the proportion of, for instance, people *with* a protected attribute who can comply with a requirement, do we seek to ascertain that proportion by reference only to people with the protected attribute, or do we seek to ascertain that proportion by reference to the aggregate of people with the attribute, and people without the attribute?
    - Who makes up the denominator?
        -
    - Advert for 200cm employee at book shop
        - Whether significantly lower proportion of women that can comply with it than men?
        - Is it women who can comply over men who can comply; OR
        - Women who can comply over men AND women (total) who applied who can comply
        - Is it the men in the base group or is it the men and women?
- **Banovic**
    - the proportion of female employees who could meet the requirement should be assessed by reference to the total number of females in the base group, and the proportion of male employees who could satisfy the requirement should be assessed by reference to the total number of males in the base group
    - say there are 8 employees – 6 women and 2 men
    - 3/6 women and 2/2 men but if denominator is total than it would be 2/8 and 3/8 which does not reflect reality
    - Deane and Gaudron JJ –
        - if the proportion of women who could satisfy the requirement was ascertained by reference to the total number of men and women in the base group, and if the proportion of men who could satisfy the requirement was ascertained by reference to the total number of men and women in the base group, then when it came to comparing the two, the court would not be engaged in looking at proportions of staff who could satisfy the requirement, but would be just looking at numbers of staff
- **How broadly is the base group drawn?**
    - Dawson J (relying on Kidd v D.R.G.) –

        - the breadth of the base group should be determined by reference to "the particular section…of the public" likely to be affected by the requirement or condition. This will vary from case to case
        - where a "requirement is contained in a published offer of employment, the relevant base group may be made up of those who might be expected to be eligible to take up the employment, based upon geographical, educational and other restraints"
        - by contrast, where a requirement is imposed upon existing employees, the relevant group may be the class of employees affected.
    - Deane and Gaudron JJ
        - the appropriate base group will vary according to the context in which the condition or requirement is imposed.
        - But cf if the selection of a particular base group masks previous discriminatory behaviour
- The high proportion requirement
- As was noted with respect to the test of "less favourable treatment" in direct discrimination, anti-discrimination law generally requires a comparison to be made in order to determine whether indirect discrimination exists. This requires a comparison between persons with the attribute and persons without the attribute, and a finding that a "higher proportion" of people with the protected attribute cannot meet the requirement.
- **Finance Sector Union v Commonwealth Bank of Australia -** a broad calculation revealed that 98% of men and 91% of women were able to comply with a requirement that new positions be taken up within 4 weeks of the Bank's restructure. This difference was held to be a substantially higher proportion
- **Australian Iron and Steel Pty Ltd v Banovic (1989) 168 CLR 165, 177-80, 185-191**

  Facts

  Issues

  Decision
    - Past discriminatory behaviour – men who applied for jobs, employed immediately but women had to wait
    - Base group was people that were appointed AND who applied to take into account past discriminatory practices
    - The relevant proportions for comparison were the number of men who could comply as a proportion of all relevant men and the number of women who could comply as a proportion of all relevant women
    - The comparison of the proportions of complying men and women to the male and female populations to be divided by the condition or requirement in question will

reliably reveal the extent of the significance, if any, of sex to compliance only if sex is not a factor influencing the composition of those populations

- The section required a comparison of the proportions which complying men and women bore to a base group separated into men and women. The base group from which the proportions were to be derived should be selected so as not to mask the effect of previous discriminatory recruitment practices
- **The majority of the High Court adopted a broad approach, saying the Act did not require any particular base pool; rather the appropriate base pool is a matter of fact, depending on the context in which the requirement or condition is imposed (at 178, 187). The pool selected must not be one which itself incorporates the effects of past discriminatory practices**
- **Dawson J**
    - *One method is to make a bold comparison, within the aggregate workforce of A.LS. at the time of the retrenchments, between the raw figures for the number of men who complied and the raw figures for the number of women who complied. Given that 7,177 men were employed before 6 January 1981 while only 478 women had commenced employment before that date, it is self-evident upon that comparison that the requirement was satisfied by many more men than women. The problem with that form of comparison is that the result may merely be a reflection of the fact that the workforce was sexually imbalanced. Indeed, where the sexes are not evenly balanced in a workforce, the application of the "last on, first off" principle will almost always result in the retrenchment of a higher proportion of one sex. Where, as in this case, the men employed outnumbered the women by a ratio of fifteen to one, it was only to be expected thatthe number of men who complied with any condition, however genuinely neutral and non-discriminatory, would greatly outnumber the number of women who could comply. Upon this approach, the fact that the sexes in a workforce are unequal is itself a significant factor in determining whether a requirement imposed upon that workforce amounts to discrimination within the meaning of s. 24(3), regardless of whether or not that inequality is the result of a prior discriminatory practice. Such an approach could only be justified by treating s. 24(3) as being aimed generally at discouraging workforces in which the sexes are unequally represented and there is, in my view, no basis for interpreting the sub-section in such a far-reaching manner. Obviously, the reach of the sub-section was intended to be far less ambitious and to extend only to discriminatory requirements or conditions imposed upon a workforce, whether the sexes in the workforce happen to be unequal or not. The sub-section was not intended to embrace requirements which are truly non-discriminatory and it must, therefore, require something more than a direct comparison between the number of men who comply and the number of women who comply with a requirement imposed by an employer*

- *The English legislation makes it clear that what is to be compared for the purpose of establishing that a requirement is discriminatory are not the raw figures of those of each sex who comply but the proportion of men who comply and the proportion of women who comply*

Not reasonable

- The imposition of a requirement or condition will not be discriminatory if the requirement or condition is reasonable in the circumstances
- Whether a requirement, condition or practice is reasonable depends on all the relevant circumstances of the case, including:
    - the consequences of failing to comply with the requirement, condition or practice
    - the cost of alternative requirements, conditions or practices; and
    - the financial circumstances of the person imposing, or proposing to impose, the requirement, condition or practice
- Reasonableness must be assessed against the objectives of the EOA and the circumstances of the particular case. A requirement, standard or condition which is merely for business convenience or because things have always been done in a particular way, may not be considered reasonable.
- There should be a demonstrated nexus between the requirement or condition and the activity to be performed, so that it can be shown that the requirement is appropriate and adapted to the particular activity and not merely arbitrary. Further, it needs to be determined whether an alternative requirement or condition could have avoided or lessened the disadvantage suffered by the complainant.
- In **Cocks v State of Queensland** the requirement that patrons with mobility impairments enter the newly constructed Brisbane Convention and Exhibition Centre through a side entrance was held to be indirect discrimination. In that case, the detriment to the respondent was cost and the aesthetic effect of the installation of a lift. The benefit to those with an impairment was that they would feel welcomed into a major public building thereby enhancing their rightful acceptance as members of the community with equal dignity. This would be in furtherance of the objects of the Act. It was estimated that this would affect about 10% of the population of Queensland
- The test for reasonableness is less demanding than necessity, but more demanding than convenience **(Styles).** All the circumstances of the case must be taken into account.
- **Styles** per **Bowen CJ and Gummow -** The criterion of whether a requirement or condition is not "reasonable having regard to the circumstances of the case" is an objective one, which requires the court to weigh the nature and extent of the discriminatory effect against the reasons advanced in favour of the requirement or condition, taking into account all the circumstances

of the case. The requirment or condition in this case was based on merit. The practice of appointing officers at their substantive grade is conducive to tidy administration and conforms to a precept of fairness that persons be employed according to the substantive level of their qualification. Considerations of tidy administration alone would be insufficient to render the requirement or condition reasonable. The precept of fairness when weighed against the discriminatory impact is sufficient to render the requirement or condition reasonable in the circumstances of this case.

- **Department of Foreign Affairs and Trade v Styles (1989) 23 FCR 251, 263-4, [1989] FCA 342, paras 51-60**

  Facts

  Issues

  Decision

  - **Bowen CJ and Gummow - The criterion of whether a requirement or condition is not "reasonable having regard to the circumstances of the case" is an objective one, which requires the court to weigh the nature and extent of the discriminatory effect against the reasons advanced in favour of the requirement or condition, taking into account all the circumstances of the case.** The requirement or condition in this case was based on merit. The practice of appointing officers at their substantive grade is conducive to tidy administration and conforms to a precept of fairness that persons be employed according to the substantive level of their qualification. Considerations of tidy administration alone would be insufficient to render the requirement or condition reasonable. The precept of fairness when weighed against the discriminatory impact is sufficient to render the requirement or condition reasonable in the circumstances of this case.
  - Bowen CJ and Gummow J –
    - the criterion of reasonableness is "an objective one".
    - in order to ascertain whether a particular requirement is reasonable the court must "weigh the discriminatory effect [of the condition] on the one hand, against the reasons advanced in favour of the requirement or condition, on the other".
    - in performing that weighing exercise, the court must take into account "all the circumstances of the case".
    - if the reasons in favour of the requirement or condition outweigh the condition's discriminatory effect, then the condition will be reasonable. But if not, then the condition will be unreasonable
    - if judge thinks discrimination is really bad, makes it harder vs if judge does not think notion of discrimination is bad, makes it easier

- Department argued - administrative untidiness –untidy to have level A1 employees to occupy A2 jobs, by contrast a condition that required people to occupy jobs corresponding to their level promotes admin tidiness but court didn't think that considerations of tidiness alone would outweigh discriminatory effect of condition and thus render it reasonable
- The practice of appointing officers conforms to a preset of fairness that persons be employed according to the substantive level of their qualification – one of the rewards for higher level of qualification is to be appointed to a position for which qualification is demanded in preference to a person who perhaps has capacity to fulfil the position lacks the qualification – such a condition is fair and thus rendered it reasonable

- **Waters v Public Transport Corporation (1991) 173 CLR 349, 378-380, 382-384, 394-396, 408-411, cf 363-365, [1991] HCA 49 per Brennan J (paras 15-19), McHugh J (paras Deane J (paras 1-5), Dawson and Toohey JJ (paras 27-29)**

  Facts

  - Conductors removed from trams and as a result people would have to endure riding trams without conductors

  Issues

  Decision

  - **Brennan J** said there were 2 aspects to reasonableness:
    (1) Whether the imposition of the condition is appropriate and adapted to the performance of the activity or the completion of the transaction; and
    (2) Whether the activity could be performed or the transaction completed without imposing a requirement or condition that is discriminatory or that is as discriminatory as the requirement or condition imposed
  - **Brennan J** said that effectiveness, efficiency and convenience in performing the activity or completing the transaction, and the cost of not imposing the discriminatory requirement or condition or of substituting another requirement or condition are relevant factors in considering what is reasonable
  - In addition to these factors, **Dawson and Toohey JJ** added that relevant factors included the maintenance of good industrial relations, the observance of occupational health and safety requirements, the existence of competitors and the like
  - The question of whether a requirement or condition is reasonable in the circumstances is a question of fact determined by weighing all the relevant factors
  - In determining whether a condition or requirement is reasonable, the court should have regard to all of the circumstances of the case, not just the impact that the condition had upon the complainants.

- It follows that the financial benefits to the respondent resulted from the imposition of a condition were something that could be taken into account in determining whether that condition was reasonable.
- Dawson and Toohey JJ
    - "what is relevant will differ from case to case".
    - In the present case "the ability of the respondent to meet the cost…of accommodating the needs of impaired persons who use trams was relevant in relation to the reasonableness of [the condition in question]
- Brennan, Deane and McHugh JJ
    - all agree that financial benefits to the defendant following from its imposition of a particular requirement can be taken into account in determining whether the requirement was reasonable
- availability of other methods for achieving the same objective but which are less discriminatory, maintenance of industrial relations, observance of health and safety requirements – these would make it less likely condition was unreasonable

Unable to comply

- The meaning of the term "does not or cannot comply with" has been interpreted broadly with the effect that compliance is considered as a matter of practicality and not given a literal interpretation
- The person complaining of the discrimination must not herself be able to comply with the requirement in question
- **When where there be inability to comply?**
    - The courts - it is enough in order to say that a person is unable to comply with a particular condition if she can comply, but only with great difficulty
    - E.g. disabled people CAN travel on trams without conductors but this would be dangerous
- In **Byham v Preston City Council** the complainant who had a mobility disability was considered unable to comply with the requirement that in order to attend council meetings he must be able to climb the stairs to the first floor, although he could in fact climb the stairs if assisted by a staff member or a family relative.
- For example a person in a wheelchair is physically unable to comply with the requirement to enter a place of employment via stairs. The fact that the person could be carried up the stairs does not render them able to comply – individual dignity is a factor taken into account by anti-discrimination laws.
- However, it is not necessary that a person be physically unable to comply with the requirement. If the person is unable to comply in practice then there is an inability to

comply. Therefore, a man of the Sikh religion may be physically able to refrain from wearing a turban while at work but, in practice, this may so greatly offend genuinely held religious beliefs that he is practically unable to comply. Likewise, while a female employee may be physically able to work full-time, in practice her family responsibilities may prevent her attending work on a full-time basis.

- Inability to comply must be a consequence of having a protected attribute. It is not a matter of mere choice or preference of the individual made for their own personal reasons. The attribute itself must lead to the inability to comply
- Relevance for the second element
    - should the court adopt an approach at the second stage with respect to whether there was compliance with the condition that conforms with the approach adopted at the final stage?
    - in other words, in determining the proportion, especially of people with the protected attribute who could comply with the condition, should the court categorize those who could literally comply, but only with great difficulty, as non-compliers?
- Inability to comply must be a circumstance shared by and common to people with that attribute. It must be proven that a higher proportion of people without that attribute (or with a different attribute) can or do comply with the requirement.
    - For example, one must demonstrate that most persons not in a wheelchair can enter a place of employment via stairs, whereas a person with a mobility disability cannot. Or persons who are not of the Sikh religion can readily wear any or no headdress, whereas followers of the Sikh religion must wear a turban.
- **Mandla v Dowell Lee [1983] 2 AC 548, 565-6**

  Facts
    - A Sikh boy was refused entry to Park Grove School, Birmingham by the headmaster, because his father refused to make him stop wearing a turban and cut his hair
    - The boy went to another school, but the father lodged a complaint with the Commission for Racial Equality (CRE), which brought the case

  Issues

  Decision
    - Sikhs were a racial or ethnic group
    - it is obvious that Sikhs, like anyone else, "can" refrain from wearing a turban, if "can" is construed literally.
    - but in the context of legislation designed to prevent discrimination on the basis of race and place of ethnic origin, according a literal definition to 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 had intended the Act to afford them.

- therefore, the word “can” in the relevant legislation did not mean “can physically”. Rather, it had the meaning “can in practice” or “can consistently with the customs and cultural conditions of the racial group”

- **Travers v State of New South Wales [2000] FCA 1565 (3 November, 2000), paras 12-17**

  Facts

  - Applicant has spina bifida and school refused to provide applicant with key to disabled toilet
  - Refusal to leave disabled toilet unlocked meant that applicant required to attend classes in classroom from which she could not have immediate access to toilet

  Issues

  - Whether applicant 'not able to comply' with restrictions imposed by respondent

  Decision

  - Condition was – applicant and presumably other people in her class were required to attend class in a classroom form which they couldn’t walk to a toilet which they had access to in 12 seconds
  - It wasn’t literally impossible for complainant to attend classes in which she was not 12 second walking distance from accessible toilet
  - She could attend classes but only in consequences that would be seriously embarrassing and distressing
  - Indirect discrimination
  - The State contended that the requirement or condition alleged can only be that the applicant not be provided with a key to the disabled toilet. That requirement or condition was imposed not because of the applicant's disability but was a condition imposed on all students at the school. Nor was the applicant unable to comply with that condition. For those two reasons, the statutory test would not be met if the allegations were established
  - **Lehane J**
    - it was not literally impossible for the complainant to attend classes in circumstances where she was not within 12 seconds’ walking distance of an accessible toilet.
    - she could attend classes in such circumstances, but only with consequences that would be seriously embarrassing and distressing.
    - that was sufficient for it to be said for the purposes of the Commonwealth *Disability Discrimination Act* that she was unable to comply with the condition

REVERSE DISCRIMINATION/SPECIAL MEASURES

- According to case law, a special measure is defined as being any affirmative action that would be taken by a reasonable person, in the same circumstances, in order to achieve the goal of substantive equality. The Court will consider whether the measure taken was proportionate to the goal. Finally, any measure taken should have its effectiveness monitored so that it can be stopped as soon as the goal is achieved.
- Reverse discrimination essentially involves treating someone with a protected attribute *more* favourably, by virtue of her possession of that attribute, than someone without the attribute.
- **Arguments in favour**
    - The redressing of past disadvantage – as a consequence of being discriminated in the past, have been radically unrepresented, RD goes someway into restoring the balance
    - Bringing about of structural change
    - Providing role models – institutional forces will still be in place
        - It's okay if it promotes substantive equality
    - Promotion of diversity
    - "[a]n otherwise qualified medical student with a particular background – whether it be ethnic, geographic, culturally advantaged or disadvantaged – may bring to a professional school of medicine experiences, outlook, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity" (Regents of University of California v Bakke, per Powell J)
- Arguments against
    - Runs counter to (formal conceptions of) equality
        - "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to an individual of another colour". (Regents of University of California v Bakke, per Powell J)
        - Government sponsored racial discrimination "based on benign prejudice" should be considered just "as noxious as discrimination motivated by malicious prejudice" (Thomas J)
        - Harm to innocent third parties
        - Selection of unmeritorious candidates
- The position in Australian law
    - In many instances treating someone more favourably because of her possession of a protected attribute, necessarily involve treating someone else less favourably because of his possession of a protected attribute.
    - That may be an act of direct discrimination and, therefore, illegal
    - Special measures provisions

    - eg The *Sex Discrimination Act* permits the taking of special measures for the purpose of achieving substantive equality between, amongst others, men and women
    - not illegal to treat someone less favourably because they are not disabled but other areas are symmetrical (sex, age, race) – is a consequence of the symmetrical nature that we don't have RD in relation to sex, age and race? No it is not. Each of the legislation concerned with discrimination (sex, age, race act) contains provisions permit the taking of special measure to achieve substantive equality and act states that it does not constitute illegal discrimination

- **Jacomb v Australian Municipal Administrative Clerical and Services Union [2004] FCA 1250, paras 3-9, 37-44, 60-66**

  Facts

  - Union had set aside a number of positions in the executive for women
  - J argued that proportion of positions set aside for women out-strict the proportion of union members that were women
  - Accordingly, the rules treated him as a man less favourably than a woman had been treated because there were less positions he could occupy as a man than were he a woman
  - The rules of a union provided that particular elected positions on the branch executive were available only to women
  - A male applicant complained that the rules discriminated against men and were unlawful under the Sex Discrimination Act
  - The essence of the applicant's objection to the rules was that the union policy of ensuring 50% representation of women in the governance of the union (which was the basis of the quotas within the rules) exceeded the proportional representation of women in certain of the union branches
  - Consequently, women were guaranteed representation in particular branches of the union in excess of their membership, to the disadvantage of men
  - **Section 7D** of the **SDA** provides that a person may take special measures for the purpose of achieving substantive equality between, inter alia, men and women. It provides that a person does not discriminate against another person by taking special measures authorised by the section – the focus of which is on the achievement of substantive equality or equality of outcomes, rather than formal equality or equality of opportunity. The provision contemplates that substantive equality requires more than the termination of discriminatory practices. It requires measures to correct or

compensate for past or present discrimination, or to prevent discrimination from recurring in the future.

Issues

Decision

- The rules complained of were special measures designed to achieve substantive equality between men and women in accordance with s.7D of the Sex Discrimination Act
- Establishing quotas for female representation amounted to a 'special measure' directed at ensuring substantive equality in accordance with the Convention on the Elimination of All Forms of Discrimination Against Women
- subjective component: it is necessary that a purpose of the measure – not the sole purpose, just *a* purpose – is to achieve substantive equality, in this case between men and women;
- objective component
- the respondent must have acted reasonably in assessing the need for a special measure;
- the respondent must have acted reasonably in choosing the particular special measure in question
- degree of proportionality to be achieved and the special measure
- here, in implementing the rules in question, substantive equality between men and women had been achieved and union had reasonably believed that implementing this special measure would achieve substantive equality between men and women in the union
- ***[44] -*** *A "special measure" as referred to in s 7D, and as construed by reference not only to the ordinary meaning of words repeated from the Convention, but also by reference to the context, object and purpose of the Convention is one which has as at least one of its purposes, achieving genuine equality between men and women. The phrase "special measure" is wide enough to include, what is known as, affirmative action. A special measure may on the face of it be discriminatory but to the extent that it has, as one of its purposes, overcoming discrimination, it is to be characterised as non-discriminatory. Without reference to the legislative history and the Convention, it would not necessarily be easy to appreciate the characterisation of a "special measure" as non-discriminatory when s 19 contains explicit prohibitions against discrimination in the workplace. That difficulty lies at the heart of this proceeding and explains the applicant's efforts in various forums to have rr 5 and 9 declared invalid, because they ostensibly discriminate against men, which of course includes him. This emphasises the importance of the Human Rights Commission's function specified in s 11(1)(g) of the HREOC Act 'to promote an understanding and acceptance, and the public discussion of human rights in Australia'*
- ***[64] -*** *On the evidence from the union I am satisfied that before the passing of the rules, it held a view that substantive equality between men and women members of the respondent had not*

been achieved. The evidence it relied on in forming this view was substantial and included a good deal of statistical evidence. I am also satisfied, on the evidence, that the respondent believed solving this problem required having women represented in the governance and high echelons of the union so as to achieve genuine power sharing between men and women. The evidence also demonstrates that whilst the respondent espoused proportional representation for women, at least in the period 1994 to 1998, it subsequently adopted a 50% policy for representation of women at Branch and State Conference level, in order to accelerate substantive equality between its male and female members.

- ***[65] -*** *The same evidence is also relied upon by me as the basis for finding that the rules are a reasonable "special measure" when tested objectively. While the rules sanction inflexible quotas in favour of women, it is noted that there was evidence of union rules, which enabled the discontinuance of the two rules in question, if they were no longer needed. Having regard to the inflexibility of the quotas and the express provisions of subs 7D(4), monitoring is important to ensure the limited impact of such measures on persons in the applicant's position. The rules have only been utilised once and there was evidence that elections to the relevant positions were for four-year terms. Accordingly, it is too soon to find that the special measure is no longer needed or that rules 5 and 9 are deprived of their character as a special measure because they have been utilised once. However, rr 5 and 9 cannot remain valid as special measures beyond the "exigency" (namely the need for substantive equality between men and women in the governance of the union) which called them forth*
- **Scope and Interpretation**
    - Section 7D is limited, in its terms, by a test as to purpose. A person may take special measures for the purpose of achieving substantive equality between men and women (s 7D(1)(a)). The achievement of substantive equality need not be the only, or even the primary purpose of the measures in question (s 7D(3)).
    - Any application of s 7D requires an assessment of whether the measure in question was taken for the purpose of achieving substantive equality. It was accepted by Crennan J that the test as to purpose is a subjective test. Her Honour stated “it is the intention and purpose of the person taking a special measure, which governs the characterisation of such a measure as non-discriminatory”. In applying this test, her Honour was satisfied that the union believed substantive equality between its male and female members had not been achieved, and that solving this problem required having women represented in the governance and high echelons of the union.
    - Section 7D also requires the court to consider the special measure objectively. Crennan J appeared to accept the submission of the Sex Discrimination Commissioner that s.7D requires the court to assess whether it was reasonable

for the person taking the measure to conclude that the measure would further the purpose of achieving substantive equality. The Commissioner submitted that in making this determination the court must consider whether the measure was one which a reasonable person in the same circumstances would regard as capable of achieving that goal. The court ought not substitute its own decision, but should consider whether in the circumstances, the measure imposed was one which was proportionate to the goal. Crennan J was satisfied, on the evidence, that the union rules were a reasonable special measure when tested objectively

- Finally, s 7D(4) provides that the taking, or further taking, of special measures for the purpose of achieving substantive equality is not permitted once that purpose has been achieved. This gives rise to the question: when can it be said that measures are no longer authorised because their purpose has been achieved? The judgment in Jacomb provides little guidance on this point. Her Honour stated: "having regard to the inflexibility of the quotas and the express provisions of s 7D(4), monitoring is important to ensure the limited impact of such measures on persons in the applicant's position. The rules have only been utilised once and there was evidence that elections to the relevant positions were for four-year terms. Accordingly, it is too soon to find that the special measure is no longer needed ... However, [the] rules cannot remain valid as a special measure beyond the 'exigency' which called them forth
- Section 7D provides a welcome opportunity to implement measures aimed at achieving substantive equality. Section 7D is limited, in its terms, by a test as to purpose and the choice of a particular measure may be restricted by reference to the particular goal sought to be achieved and considerations of proportionality. It should also be acknowledged that despite the ongoing disadvantage suffered by women, such measures continue to be controversial and their implementation may be subject to challenge. In Jacomb, the union rules were challenged before the Human Rights and Equal Opportunity Commission, the Australian Industrial Relations Commissionand the Federal Court. Nevertheless, the terms of s.7D are sufficiently broad to accommodate a range of actions and the provision should be seized as a means to effect the structural changes necessary to correct past and current forms and effects of discrimination.