FEDERAL COURT OF AUSTRALIA

DISCRIMINATION LAW – direct discrimination – directive by State Premier to Ministers re description to be accorded to Macedonian language – reason for directive to promote peace and harmony – contravention of *Racial Discrimination Act* 1975 (Cth) s 9(1) – conduct alleged to be unlawful – test to be applied – true basis of alleged act of discrimination – interpretation of "based on" – whether requires relationship of cause and effect – standard of proof to be applied.

WORDS & PHRASES: - "based on".

Administrative Decisions (Judicial Review) Act 1977 (Cth), s 5
Racial Discrimination Act 1975 (Cth), ss 6, 9, 18, 25L, 26, Art 1.1, 5

Aboriginal Legal Rights Movement Inc v South Australia (No 1) (1995) 64 SASR 551 referred to
Australian Medical Council v Wilson (1996) 68 FCR 46 applied
Australian Iron & Steel Pty Ltd v Banovic (1989) 168 CLR 165 applied
Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd (1993) 46 FCR 301 referred to
Commonwealth of Australia v Human Rights and Equal Opportunity Commission (1993) 46 FCR 191 referred to
John Bell v Aboriginal and Torres Strait Islander Commission & Ors (unreported, 11 August 1993, HREOC, H92/003) referred to
Re East & Ors; ex parte Nguyen [1998] HCA 73 referred to
IW v The City of Perth (1997) 191 CLR 1 referred to
Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission (1997) 80 FCR 78 referred to
Cosco Holdings Pty Ltd v Do (1997) 150 ALR 127 referred to
Fulcher v Hilt (1985) 61 ALR 359 referred to
Commonwealth v Human Rights and Equal Opportunity Commission (1998) 158 ALR 468 referred to
Korematsu v United States 323 US 214 (1944) referred to
Buchanan v Warley 245 US 60 (1917) referred to
R v Birmingham City Council; ex parte Equal Opportunities Commission [1989] AC 1155 referred to
Palmore v Sidoti 466 US 429 (1984) referred to
Waters v Public Transport Corporation (1991) 173 CLR 349 applied
Re Canadian National Railway Co v Canadian Human Rights Commission (1983) 147 DLR (3d) 312 referred to
Re Bhinder v Canadian National Railway Co (1985) 23 DLR (4th) 481 referred to
Andrews v Law Society (British Colombia) [1989] 1 SCR 143 referred to
Briginshaw v Briginshaw (1938) 60 CLR 336 referred to

Ebber v Human Rights and Equal Opportunity Commission (1995) 129 ALR 455 referred to
Department of Health v Arumugam [1988] VR 319 referred to
Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 referred to
G v H (1994) 181 CLR 387 referred to

MACEDONIAN TEACHERS' ASSOCIATION OF VICTORIA INC v HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION & ANOR
VG 41 of 1998

WEINBERG J
MELBOURNE
21 DECEMBER 1998

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **VG 41 of 1998**

BETWEEN:	**MACEDONIAN TEACHERS' ASSOCIATION OF VICTORIA INC** **Applicant**
AND:	**HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION** **First Respondent**
	STATE OF VICTORIA **Second Respondent**
JUDGE:	**WEINBERG J**
DATE OF ORDER:	**21 December 1998**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. The decision of the Human Rights and Equal Opportunity Commission dismissing the complaint brought against the State of Victoria by the Australian Macedonian Human Rights Committee Inc be set aside.
2. The complaint be remitted for further consideration according to law.
3. Any further consideration by the Commission of that complaint be confined to the material filed at the time of the original decision.
4. The second respondent pay the applicant's costs of this application.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **VG 41 of 1998**

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AND:	**HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION** **First Respondent**
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JUDGE:	**WEINBERG J**
DATE:	**21 December 1998**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

The application before the Court

This is an application by the Macedonian Teachers' Association of Victoria Inc for an order of review under s 5 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth). The applicant seeks to review a decision made on 8 January 1998 by the Human Rights and Equal Opportunity Commission ("the Commission"). By that decision, the Commission dismissed a complaint brought against the second respondent by the Australian Macedonian Human Rights Committee Inc. That complaint alleged a contravention by the State of Victoria of s 9(1) of the *Racial Discrimination Act* 1975 (Cth) ("the Act").

That sub-section is in the following terms:

> ***"Racial discrimination to be unlawful***
>
> *9. (1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life."*

Sub-section 9(2) provides:

> *"(2) A reference in this section to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes any right of a kind referred to in Article 5 of the Convention."*

The Convention in question is the International Convention on the Elimination of all forms of Racial Discrimination, ratified by Australia on 30 September 1975. It is set out in full as a Schedule to the Act. The provisions of Art 5 are as follows:

"Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- *(a) The right to equal treatment before the tribunals and all other organs administering justice;*
- *(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution;*
- *(c) Political rights, in particular the rights to participate in elections – to vote and to stand for election – on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;*
- *(d) Other civil rights, in particular:*
  - *(i) The right to freedom of movement and residence within the border of the State;*
  - *(ii) The right to leave any country, including one's own, and to return to one's own country;*
  - *(iii) The right to nationality;*
  - *(iv) The right to marriage and choice of spouse;*
  - *(v) The right to own property alone as well as in association with others;*
  - *(vi) The right to inherit;*
  - *(vii) The right to freedom of thought, conscience and religion;*
  - *(viii) The right to freedom of opinion and expression;*
  - *(ix) The right to freedom of peaceful assembly and association;*
- *(e) Economic, social and cultural rights, in particular:*
  - *(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;*
  - *(ii) The right to form and join trade unions;*
  - *(iii) The right to housing;*
  - *(iv) The right to public health, medical care, social security and social services;*
  - *(v) The right to education and training;*
  - *(vi) The right to equal participation in cultural activities;*

> *(f) The right of access to any place or service intended for use by the general public such as transport, hotels, restaurants, cafes, theatres and parks."*

The expression "racial discrimination" is defined in Art 1.1 which reads as follows:

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

It will be readily apparent that s 9(1) of the Act is modelled closely upon the language of Art 1.1 of the Convention. That is a matter of some significance, to which I shall return later in this judgment.

It should be noted that the Act binds the Crown – s 6. Unlawful acts are not offences unless the Act expressly so provides – s 26. There is no such provision in relation to a contravention of s 9. It is in Part III of the Act that there are to be found the procedures and remedies applicable to cases of unlawful discrimination. The elaborate scheme contained within Part III was plainly intended to provide the means by which a person aggrieved by a contravention of s 9(1) of the Act might obtain a remedy.

The act said to have given rise to the contravention of that sub-section was the issuing of a directive to his Ministers by the Victorian Premier, Mr Jeff Kennett, on 21 July 1994. That directive was in the following terms:

> *"Memorandum*
>
> *To: All Ministers*
>
> *From: Premier*
>
> *Date: 21 July 1994*
>
> *Subject: "Macedonian" Language*
>
> ---
>
> *The Federal Government's official policy when referring to people living in, or originating from, the Former Yugoslav Republic of Macedonia(FYROM) is to refer to them as Slav Macedonians. In my memorandum to you on this*

issue, dated 15 March 1994, I similarly requested that all Government Departments, and agencies in which the State Government has a capacity to direct, refer for the time being to the country as FYROM and people living in, or originating from it, as Slav-Macedonians.

Further to the Federal Government's decision to use the term Slav Macedonians (and in order to be consistent and avoid any further confusion) I now request all Victorian Government Departments, and agencies, to refer for the time being to the language that is spoken by people living in FYROM, or originating from it, as Macedonian (Slavonic).

How members of the respective communities choose to describe themselves, and in particular how they choose to describe their ethnicity and language will continue to remain up to those individuals and communities themselves.

If you have any queries relating to this matter please contact Phil Honeywwood (sic).

(Signed J. Kennett)
Jeff Kennett"

The Commission dismissed the complaint brought against the second respondent. It found that the true basis of the decision to issue the directive was the Government's imperative to take action to restore peace and harmony to the community. The racial distinction which was recognised as being implicit in the directive was found not to be a material factor in the making of the relevant decision. The impugned conduct was not based on ethnic origin. It was unnecessary, therefore, to consider whether the issuing of the directive had the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom of the type referred to in s 9(1).

The applicant, brings this proceeding not only in its own right, but also as a representative proceeding on behalf of its members – see s 25L of the Act and Part IVA of the *Federal Court of Australia Act* 1976 (Cth). It challenges the Commission's decision to dismiss the complaint upon four separate grounds. They are:

(a) The Commission took into account matters irrelevant to the decision whether the Premier's directive contravened s 9(1) of the Act – these included the motivation of the Victorian Government to ease tension between two communities in conflict and its attempt to bring about peace and harmony between those communities.

(b) The Commission erred in law in arriving at the conclusion that the impugned conduct was not based on ethnic origin, because it misconstrued the words "based on" in s

9(1) of the Act.

(c) The Commission erred in law in holding that in order for the complainant to discharge its onus of proof in identifying "the true basis" of the decision, the complainant was required to meet an onus higher than that of balance of probabilities.

(d) The Commission erred in law in failing to give proper effect to the operation of s 18 of the Act.

The first respondent indicated that it would abide any decision of the Court. The second respondent appeared to support the decision under review.

The complainant's case before the Commission

The complainant adduced evidence from a substantial number of witnesses before the Commission. It also tendered a large number of documents in support of its contention that the Premier's directive contravened s 9(1) of the Act. It is necessary to summarise briefly the nature of the evidence led in support of the complainant's case before the Commission.

- Dr Ilija Casule of the School of Modern Languages, Macquarie University, Senior Lecturer in charge of Macedonian Studies, and an expert in Macedonian linguistics, gave evidence concerning the nature and history of the Macedonian language. He testified that linguists recognise one Macedonian language only – namely the official language of what was known formerly as the Republic of Macedonia, and is now known as the Former Yugoslav Republic of Macedonia.

  Dr Casule stated that the Macedonian language had been recognised by all countries, and by all linguists throughout the world, except those in Greece and Bulgaria. He traced the history of the language back to the 19th Century, and stated that it had developed thereafter from a vernacular into a standard or literary language. He described Macedonian as part of a larger group of Slavic languages which include Slovenian, Serbian/Croatian, and Bulgarian. He characterised it as being related to Russian, Byelorussian, Ukrainian, Polish, Czech and Slovak. He observed that modern Greek is not related to Macedonian.

  Dr Casule said that there had never been any international objection to the use of the name "Macedonian language" in any international forum until 1991 when the Republic of Macedonia became a separate nation following the break-up of Yugoslavia. He

noted that prior to 1991, Macedonian was a language which could be studied in Australia for the Victorian Certificate of Education, and before that, for the Higher School Certificate examinations. The National Accreditation Authority and the Translating and Interpreting services offered accreditation in Macedonian, while SBS transmitted programs in the Macedonian language.

Dr Casule claimed that there were in Greece today between 300,000 to 400,000 Macedonians who spoke the Macedonian language. He stated that the addition of the term "Slavonic" to the name "Macedonian" was not required to prevent any confusion about the identity or definition of the Macedonian language. He commented that nowhere else in the world, apart from Victoria, was the language described as "Macedonian (Slavonic)". He observed that the Premier's directive had become known to many linguists both within and outside Australia. He said that those linguists found the directive absurd. From a linguistic point of view it was without foundation.

- Professor Michael Clyne of the Department of Linguistics, Monash University stated that in his opinion, there was no necessity to identify the Macedonian language in the way in which the Victorian Government directive sought to do. In particular, there was no need, for language purposes, to differentiate the Macedonian language from a modern dialect of Greek spoken in the region of Thessaloniki. The former had been codified as a language. The latter had not. The former was a medium of instruction in some parts of the world. The latter was not. In Greece any speaker of the Macedonian dialect of Greek was required, for official purposes, to use Standard Greek, and not the Macedonian dialect.

Professor Clyne observed that, to the best of his knowledge, the Premier's directive represented the first occasion upon which a government of a State forming part of a country heavily populated by immigrants and their descendants had sought to change the name of the language of one of its immigrant communities. He also observed that the change of name adopted by the Victorian Government was one based upon the genetic origin of the language. If the same treatment were to be accorded to other languages, the result would be name changes such as "English (Germanic)", "Maltese (Semitic)" and "Irish (Celtic)". He described the Macedonian language as one of the success stories of Australian, and particularly Victorian, multiculturalism. He expressed the

opinion that the Premier's directive threatened that state of affairs. The directive suggested to Professor Clyne that Macedonian was to be singled out for different treatment, and that it was not regarded by the Government of Victoria as being on an equal footing with every other officially recognised language.

- The President of the Applied Linguistics Association of Australia, Professor Christopher N Candlin, wrote on 23 November 1994 opposing the renaming of the Macedonian language as Macedonian (Slavonic). Professor Candlin observed:

  "There is no such language as Macedonian (Slavonic). Such a term has no status whatsoever in Linguistics, nor does it have any tradition. The term for the language which has been spoken in that region for many years is Macedonian and it is recognised as such by Linguistics authorities. In my view, the term Macedonian (Slavonic) is a political designation which has no basis in linguistic description."

- Ms Winifred Sarre, Manager of the National Assessment Framework for Languages at Senior Secondary Level wrote on 31 October 1994 indicating that she was disturbed by the Premier's directive because it violated an agreement between the members of the Australian Curriculum, Assessment and Certification Authorities (ACACA) to which the State of Victoria was a signatory. Ms Sarre stated:

  "The names which designate all languages in this scheme are those that are internationally used and recognised by linguists, and taught in educational institutions around the world. The name "Macedonian" is that used by NAFLaSSL to refer to this international language.

  As the NAFLaSSL examination is taken by students across Australia, and not only by those in Victoria, it is not possible for one State to unilaterally change its name. Other States have not requested any change and in fact firmly support the retention of the name "Macedonian". The fact that Victoria is "host" to this language, and that the national examination paper originates from that State should not be allowed to alter the situation. The name "Macedonian" must continue to be used by NAFLaSSL for the national examination, and under the agreement Victoria is bound to produce an examination with that name."

- There was evidence before the Commission from a number of Macedonian language teachers in Victoria who were profoundly upset by the Premier's directive, and who spoke of the unsettling effect that the directive had upon their students. Individual members of the Macedonian community claimed that they were embarrassed and humiliated by the term "Slavonic" which was regarded as being deeply offensive to members of the Macedonian community. These individuals described the terms "Slav"

and "Slavonic" as labels used by members of the Greek community in a derogatory way, designed to distinguish ethnic Macedonians from those Greeks living in or originating from that part of Northern Greece which was part of the historical territory of Macedonia.

- There was other evidence as to the effects of the Premier's directive upon members of the Macedonian community engaged in the study of the Macedonian language. In 1994, the VCE examination in Macedonian proceeded with the language described as "Macedonian". However, by the end of that year, correspondence from the Education Department began to appear with the term "Slavonic" appended to the word "Macedonian". The Victorian Board of Studies also began to implement the Premier's directive. This led to tension within schools, and hostility on the part of parents who indicated that their children would boycott the VCE examination in Victoria, and would be sent interstate to sit the examination in Macedonian without the offending term "Slavonic" attached to the name. Students moving from Year 11 in 1994 to Year 12 in 1995 would have the Macedonian language subject described as "Macedonian" on their Year 11 certificate, but "Macedonian (Slavonic)" on their Year 12 certificate. This would produce uncertainty and confusion.

- At the end of the 1995 school year, the Macedonian Teachers' Association of Victoria organised an annual VCE Macedonian graduation evening. Approximately 120 VCE students attended. There were approximately 400 people in total present at the ceremony. This was an annual event of great importance to members of the Macedonian community. Mr Phil Honeywood, the Parliamentary Secretary for Ethnic Affairs and Chairperson of the Victorian Ministerial Advisory Council for Languages, was invited to attend the evening and to present the graduation certificates. On 1 December 1995 he wrote to the Association indicating that he would be pleased to attend, but only on the basis that the certificates were identified as "Macedonian (Slavonic)". Mr Honeywood observed:

  "You will appreciate that, as this is established Government policy, I cannot accept your invitation on any other basis."

- Other Ministers, including the Victorian Minister for Justice, Mrs Jan Wade, declined to attend official functions sponsored by the Macedonian community because information

pamphlets written in the Macedonian language, which were to be distributed at those functions, did not describe the language as "Macedonian-Slavonic".

- Government funding for community education workshops about the Macedonian language was curtailed unless the government approved designation of that language was accepted. The refusal of members of the Macedonian community to countenance the description of their language as "Macedonian (Slavonic)" meant that they were denied government funds routinely made available to other ethnic groups.

- The Premier's directive was said to have led to the production by some government departments of information brochures for what was described as the "Macedonian/Slovenian" language. Slovenian is, of course, a totally different language from Macedonian. This had led to further confusion, embarrassment and humiliation on the part of members of the Macedonian community.

- There was placed before the Commission a report prepared by Dr Michael Underdown of the Foreign Affairs, Defence and Trade Group dated 23 June 1994. The report was entitled "Background to the Macedonian Question". It appeared to have been prepared under the auspices of the Parliamentary Research Service.

  Dr Underdown spoke of the history of the former Socialist Federal Republic of Yugoslavia, and of its final disintegration in 1991-2. He dealt with the position of the Republic of Macedonia as part of that Federal Republic. He noted that the Australian Government had declined to recognise the new entity until 15 February 1994, and then only under the temporary designation given to it by the United Nations – "Former Yugoslav Republic of Macedonia" or "FYROM".

  Dr Underdown observed that the FYROM was not to be equated with the historical territory known as Macedonia. He examined the history of that historical territory from the reign of Phillip II (359-336 BC) and that of his son Alexander the Great (336-323 BC), the Roman occupation of that territory, and its subsequent history first as part of the Byzantine Empire, then under Slav domination, and finally from the late 14th Century to the 19th Century as part of the Ottoman (Turkish) Empire. He analysed the partition of

the historical territory of Macedonia in 1913 into Serbian, Bulgarian, and Greek territories. He set out the history of the conflict thereafter between Serbian Macedonia, and Greece and Bulgaria.

Dr Underdown noted that successive Greek governments had expressed concerns about Macedonian nationalism, and about the existence of the Macedonian minority within Greece. The prevailing Greek Government line was that "Macedonia is Greek and only Greek". In September 1991 the Greek Government had held talks with both Yugoslavia and Bulgaria in an effort to have the FYROM incorporated into Greece. These talks were unsuccessful. Thereafter, Greece had opposed recognition of the FYROM. It strongly opposed the use by the FYROM of the name "Macedonia". The Greek Government expressed concerns that the new regime, based in Skopje, had territorial claims on what it described as "Aegean-Macedonia". Dr Underdown noted that there were elements within the FYROM campaigning for a "greater Macedonia" who were said to have irredentist designs upon part of Northern Greece.

When recognition was finally accorded to the FYROM by the Australian Government, it was granted subject to stringent conditions. The newly recognised entity was required to describe itself as the FYROM, not as the Republic of Macedonia. In addition, no contentious flag or other symbol was to be displayed by the new regime pending final resolution of all relevant outstanding issues. Australian Government Departments and agencies were instructed by a directive issued on 14 March 1994 by the Minister for Foreign Affairs to refer to people living in, or originating from the FYROM as "Slav-Macedonians". That term was to be used as a geographic descriptor for the purposes of assembling data relating to country of birth or nationality.

Dr Underdown stated that the decision by the Australian Government to recognise the FYROM had provoked an angry reaction on the part of some Greek-Australian community leaders. These leaders had lobbied the Government not to recognise the new regime in Skopje ever since the break-up of Yugoslavia, in 1991.

There followed, in the months after February 1994, a number of acts of violence. These included the fire bombing of churches, attacks upon business premises, and the daubing of graffiti upon a number of buildings. Community leaders on both sides blamed the

violence on a small minority of individuals. It occurred mainly in Melbourne, and not in other Australian cities. It was against this background of violence that the Premier had issued his directive of 21 July 1994.

- Enquiries by members of the Macedonian community as to the reasons for the Premier's directive had originally elicited two quite specific responses. The first was that the directive was required in order to ensure consistency with the March 1994 directive concerning "people who live in, or originate from, the FYROM". However, this explanation was rejected by Senator Evans, the then Minister for Foreign Affairs, who confirmed in a letter addressed to Mr Honeywood on 14 November 1994 that the Commonwealth directive had not been intended to have any application to the designation of the Macedonian language. Referring to the Premier's directive of 21 July 1994, Senator Evans stated:

> *"It is of considerable concern to me that the Victorian Government has sought to justify its decision by reference to what it has perceived as the need to maintain consistency with the Federal Government's Directive of 14 March 1994 relating to the use of the term "*Slav-Macedonian*". As you will know, the Federal Government's Directive does not purport to take any measures with respect to language questions, nor was it envisaged that it would be used by other governments as a basis for taking such action. I have made this view known to the Macedonian Teachers' Association, noting that whatever motives the Victorian Government may have had for adopting usage of the term "*Macedonian (Slavonic)*", this was not from any point of view a necessary corollary of the Federal Government's decision."*

The Premier's directive also drew a strong response from Senator Bolkus, the then Minister for Immigration and Ethnic Affairs, when on 15 May 1995, in a letter addressed to the Victorian Premier, he stated:

> *"In neither the 15 February news release, the 14 March ministerial statement to the Parliament nor in subsequent instructions issued by the Secretary of the Department of Immigration and Ethnic Affairs on 14 April and 6 May 1994 to the Secretaries of all Australian Government departments and agencies was any reference made to any name change in relation to the Macedonian language. This omission was deliberate.*
>
> *Your directive, as reported in the media, that all Government agencies in Victoria should now refer to the language spoken by people from the FYROM as "*Macedonian (Slavonic)*" is at odds both with the Australian Government's announcements and subsequent instructions and with linguistic research which demonstrates that there is a "*Macedonian language*".*
>
> *The 2 August 1994 addition of the* Australian Macedonian Weekly *reports*

*that, according to your Parliamentary Secretary, Mr Phil Honeywood, this decision was based on the "*Slavonic*" definition of the Macedonian language in the Encyclopaedia Britannica. The Macedonian language is indeed a Slavic language. In fact, it is described as a South Slavic language in the Encyclopaedia Britannica, along with the Slovene, Serbian, Croatian and Bulgarian languages. Other Slavic languages include Polish, Czech, Ukrainian, Russian but the world does not refer to their languages as Polish (Slavonic), Czech (Slavonic), Ukrainian (Slavonic) or Russian (Slavonic). So, it is not unreasonable to ask why then instruct Victorian State Government agencies to refer to the Macedonian language as "*Macedonian (Slavonic)*"? I enclose, for your information, an extract from page 693 of the Encyclopaedia Britannica (1985 edition) which sets out the family tree of the Slavic languages, showing clearly that Macedonian is a separate language in its own right.*

I am concerned that the unilateral action you have taken has served to raised tensions further and unnecessarily in sections of the community and that it has the potential to impact significantly upon the future of community relations in Australia. Our current relatively harmonious community relations position is something that is greatly cherished by all Australians and is an achievement for which many have worked very hard and which few in our country would like to see damaged through actions of this kind.

The Commonwealth does not intend, and never has, to refer to the Macedonian language by any such qualification as the suffix-Slavonic- and I would urge you to reconsider your decision in this light."

The second reason originally given for the Premier's directive, according to a spokesperson for the Premier, was that there had developed "an academic row at La Trobe University in the naming of a Macedonian studies course …". It subsequently emerged, however, that no such course existed at La Trobe University. Moreover, there were no proposals for the creation of any such course. In a letter dated 30 August 1994, the Vice-Chancellor of La Trobe University confirmed that, contrary to information provided by the Office of the Parliamentary Secretary for Ethnic Affairs, there was no language course entitled "The Greek Macedonian Dialect" at La Trobe University, and that the University had not been consulted by the Victorian Government in relation to the Premier's directive.

- There was also evidence before the Commission to the effect that the language spoken by those who came originally from the FYROM bore no resemblance to the modern dialect of Greek spoken by those inhabitants of that part of Northern Greece which had been part of the historical territory of Macedonia. Nowhere throughout Australia was the

Macedonian dialect of Greek taught separately, or treated separately from standard Greek. There was, therefore, no realistic possibility of any confusion between the Macedonian language, and the Greek dialect which also bore that name.

The second respondent's case before the Commission

The second respondent adduced a substantial body of evidence in support of its contention that the Premier's directive had not contravened s 9(1) of the Act. The effect of that material may be summarised as follows:

- The explanation provided by the Victorian Government for the Premier's directive was that set out in a letter written by Mr Honeywood to Senator Evans on 5 December 1994. Mr Honeywood had stated in that letter:

  "In order for peace and consistency in our community the Victorian Government decided to refer to the language that is spoken by people living in FYROM, or originating from it, for the time being, as Macedonian (Slavonic).

  Having met with both sides in this dispute it was important we adopt this terminology until the issue is resolved.

  The Victorian State Government, at all times, has acted on the basis of ensuring harmony between our various communities."

  Mr Honeywood's explanation for the directive was confirmed by the Premier himself in a letter dated 25 May 1995 addressed to Senator Bolkus in which he observed:

  "Similarly, to ensure that peace and harmony continues to exist in our schools, a decision was also taken on the terminology used when referring to the language that is spoken by people from the FYROM. You will appreciate that a number of communities feel very strongly about this issue and this is a strong indication of the linguistic, historical and political complexity of this topic. In relation to other languages you will also appreciate that there is no controversy with any other Slavic language for there to be a need to include a suffix.

  *It is the Commonwealth Government's inconsistency and conflicting information on this issue that is causing tension and friction between the various communities. Both the Prime Minister's comments, as reported in the Greek media, and your comments clearly suggest that you are not adhering to your own guidelines. I would therefore request that you clarify the Commonwealth Government's guidelines as to the use of the term "*Slav-Macedonian*" and advise the communities accordingly."*

- Mr Honeywood gave evidence that in the months preceding and following the directive issued by Senator Evans, the then Minister for Foreign Affairs, on 14 March 1994

requiring Australian Government Departments and agencies to use the description "Slav-Macedonian" when referring to people who live in, or originate from the FYROM, tensions between the Greek-Macedonian and Slav-Macedonian communities in Victoria were running high. Among other disturbing incidents, there were a number of fires at communal buildings (including churches) of both groups. Tensions between the two ethnic communities spilled over into the primary and secondary school arena. One of the causes of concern communicated to Mr Honeywood by parents of students of Greek-Macedonian background was the description of the Slav-Macedonian language as "Macedonian". Members of the Greek-Macedonian community had conveyed to Mr Honeywood in the strongest terms the offence taken at the description of the language of Slav-Macedonians as "Macedonian". They had also pointed out the risk of confusion between that language, and the Macedonian dialects of Greek.

Mr Honeywood went on to state:

> *"As a result of such representations, the decision was taken in July 1994 to issue the directive that the language be referred to as* "Macedonian (Slavonic)". *This measure was seen by the Government as a compromise between the two ethnic communities. There was no sense that this was adopting the Greek* "side" *in the dispute, as the Greek-Macedonian community were not happy with any reference to* "Macedonian" *in the name of the language. The directive was seen as a compromise measure which would assist in calming tensions between the two communities, particularly in schools. The directive was wholly consistent with the decision to refer to the people as* "Slav-Macedonians" *and the justifications for the directive were essentially the same."*

- Australia has both large Greek-Macedonian and Slav-Macedonian communities. The name "Macedonia" evokes great sensitivities within both communities. Greek-Macedonians regard it as wrong for that name to be appropriated as a descriptor of the language spoken by those who come from the FYROM. Indeed, they assert that the name "Macedonia" has been synonymous with Greece for thousands of years, whereas what is described as "Slav-Macedonia" was created only in 1944. Prior to that, Slav-Macedonians were identified as Ethnic Bulgarians. Their language is perceived by Greek-Macedonians as merely a Bulgarian dialect, whereas the language of ancient Macedonia was, in essence, Greek.

- Other than the ancient Macedonians, there had never been a concept of Macedonian

ethnicity. Throughout history, the term "Macedonian" was used exclusively to refer to the geographic region of the historical territory of Macedonia. Macedonians were not considered a nationality separate from Bulgarians, Greeks, Serbs or Albanians. Then, in 1944, Marshal Tito established the Federal People's Republic of Yugoslavia. The federal form of that state was specifically designed to solve the problem of conflicting nationalities and ethnic minorities. Boundaries between the federated republics were created in a wholly arbitrary manner. Tito simply took a segment of the Macedonian population, and created the Republic of Macedonia. This was essentially a province of Yugoslavia. He did so in order to counter pro-Bulgarian sentiments among the population, and to reduce Serbian influence as well. This artificial creation was designed also to serve another purpose, namely gaining territorial access to the Aegean Sea through the port of Thessaloniki.

- The Greek Civil War was fomented by Tito with a view to annexing Greek-Macedonia to Yugoslavia. Recognition of the FYROM under the name Macedonia laid the foundations for the destabilisation of the Balkan region. The issue of the name of the newly independent state was not simply a matter of its right to self-determination. It was an unprecedented case of FYROM laying claim to the history, culture and sovereign territory of Greece by appropriating to itself the name Macedonia.

- There was evidence before the Commission from Professor Anastasios Myrodis Tamis, Professor of Sociolinguistics at La Trobe University, and an authority upon the Greek language and its dialects. He stated that, in his opinion, it was quite accurate to describe the language spoken by people living in the FYROM as "Slavonic", and that he himself referred to it as "Macedoslav". Professor Tamis said that while the language spoken by a majority of people in FYROM is a Slavonic language, the language spoken by the inhabitants of historical Macedonia clearly was not. He regarded that language as having belonged to the family of Greek languages. It was, in substance, a dialect of Greek. He regarded the so-called "Macedonian language" as being merely a modified version of a Western Bulgarian dialect. He supported the Premier's directive as being both justifiable and sensible because it avoided possible confusion between the modern Macedonian language, and the language of the ancient Macedonians. It also avoided possible confusion between the modern Macedonian language, and the Macedonian

dialects of Modern Greek spoken today by people living in and originating from Greek Macedonia. He said that some of these dialects were taught in the Department of Hellenic Studies at La Trobe University. The Vice-Chancellor's letter of 30 August 1994 which had denied the existence of a language course at La Trobe University entitled "the Greek Macedonian dialect" was misleading and inaccurate.

The Commission's decision

The Commissioner who heard this matter commenced his reasons for decision by noting that a written complaint with respect to the Premier's directive had been lodged on 15 August 1995 pursuant to s 22(1)(c) of the Act. The complaint had been lodged with the Victorian Equal Opportunity Commission in its capacity as an agent of the Commission. Following inquiry and investigation, the complaint had been referred to the Race Discrimination Commissioner, a member of the Commission. By letter addressed to the parties, dated 26 June 1997, the Race Discrimination Commissioner declined to enquire further into the matter because, having regard to s 24(2)(a) of the Act, she was satisfied that the conduct complained of was not unlawful by reason of a provision of the Act.

By letter of 15 July 1997 the Australian Macedonian Human Rights Committee Inc exercised its right pursuant to s 24(4)(a) of the Act to require the Race Discrimination Commissioner to refer the complaint to the Commission for public inquiry and determination. The matter was so referred by letter dated 8 August 1997. Consequently the Commission was authorised by s 25A(1) of the Act to conduct an inquiry.

The Commissioner noted that the complainant alleged that the conduct of which it complained was rendered unlawful by reference to any one of ss 9(1), 13, 16, 17 and 18C of the Act. He noted, however, that the hearing had focussed almost exclusively on s 9(1), and to a minor extent only on ss 13 and 18C. He indicated in his reasons for decision that he proposed to confine his attention primarily to s 9(1).

In outlining the issues before him, the Commissioner observed that in the context of this case, s 9(1) of the Act raised a number of issues, some of which were complex and difficult to resolve. He stated:

> *"In my understanding there is a central problem which lies at the heart of the case. I believe it can be described in general terms, before coming to any*

particular words in the Act. It is a question of the true characterisation of the act alleged to constitute racial discrimination."

He continued:

"A chronology of events which was received in evidence shows that between 15 February 1994, when the Federal Government's decisions were made and 19 April 1994, there were no less than nine distinct incidents of violence in Melbourne which caused or could have caused serious damage to property and risk to the lives of people. During the same period there was a brawl involving about 300 people at a soccer match and a protest march when approximately 60,000 members of the Greek community marched to Parliament House to protest the Federal Government's decision to recognise FYROM.

*It is against this background that the respondent's directive was made on 21 July 1994. The members of the Slav-Macedonian community saw it as a deliberate assault on their rights, taken by a Government which in their view had demonstrated a sympathy for members of the Greek community in the problems that had arisen over the use of the word "*Macedonian". *They found support for this view in the belief that while the Government had consulted with representatives of the Greek community before making the decision, it had neglected to consult adequately or at all with their side. The addition of the word* "Slavonic" *to the word* "Macedonian" *when describing their language was seen as insulting and offensive and a standing embarrassment to their children and their families in relation to their education. In no other part of Australia and in no other country in the world had it been found necessary to qualify the description of their language as* "Slavonic".

On the other hand, the respondent asserts that the Slav-Macedonian community has totally misunderstood the reason for its directive. In essence, it seeks to make two points. The first is that its action was to be expected following the decisions of the Federal Government to recognise FYROM by that name and the people associated with that country as Slav-Macedonians. The directive was entirely consistent with and consequent on those decisions. The fact that the spokespersons for the Federal Government disavowed any necessary connection between the decisions taken by the Federal Government and the directive was the kind of difference of opinion to be expected from governments of opposing political affiliations. In any event, whatever the view of the Federal Government, the Victorian Government was responsible for education in Victoria and the decision on the directive was entirely within its powers. More to the point, the Government has a responsibility for the peace, order and good government of Victoria. The State had experienced very disturbing turmoil involving threats to life and property and it had an overriding responsibility to make what decisions it could to ease the tension between the two warring communities. This was the sole reason for the directive. It had an objective and reasonable justification and there was reasonable proportionality between the means employed and the aim sought to be realised. It may have made a mistake in failing to consult more adequately with representatives of the Slav-Macedonian community prior to

> *issuing the directive but that mistake was not sufficient to establish bad faith and an ulterior agenda on the part of the Government."*

When the Commissioner came to make his findings, he turned essentially to one element of s 9(1) of the Act. That element was whether the Premier's directive was "based on" race, colour, descent or national or ethnic origin.

The Commissioner referred to the fact that there was authority available on the construction to be given to the word "based" in s 9 of the Act. He referred to the decision of the Full Court of the Supreme Court of South Australia in *Aboriginal Legal Rights Movement Inc v South Australia (No 1)* (1995) 64 SASR 551 (the Hindmarsh Bridge case) at p 553 where Doyle CJ (with whom Bollen J agreed generally, and with whom Debelle J agreed on this issue) stated:

> *"In my opinion that section [s 9] is not attracted unless an act (the relevant act being the appointment of the Royal Commissioner) is done which in fact produces a distinction on the base* (sic) *of race (which has occurred here because the inquiry is into and affects Aboriginal beliefs only) and the existence of that racial distinction is the basis of the relevant act in the sense that the act occurred by reason of or by reference to the racial distinction. This does not mean that the inquiry is one as to motive. The inquiry is into whether the racial distinction is a material factor in the making of the relevant decision or the performing of the relevant act."*

Doyle CJ continued:

> *"I have considered in particular the fact that the beliefs inquired into are beliefs characteristic of and apparently confined to Aboriginal belief, the fact that the declaration by the Commonwealth Minister was made under legislation which relates to the protection of Aboriginal heritage and the other links to the Aboriginal race. In other words, the subject matter of the inquiry has a distinctive association with the Aboriginal race, and perhaps a unique association.*
>
> *But in my opinion that does not expose race as the true basis of the decision. It does not disclose that the basis of the decision is a characteristic that appertains generally or uniquely to a particular race. In my opinion the basis of a decision remains in particular the asserted fact (be it correct or not) that a declaration was made under Commonwealth legislation in reliance upon assertions which are now disputed.*
>
> *For those reasons in my opinion the claim under s 9 of the* Racial Discrimination Act *fails."*

The Commissioner observed that the views of Doyle CJ had been endorsed by Heerey J in *Australian Medical Council v Wilson* (1996) 68 FCR 46 at 58. In the same case, Sackville J

had, at 76-7, cited from the joint judgment of Deane and Gaudron JJ in *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 where their Honours in discussing direct discrimination "on the ground of sex" under s 24(1) of the *Anti-Discrimination Act* 1977 (NSW) suggested that the "true basis" for an act or decision is the "ground" of the decision. It is not necessarily the ground assigned for the act or decision. In *Banovic* Dawson J had also adopted the expression "true basis" as the criterion for determining whether there had been discrimination on the ground of sex.

The Commissioner then referred to *Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd* (1993) 46 FCR 301 where Lockhart J at 321 discussed the meaning of the phrase "by reason of" in the definition of discrimination in the *Sex Discrimination Act* 1984 (Cth). The Commissioner noted that Lockhart J had stated at 321:

> *"In my opinion the phrase* "by reason of" *in s 5(1) of the SD Act should be interpreted as meaning* "because of", "due to", "based on", *or words of similar import which bring something about or cause it to occur. The phrase implies a relationship of cause and effect between the sex (or characteristic of the kind mentioned in s 5(1)(b) or (c)) of the aggrieved person and the less favourable treatment by the discriminator of that person."*

The Commissioner then applied as the appropriate test for racial discrimination the test which had been accepted by a majority of the members of the High Court in *Banovic* in the context of sexual discrimination – what was the "true basis" for the directive?

It is necessary to set out the Commissioner's answers to that question in full. He stated:

> *"A consideration which may be of critical importance is that the onus of substantiating the complaint rests upon the complainant. Applying the test enunciated in* Briginshaw v Briginshaw *(1938) 60 CLR 336, if a finding in support of the complainant means that the Government must be found to have deliberately discriminated against one section of the community in order to favour another section and therefore be deserving of wide condemnation for such a lack of probity in office, then such a finding would surely call for proof based on more than a mere balance of probabilities.*
>
> *Is there any other construction of events that would accommodate a finding in favour of the complainant? Is it possible, in the circumstances of this case, that unlawful discrimination could have occurred through inadvertence on the part of the Government? Was it all a dreadful mistake? Perhaps the sad consequences of the change had not been appreciated. But, then, surely, the decision could readily have been reversed and the status quo restored.*
>
> *Perhaps one gets nearer to the mark if it is a question of mixed reasons*

activating the decision to issue the directive: the political imperative that the Government must be seen to be doing something to ease the community tension that was so threatening to the peace and quiet of Melbourne and to do it in a way that would please the Government's Greek supporters at the expense of the Slav-Macedonians. Such a scenario would result in a finding against the respondent. However, while there are hints in the evidence tending in such a direction, such as the lack of adequate consultation and the perceived warm relationship between the Greek community and the Government, in my opinion the evidence lacks sufficient cogency to establish such a conclusion.

In the result, then, I find that the evidence does not substantiate the complaint. In my opinion, although the circumstances are very different from the Hindmarsh Bridge case, there are some interesting parallels. In that case, the subject matter of the Royal Commission had a distinctive association with the Aboriginal race, and perhaps a unique association but that did not expose race as the true basis of the decision. In the words of the Chief Justice, "it does not disclose that the basis of the decision is a characteristic that appertains generally or uniquely to a particular race". *His Honour found that the basis of the decision was that a declaration had been made under Commonwealth legislation in reliance upon assertions which were later disputed. Applying a similar process of reasoning to the present case, notwithstanding that the directive has an intimate relation to the ethnic origin of the members of the complainant body, I find the true basis of the decision is found in the Government imperative to take action to restore peace and harmony to the community. In my view, it cannot be said that, in the words of the Chief Justice,* "the existence of the racial distinction is the basis of the relevant act in the sense that the act occurred by reason or by reference to the racial distinction". *In other words, the racial distinction implicit in the directive was not a material factor in the making of the relevant decision. The unfortunate impact of the directive on the members of the complainant body was a fortuitous by-product of the performance by the respondent of its duty to advance the peace, order and good government of Victoria attracted by reason of the acts of violence already occurring and the potential for further tension between the Greek and Slav-Macedonian communities. It is immaterial that there may have been less hurtful steps that could have been taken or that the actual steps taken may have been misconceived or have failed to achieve their objective. The fact remains that the impugned conduct was not based on ethnic origin. Ethnic origin was not the reason giving rise to the directive; the need to alleviate community tension was.*

...

Having found this central element of s.9(1) against the complainant, it is unnecessary to consider the other matters that have been in issue between the parties.

Not having been substantiated, the complaint must be dismissed."

What emerges plainly from the Commissioner's reasoning as set out above is that he construed the phrase "based on" in s 9(1) of the Act as being equivalent to other expressions such as "by reason of" or, "on the ground of", commonly found in other anti-discrimination legislation. Those other expressions, not surprisingly perhaps, have generally been held to connote a requirement that there be a causal nexus between the proscribed characteristic and the impugned conduct. The principal issue raised by the applicant in the application before the Court is whether that is a correct interpretation of the phrase "based on" in the context of s 9(1) of the Act. I propose therefore to deal initially with that ground of review.

Is the phrase "based on" in s 9(1) to be interpreted as requiring the existence of a causal nexus?

The phrase "based on" where it appears in a statute is obviously capable of bearing different shades of meaning. It can, of course, be understood as denoting a relationship of cause and effect, either in the traditional "but for" sense, or perhaps in a narrower "substantial and operating cause" sense. The latter seems to have been the interpretation adopted by the Commissioner in the present case. It was that interpretation which led him to conclude that the racial distinction which he recognised as being implicit in the directive was not a material factor in the making of the relevant decision, and, accordingly, that the first element in s 9(1) of the Act had not been established.

There are examples in the decided cases where the phrase "based on" has been treated as synonymous with other expressions which are plainly intended to signify a relationship of cause and effect. In *Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd (supra)* Lockhart J, as a member of a Full Court, construed the expression "by reason of" in the *Sex Discrimination Act* 1984 (Cth) as implying a relationship of cause and effect. More importantly, for present purposes, his Honour, in the context of anti-discrimination legislation, was prepared to treat as interchangeable with that expression the phrase "based on". His Honour stated at 321:

> *"Equal opportunity legislation has also used the expression* "by reason of" *and was considered by the High Court in* Waters v Public Transport Corporation *(1991) 173 CLR 349 per Mason CJ and Gaudron J (at 359) and interpreted in the sense of* "based on" *..."*

His Honour continued at 321-2:

> *"In my opinion the phrase* "by reason of" *in s 5(1) of the* SD Act *should be interpreted as meaning* "because of"*,* "due to", "based on" *or words of similar import which bring something about or cause it to occur. The phrase implies a relationship of cause and effect between the sex (or characteristic of the kind mentioned in s 5(1)(b) or (c)) of the aggrieved person and the less favourable treatment by the discriminator of that person."*

Lockhart J went on to deal with the question whether the test for discrimination under the *Sex Discrimination Act* was whether the complainant would have received the same treatment from the alleged discriminator "but for" his or her sex, or whether the test was subjective in the sense that what is relevant is the defendant's reason for doing an act and not (or perhaps not merely) the causative effects of the act done by the defendant. His Honour concluded that the intention of the defendant was not necessarily irrelevant, and the purpose and motive of the defendant may also be relevant. He observed at 324-5:

> *"A public authority may have a policy which determines its conduct such as the criterion adopted in* Eastleigh *admitted women free of charge to the leisure centre if they were over 60 but not admitting men free of charge until they reached the age of 65. In that case, the criterion was so essentially discriminatory in its nature that evidence of the Council's intention, motive or purpose would have added little or nothing to save the policy from inevitable conflict with the* Sex Discrimination Act *1975 (UK) ... But that does not render evidence of intention or motive irrelevant, though it would bear strongly on its weight.*
>
> *Thus, in some cases intention may be critical; but in other it may be of little, if any, significance. The objects of the SD Act would be frustrated, however, if sections were to be interpreted as requiring in every case intention, motive or purpose of the alleged discriminator ...*
>
> *The search for the proper test to determine if a defendant's conduct is discriminatory is not advanced by the formulation of tests of objective or causative on the one hand and subjective on the other as if they were irreconcilable or postulated diametrically opposed concepts. The inquiry necessarily assumes causation because the question is whether the alleged discrimination occurs because of the conduct of the alleged discriminator; and the inquiry is objective because its aim is to determine on an examination of all the relevant facts of the case whether discrimination occurred. This task may involve the consideration of subjective material such as the intention or even motive, purpose or reason of the alleged discriminator; but its significance will vary from case to case ... Objective, causative and subjective are well-known expressions in various branches of the law but must be used with caution as they can lead to polarisation of thought."*

His Honour continued at 326:

> *"I am not attracted by the proposition (which appears to have been favoured*

> *by the majority of the House in* Eastleigh*) that the correct tests involves simply asking the question what would the position have been* <u>*but for*</u> *the sex (or marital status) of the complainant. The* "but for" *test may be a useful practical guide in many cases ...It is a test to be handled with care as its beguiling simplicity masks the real inquiry that must be conducted ... Provided the* "but for" *test is understood as not excluding subjective considerations (for example, the motive and intent of the alleged discriminator) it may be useful in many cases; but I prefer to regard it as a useful checking exercise to be engaged in after inquiring whether in all the relevant circumstances there has been discriminatory conduct."* (emphasis added)

In *Commonwealth of Australia v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 191 Lockhart J reiterated these views. The case involved a complaint by a member of the Royal Australian Air Force who had been posted to Townsville, and who sought payment of an allowance to assist him in buying a house. Pursuant to a particular Determination the allowance was not payable to a "member without a family". The complainant was single, and claimed that the decision to deny him an allowance discriminated against him on the ground of marital status.

In construing the phrase "by reason of" in the context of s 6(1) of the *Sex Discrimination Act* Lockhart J treated that expression as signifying a relationship of cause and effect. In applying the principles which he earlier had laid down in *Mount Isa Mines Ltd,* his Honour stated at 204:

> *"In the present case an examination of the intention, motive or purpose of the relevant officers of the Defence Force who made the decision refusing HPSEA to Mr Dopking, though not irrelevant, does not carry the matter very far because they simply applied the text of Determination 0509 to Mr Dopking; so that, if the criteria on which that determination is founded are inherently or essentially discriminatory, the decision unfavourable to Mr Dopking will be unlawful. It is the determination itself which holds the key to the case."*

Lockhart J concluded that it had not been established that Mr Dopking had been treated "less favourably" in circumstances that were the same, or not materially different than, the alleged discriminator had treated or would treat other members of the Defence Force of a different marital status. Wilcox J agreed with his Honour, while Black CJ dissented.

The approach adopted by Lockhart J in the context of these decisions provides some support for the second respondent's contention that the phrase "based on" in s 9(1) of the Act should be read as the Commissioner construed it, namely as requiring the existence of a causal nexus

between the elements which it connects. It must be remembered, however, that his Honour was not dealing with that subsection, but with an entirely different statutory formulation in a different Act of Parliament.

The decision of the Full Court of the Supreme Court of South Australia in *Aboriginal Legal Rights Movement Inc v South Australia (No 1) (supra)* is, however, directly in point. The Court was there dealing with s 9(1) of the Act. It is necessary, however, to approach that decision with some caution.

Doyle CJ began his judgment by indicating that what followed was no more than a summary of his reasons for dismissing each claim. His Honour expressly reserved the right to publish more complete reasons at a later time, though he did not ultimately avail himself of that right. The judgment was delivered within a few days of the completion of the argument before the Court. The other members of the Full Court agreed with his Honour's reasons, with Debelle J also expressly reserving the right to publish more complete reasons at a later time.

The passage from the judgment of Doyle CJ upon which the Commissioner seems to have relied requires careful analysis. On one view, he considered the phrase "based on" in s 9(1) as connoting the existence of a causal relationship. His Honour stated at 553:

> *"...and the existence of that racial distinction is the basis of the relevant act in the sense that the act occurred by reason of ... the racial distinction."* (emphasis added)

His Honour's willingness to use the expression "by reason of" as synonymous with the phrase "based on" may be read as support for the view that these words connote a causal nexus, and hence as support for the reasoning of the Commissioner.

However, the matter is more complex than at first appears. Doyle CJ also adopted as synonymous with the phrase "based on" in s 9(1) the expression "by reference to". That expression does not, of itself, suggest a relationship of cause and effect. It suggests rather a relationship of a different and broader kind. The links between the elements connected by this expression must, no doubt, be real and tangible, but not necessarily causal in nature. To ask whether the manner in which the complainant was treated is in any way referable to his race, colour, descent or national or ethnic origin is not necessarily to ask whether these

characteristics "caused" the impugned conduct. Indeed, the latter question almost invites an inquiry into the motives underlying the conduct – an inquiry which the authorities suggest should not be part of a consideration of the operation of provisions of this type.

A careful analysis of his Honour's judgment suggests that he did not consider that the phrase "based on" should be confined to expressing a relationship of cause and effect, whether in a "but for", or any other sense. His willingness to use the expression "by reference to" as interchangeable with the phrase "based on" suggests that he may have had in mind a broader, and different, connotation of that phrase.

As noted earlier, in *Australian Medical Council v Wilson (supra)* Heerey J expressly endorsed the approach adopted by Doyle CJ in *Aboriginal Legal Rights Movement v South Australia (No 1)*. His Honour did not, however, provide any indication as to whether he viewed the remarks of Doyle CJ as having limited the expression "based on" in s 9(1) to a relationship of cause and effect. Sackville J in the same case also analysed closely the operation of that subsection. His Honour observed at 76:

> *"Dr Siddiqui must demonstrate, inter alia, that the distinction imposed by the AMC was* based on *one of the criteria specified in the RD Act …*
>
> *The most obvious case of a distinction based on national origin is one where a distinction is imposed expressly* by reference to *a person's national origin. If for example, a medical college explicitly denied admission to all persons of Indian origin, that act, or the distinction involved in the act, would clearly be* based on *national origin. (It might also be based on other grounds covered by s 9(1), but that is not presently relevant.) Even where the act or distinction is not* expressly *based on national origin, if the criterion* actually applied *by the alleged discriminator is national origin that is enough to attract the legislation."* (emphasis added)

There is nothing in this passage to suggest that his Honour considered that there must be a relationship of cause and effect between the racial characteristic and the impugned conduct in order to give rise to a contravention of s 9(1) of the Act.

His Honour went on, however, to state at 77:

> *There was nothing in the evidence to suggest that, even though the AMC did not impose any distinction expressed by reference to the national origin of candidates, nonetheless the "*true basis*" for requiring OTDs to undertake the examination was their national origin. The criterion applied by the AMC was not a subterfuge for drawing a distinction between particular candidates*

> *for registration, the true basis for which was their differing national origin. No suggestion was made, for example, that persons of Indian origin were at any disadvantage,* by reason of their national origin, *in gaining entry to or graduating from Australian or New Zealand medical schools."* (emphasis added)

His Honour's use of the expression "by reason of" in the passage set out above suggests that he may view the phrase "based on" in s 9(1) as connoting the existence of a causal nexus. That may not, however, be an exhaustive statement of the limits of its meaning.

In a decision of the Human Rights and Equal Opportunity Commission constituted by Commissioner Castan QC, *John Bell v Aboriginal and Torres Strait Islander Commission & Ors* (unreported, 11 August 1993, H92/003) s 9(1) was construed as though the phrase "based on" required a finding of causation. By implication the Commissioner seems to have concluded that no other relationship could trigger the operation of s 9(1) of the Act. It appears, however, that the issue was simply not debated before the Commissioner.

In *Re East & Ors; ex parte Nguyen* [1998] HCA 73, a decision of the High Court reasons for which were delivered on 3 December 1998, s 9(1) of the Act was carefully considered. The issue was whether that subsection provided a basis for overturning a sentence of imprisonment imposed upon the applicant by the Chief Judge of the County Court of Victoria. In effect, the applicant claimed that the failure of a magistrate, and of the Chief Judge, to insist that he have an interpreter when he, and his lawyers, had never asked for one, amounted to unlawful conduct under s 9 of the Act.

In a joint judgment all members of the Court (other than Kirby J) observed at par 28:

> *"To identify from these circumstances any act of the magistrate or the Chief Judge as an act* "based on race"*, within the meaning of sub-s (1) ... involves torturing the language of the statute."*

Kirby J, who joined in the order dismissing the applicant's motion, but delivered a separate judgment, noted that s 9 was succeeded by a number of provisions rendering it unlawful to do certain things in the fields of access to places or facilities, dealing in land, housing or other accommodation, providing goods and services, affording membership of trade unions, providing employment, publishing advertisements, and inciting unlawful acts.

His Honour observed that it was contended on behalf of the applicant that both the magistrate

and the Chief Judge had acted unlawfully because each had made a distinction which affected him based on an inherent characteristic of his race, descent or national or ethnic origin, namely his lack of facility in the English language when compared to the advantages he would have enjoyed if he had been a native English speaker. The distinction was alleged to be in the failure to ensure that, in both courts, the applicant had the facility of an interpreter. The applicant contended that there had been both direct discrimination under s 9(1), and indirect discrimination under s 9(1A) of the Act.

Kirby J stated at par 63:

> *"Allowing fully for the purpose of s 9(1A) to facilitate proof of the basis for a discriminatory distinction alleged, the sub-section is still aimed at establishing that the person whose actions are alleged to be unlawful has based the acts complained of on the basis of the other person's* "race, colour, descent or national or ethnic origin". *There appears to be no evidence whatever that, in this case, any such considerations entered into the decisions either of the magistrate or of Chief Judge Waldron."*

Though the judgment of the High Court does not deal directly with the question whether the phrase "based on" is to be construed in the sense of requiring a causal nexus, or whether it should carry a wider meaning of the kind for which the present applicant in the proceedings before me contends, the passage in the judgment of Kirby J cited above seems to me to provide tacit support for the wider view. The use by his Honour of the expression "any such considerations entered into the decisions" carries with it the same broad and general connotation as does the expression "by reference to". It is not the language of cause and effect.

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

What is established by the authorities is that anti-discrimination legislation should be regarded as beneficial and remedial legislation. It should, therefore, be given a liberal construction. I am conscious of the fact that "the task remains one of statutory construction" and a court "is not at liberty" to give such legislation "a construction that is unreasonable or unnatural" – see *IW v The City of Perth* (1997) 191 CLR 1 at 12 per Brennan CJ and McHugh J. See also *Commonwealth Bank of Australia v Human Rights and Equal Opportunity*

Commission (1997) 80 FCR 78 at 88 per Davies J. There is, however, nothing "unreasonable or unnatural", in my view, in treating as encompassed within the phrase "based on" the meaning of "by reference to", rather than the more limited meaning of "by reason of".

As I indicated earlier, it is obvious that the phrase "based on" is capable of bearing different shades of meaning. It should not, in my opinion, be read in a manner which would tend to defeat the objectives which underlie the statute. Those objectives are to be ascertained from its nature, its scope, and its terms. It seems to me, with respect, that Kirby J expressed the relevant principles correctly in *IW v City of Perth* at 52:

> *"Those who are alleged to have acted in an unlawful and discriminatory manner are entitled to defend themselves and to raise every available legal argument, as the respondents have done here. That is what the rule of law permits. But unless courts are willing to give such legislation the beneficial construction often talked about, it seems likely that the legislation will continue to misfire. That risk may be greatest when those who invoke the legislation comprise individuals or groups in minorities most in need of protection but least likely to strike a sympathetic chord."*

Similar considerations seem to me to underlie the reasoning of Deane and Gaudron JJ in *Banovic* where, at 176, their Honours rejected the contention that there could be no liability under the *Anti-Discrimination Act* 1977 (NSW) without proof of an intent on the part of the defendant to discriminate, or at least, proof that this was the motive which lay behind the impugned conduct. Dawson J at 184 agreed that the relevant section should not be applied subjectively.

I am fortified in my view that the phrase "based on" in s 9(1) of the Act should be construed as encompassing the broader, non-necessarily causative, relationship expressed in the phrase "by reference to" because the words "based on" are taken directly from the definition of "racial discrimination" which appears in Art 1.1 of the Convention, and not from any other anti-discrimination statute. What Parliament did when it enacted the subsection was to convert that language into part of one of the elements of a designated form of unlawful conduct. It did so by adding to that definition what is, in substance, an *actus reus*: "It is unlawful for a person to do any act involving" what is defined as "racial discrimination". To combine the type of language typically used in a treaty (or other international instrument) which may, itself, be subject to special rules of interpretation under the Vienna Convention on the Law of Treaties, with words which are intended to signify the *actus reus* of unlawful

conduct, is not conducive to drafting in clear and unambiguous language the elements of what is, in substance, a statutory offence.

It is important to note that all subsequent prohibitions contained within Part II of the Act, apart from that contained within s 9(1), use the same type of language typically found in other anti-discrimination statutes – namely "by reason of". See for example ss 11, 12, 13, 14, 15 and 16 of the Act.

That of itself may suggest that the legislature had in mind a different meaning for the phrase "based on" in s 9(1) than that normally conveyed by the expression "by reason of". Considerations of constitutional validity may, of course, have dictated a perceived need to adhere closely to the language of the Convention in s 9(1). It may be dangerous, therefore, to carry this argument too far.

The Act was amended in 1990 with the introduction of s 9(1A). That subsection is in the following terms:

> *(1A) Where:*
>
> *(a) a person requires another person to comply with a term, condition or requirement which is not reasonable having regard to the circumstances of the case; and*
>
> *(b) the other person does not or cannot comply with the term, condition or requirement; and*
>
> *(c) the requirement to comply has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life;*
>
> *the act of requiring such compliance is to be treated, for the purposes of this Part, as an act involving a distinction based on, or an act done by reason of, the other person's race, colour, descent or national or ethnic right."* (emphasis added)

In enacting s 9(1A), which deals exclusively with "indirect discrimination", the legislature distinguished expressly between the phrase "based on", and the expression "an act done by reason of" the "other person's race, colour, descent or national or ethnic origin". The two expressions are separated by the disjunctive "or". Ordinary canons of construction might suggest therefore that the legislature intended that the phrase "based on" in s 9(1) should bear a different meaning from the expression "by reason of" contained within s 9(1A), both

subsections of the same section of the Act.

There is no doubt that the expression "by reason of" connotes a relationship of cause and effect. It has been authoritatively so held. The legislature, having chosen to use the expression "based on" as an alternative to the expression "by reason of", is presumed to have done so in order to signify that these two expressions are not simply interchangeable, but mean different things. This conclusion is strengthened by the operation of s 9(4) of the Act. That subsection is designed to ensure that nothing in the succeeding provisions of Part II of the Act limits the generality of s 9. Thus if the succeeding provisions in Part II are couched in the language of causal nexus, that does not limit the wider links encompassed within the expression "based on" in s 9(1).

The words "based on" are certainly capable of being construed in a manner which does not imply a relationship of cause and effect between whatever it is which is connected by those words. In *Cosco Holdings Pty Ltd v Do* (1997) 150 ALR 127 Northrop J dealt with the proper construction and application of s 170DE(1) of the *Industrial Relations Act* 1988 (Cth). That subsection provided:

> *"An employer must not terminate an employee's employment unless there is a valid reason, or valid reasons, connected with the employee's capacity or conduct or* based on *the operational requirements of the undertaking, establishment or service."* (emphasis added)

His Honour stated at 136:

> *"In its context in the Convention and in s 170DE(1) the word* "based" *is used as a verb. In the* Shorter Oxford English Dictionary*, the verb* "base" *is given the meaning:* "1. To make a foundation for; 2. to place on or upon a foundation or logical basis." *In the* Macquarie Dictionary *the verb* "base" *is given the meaning:* "19. To make or form a base or foundation for. 20. to establish, as a fact or conclusion (fol. by on or upon)." *The word* "on" *is a preposition expressing a relationship with some other fact, matter or opinion. Here, the phrase* "based on" *is used as describing a connection between a subject matter, the reason for termination, and an object, the operational requirements of the employer. The operational requirements of the employer constitute the foundation upon which the termination of employment must be based."*

Lindgren and Lehane JJ agreed with the orders proposed by Northrop J, and substantially with his Honour's reasons. The phrase "based on" was not treated in the context of the *Industrial Relations Act* as expressing a narrow and limited relationship of cause and effect. Rather these words were treated as encompassing a broader relationship involving a

connection between two concepts, one of which is referable to the other.

Returning to anti-discrimination legislation, in *Fulcher v Hilt* (1985) 61 ALR 359 Wood J of the Supreme Court of New South Wales dealt with an application under the *Extradition (Commonwealth Countries) Act* 1966 to review an order of a magistrate ordering the extradition of the applicant to New Zealand on charges of kidnapping and aggravated robbery. One argument advanced on behalf of the applicant was that the order for his extradition breached s 9 of the Act. Wood J stated at 367:

> *"In my opinion, this submission is without foundation. Sections 9 and 10 of the* Racial Discrimination Act *are concerned with discrimination, and inequality of rights, referable to differences in race, colour, descent or national or ethnic origin. The provisions of Parts II and III of the* Extradition Act *do not confer rights, or expose persons to extradition, upon the basis of their race, colour, descent or national or ethnic origin. Each Part applies to persons within its sphere of application equally, regardless of their race, colour, descent or national or ethnic origin. They differ only in their point of reference, that is whether the deportation is between Australia and New Zealand, or between Australia and a declared Commonwealth country. Thus, a person who is to be extradited to New Zealand is dealt with in the same way, and possesses the same rights and liabilities, as a person of every other race, colour, descent or national or ethnic origin."* (emphasis added)

Once again it may be seen that his Honour did not treat the words "based on" in any narrow sense requiring the existence of a causal nexus, but rather as having the connotation "by reference to".

In *Commonwealth v Human Rights and Equal Opportunity Commission* (1998) 158 ALR 468 Wilcox J dealt with an application to review a decision made by the Commission which had upheld a complaint made by a helicopter pilot who had sought entry into a particular Army Specialist Service Officer Pilot Scheme. He was rejected because he was 37 years old, and eligibility requirements stipulated that applicants be aged between 19 and 28 years. The critical provision was s 3 of the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) which when combined with Regulation 4(a)(1) of the relevant regulations defined "discrimination" as *inter alia* "any distinction … made on the basis of …age". (emphasis added). There was, of course, no dispute that the distinction made by the Commonwealth was based on age.

In dismissing the application for review, his Honour observed at 482:

> *"The term* "based on" *requires more than a logical link. The* Macquarie Concise Dictionary *gives, as the meaning of the verb* "base" *when followed by* "on" *or* "upon", "to establish, as a fact or conclusion". *So the distinction, exclusion or preference must be established upon the inherent requirements of the particular job. The correlation must be, at least, close.*
> *...*
>
> *In the present case, there are policy reasons for requiring a tight correlation between the inherent requirements of the job and the relevant* "distinction", "exclusion" *or* "preference". *Otherwise, as Mr O'Gorman pointed out, the object of the legislation would readily be defeated. A major objective of anti-discrimination legislation is to prevent people being stereotyped; that is, judged not according to their individual merits but by reference to a general or common characteristic of people of their race, gender, age etc, as the case may be. If the words* "based on" *are so interpreted that it is sufficient to find a link between the restriction and the stereotype, as distinct from the individual, the legislation will have the effect of perpetuating the very process it was designed to bring to an end. So it is not appropriate to reason that, because extreme fitness is an inherent requirement of the job of an SSO pilot, and younger pilots tend to be more fit than older pilots, therefore the requirement that SSO pilots be under 28 years of age on appointment is* "based on" *the requirement of fitness. Unless there is an extremely close correlation between the selected age and the fitness requirement, so that the age may logically be treated as a proxy for the fitness requirement, the legislation will have the effect of damning individuals over 28 years by reference to a stereotypical characteristic (less physical fitness) of their age group."*

This is not the language of "causal nexus". The requirement is one of sufficient connection. That there must be a close relationship between the designated characteristic and the impugned conduct is not in doubt – it is the nature of that relationship which is critical.

To read the phrase "based on" in s 9(1) as meaning only a relationship of cause and effect would be likely to significantly diminish the scope for protection which is afforded by that subsection. It is always possible to argue that the sole reason why the impugned conduct occurred had nothing to do with its essentially discriminatory nature, but resulted from some wholly laudatory motive. To take but one example, during the Second World War, after Pearl Harbour, President Roosevelt signed an Executive order requiring all Americans of Japanese ancestry living on the West Coast of the United States to be interned in what the President himself later described as "concentration camps". Congress gave this order the force of statute. The motive behind this edict was to ensure that in the event of an invasion by Japan, the defence forces would not be hampered by the invaders donning civilian clothes in order to remain undetected. The validity of this statute was upheld in *Korematsu v United*

States 323 US 214 (1944) by a 5-4 majority of the Supreme Court.

It is difficult to see how, or why, a law which operates in terms against a single ethnic group only, and which requires tens of thousands of their number to be interned for no reason other than their ethnic origin, should not be said to violate a provision such as s 9(1) of the Act. Merely because the motive for, and hence the "cause" of the making of , such an order is said to be military necessity, rather than a desire to discriminate, provides no justification for excluding such conduct from the ambit of such legislation. It is of course possible that the statute itself will provide for a defence of reasonable justification, as s 9(1A) does, where indirect discrimination only is in issue. Section 9 makes no provision, however, for any such defence in the context of direct discrimination under s 9(1). It is a nice question whether in an appropriate case the doctrine of necessity would operate to dispense with the obligation to comply with the terms of the statute – see F Bennion, *Statutory Interpretation*, (3rd ed) 1997 at 882. *Korematsu* seems not to have been such a case.

Korematsu is generally regarded as one of the United States Supreme Court's less distinguished contributions to jurisprudence. One can readily think of other, less extreme, examples where laudatory motives might be invoked to justify acts which are essentially discriminatory in nature. This can be done simply by adopting an analysis which focuses upon the "cause" of the impugned conduct which is then found to be something other than race. Almost of necessity questions of motive are thereby introduced, notwithstanding the admonition, repeatedly stressed, that the intent or motive with which an essentially discriminatory act is performed is irrelevant.

An example of the dangers of permitting questions of motive to intrude into proscriptions against discrimination based on race is to be found in *Buchanan v Warley* 245 US 60 (1917). There the Supreme Court overturned the Court of Appeals of Kentucky and invalidated a law forbidding Negroes from buying homes in white neighbourhoods. The Court observed at 81:

> *"It is urged that this proposed segregation will promote the public peace by preventing race conflict. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."*

In *Banovic (supra)* their Honours Deane and Gaudron JJ at 176 demonstrated that they were

acutely conscious of the dangers of permitting intention or motive to intrude into the determination of whether acts, essentially discriminatory in their nature, breach anti-discrimination legislation. They cited with approval certain observations of Lord Goff in *R v Birmingham City Council; ex parte Equal Opportunities Commission* [1989] AC 1155 at 1193-4. In rejecting as irrelevant intention or motive as a condition of liability his Lordship explained that if it were otherwise:

> *"... 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 same point was made by Mason CJ and Gaudron J, with whom Deane J agreed, in *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 359. The case concerned a provision of the *Equal Opportunity Act* 1984 (Vic) which made it unlawful for a person who provides goods or services to discriminate against another person "on the ground of" status. The complainants, a number of disabled individuals, alleged that the Public Transport Corporation had discriminated against them by removing conductors from some trams, and introducing "scratch tickets" for use on public transport. Their Honours held that the relevant provision did not require an intention or motive to discriminate. So did Kirby J in *IW v City of Perth (supra)* at 59. McHugh J did not share these views – see *Waters* at 400-1 where his Honour stated:

> *"The words* "on the ground of the status or by reason of the private life of the other person" *in s. 17(1) require that the act of the alleged discriminator be* actuated *by the status or private life of the person alleged to be discriminated against. I am unable to accept the statement of Lord Goff in* Reg. v. Birmingham City Council: Ex Parte Equal Opportunities Commission *[1989] A.C. 1155, at pp. 1193-1194, and the statements of Deane and Gaudron JJ. In* Banovic *(1989) 168 C.L.R., at pp. 176-177 concerning intention or motive to discriminate if they are intended to suggest that it is not a necessary condition of liability that the conduct of the alleged discriminator (*"the discriminator") *be actuated by status or private life in a provision such as s. 17(1). With great respect to Deane and Gaudron JJ., I think that the examples given by them in* Banovic *as to intention or motive not being a necessary condition of liability are cases which are caught by the concept of indirect discrimination which fall within s.17(5). The words* "on the ground of" *and* "by reason of" *require a causal connexion between the act of the discriminator which treats a person less favourably and the status or private life of a person the subject of that act (*"the victim"). *The status or private life of the victim must be at least one of the factors which moved the discriminator to act as he or she did. Of course, in determining whether a person has been treated differently* "on the ground of" *status or private life, the Board is not bound by the verbal formula which the discriminator has used. If the reason for the use of the*

> *formula was that it enabled a person to be treated differently on the ground of status or private life, then* "the ground of" *the act of the discriminator was the status or private life of the victim (See* Umina Beach Bowling Club v. Ryan *[1984] 2 N.S.W.L.R. 61, at p. 66, per Mahoney J.A.). But if the discriminator would have acted in the way in which he or she did, irrespective of the factor of status or private life, then the discriminator has not acted* "on the ground of the status or by reason of the private life" *of the victim. Likewise, if the discriminator genuinely acts on a non-discriminatory ground, then he or she does not act on the ground of status or private life even though the effect of the act may impact differently on those with a different status or private life."*

The position under anti-discrimination laws in other countries sheds little light upon the present problem. It may at least be said that there appears to be nothing in the jurisprudence of any of the United States, England, Canada or New Zealand, which suggests that the interpretation of the phrase "based on" in s 9(1) of the Act for which the applicant contends is in any way inappropriate.

In the United States, the *Constitution,* through the 5th and 14th Amendments, provides what is known as the "equal protection" guarantee. The "equal protection" clause in the 14th Amendment reads as follows:

> *"No state shall .... deny to any person within its jurisdiction the equal protection of the laws."*

By its terms, that clause applies only to State and local governments. There is no identical clause governing Federal actions. However, classifications established by Federal law are reviewed under the implied equal protection guarantee of the due process clause contained in the 5th Amendment.

A core purpose of the 14th Amendment was to do away with all governmentally imposed discrimination based on race – see *Palmore v Sidoti* 466 US 429 (1984) at 432. The equal protection guarantee does not reject the government's ability to classify persons or "draw lines" in the creation and application of laws, but it does guarantee that those classifications will not be based upon impermissible criteria or arbitrarily used to burden any particular group of individuals. A legislative act which classifies persons in terms may be subject to judicial review under the equal protection guarantee. Courts look carefully at any racial classification, because:

> *"Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns."* (*Palmore v Sidoti (supra)* at 432)

There are three standards of review used in equal protection decisions. The most rigorous standard is the "strict scrutiny" test. When courts consider classifications involving race or national origin they apply this test. This standard of review was established by Justice Black in *Korematsu v United States (supra)* at 216:

> *"[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."*

Under this standard of review the Court requires the government to show that it is pursuing a "compelling" or "overriding" end – one whose value is so great that it justifies the limitation of fundamental constitutional values.

The *Constitution* is not the only source of protection against discrimination. Statutes have been enacted to prevent discrimination based on race, sex, religion, age, national origin and, in some instances, sexual preference.

The *Civil Rights Act* of 1964 protects constitutional rights in public facilities and public education. It prohibits discrimination in federally assisted programs. This Act was amended by the *Civil Rights Act* of 1991 which provides for the elimination of discrimination in the private and Federal workplace on the grounds of sex, race, religion, and national origin. The text of the Act illustrates that it forbids discrimination "on the ground of" certain characteristics. Whether or not this choice of words connotes that the motivation behind an act is central to the determination whether that act violates the statute is open to question. At the very least, the expression "on the ground of" suggests that, in the United States, there must be a causal link of some type between the exclusion from participation in, or the denial of benefits of the particular program, and the characteristic of race, colour, religion or national origin.

The position in England is relatively straightforward. The principal anti-discrimination statute is the *Race Relations Act* 1976 (UK). That Act prohibits racial discrimination and victimisation in the fields of employment and education, in the provision of goods, facilities, services and premises. It applies both to direct and to indirect discrimination. Direct discrimination is defined in s 1(1)(a) which states in part:

> *"(1) A person discriminates against another in any circumstances relevant*

for the purposes of any provision of this Act if –

> *(a) on racial grounds he treats that other less favourably than he treats or would treat other persons."*

"Racial grounds" is defined in s 3 as meaning any of the following grounds, namely colour, race, nationality or ethnic or national origin.

The test of whether there is direct discrimination is objective, and causally based. Such discrimination will be found if at least one significant cause was shown to have been a racial ground. Discrimination on racial grounds does not require an intention to discriminate on the part of the alleged discriminator. It does not depend on the discriminator's subjective reasons for his conduct. It is sufficient if a person is treated less favourably than another because of his race, or to use the language in Halsbury's *Laws of England*, Vol 4 (2) para 151:

> *"If the complainant would have received the same treatment as others* "but for" *his race."*

Halsbury goes on to state:

> *"It is no defence for an alleged discriminator to show that he discriminated against the complainant to prevent industrial unrest by other prejudiced employees, objectively in the best interests of his business, in the interests of safety and good administration , or from chivalry and courtesy, or because of customer preference, or to save money, or to avoid controversy. Although the alleged discriminator's motives are not conclusive, they may be relevant as substantial evidence of why an action was taken, and therefore as evidence of the grounds on which it was taken. Race need not be the only ground for the act complained of. It is sufficient if a breach of the Act is a substantial and effective cause of the defendant's actions. It is not sufficient to consider whether race is any part of the background or is a* causa sine qua non *of what happens. The question which has to be asked is whether race is the activating cause of what has happened."*

Given the language in which the statute is expressed, this conclusion is scarcely surprising. It is of little assistance, however, in construing the very different phrase "based on" in s 9(1) of the Act.

Canadian anti-discrimination law is to be found primarily in two statutes:

(1) The Canadian *Charter of Rights and Freedoms*; and

(2) The *Human Rights Act* 1976.

Interestingly, the section of the *Charter of Rights and Freedoms* entitled "Equality rights" uses the expression "based on". It provides:

> *"15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability ..."* (emphasis added)

The *Human Rights Act* 1976 guarantees individuals equal opportunity. The stated purpose of the Act seeks to protect persons from discriminatory practices "based on" ethnic origin. It reads as follows:

> *"2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an equal opportunity to make for themselves the lives that they are able and wish to have, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted."* (emphasis added)

That is the only instance in which the Act uses the phrase "based on" in describing that which is prohibited. It goes on to describe the proscribed discrimination in terms of "prohibited grounds of discrimination". The text of the Act is as follows:

> *"3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted."*

The Act makes further mention of the concept "prohibited ground of discrimination" in ss 5-16 where it describes a series of specific discriminatory practices (involving, for example, supply of goods, employment etc.) declaring that "it is a discriminatory practice to [do X behaviour] on a prohibited ground of discrimination" (see ss 5-16).

It can be seen, therefore, that Canadian legislation uses both the expressions "based on", and "on a prohibited ground" in describing those acts of discrimination which are forbidden. It appears that no court has yet specifically addressed the meaning of "based on" as used in s 2 of the *Human Rights Act*. There is little doubt, however, that the expression "on a prohibited

ground" means "by reason of" a prohibited ground of discrimination - *Re Canadian National Railway Co v Canadian Human Rights Commission* (1983) 147 DLR (3d) 312 at 333 per Le Dain J.

For the most part, those courts which have considered the Canadian *Human Rights Act* have determined that it extends beyond intentional discrimination and comprehends unintentional and adverse effect discrimination as well – see for example *Re Bhinder v Canadian National Railway Co* (1985) 23 DLR (4th) 481 at 501 per McIntyre J.

The tenor of the Canadian decisions illustrates the possible usages which may be applied to the phrase "based on". That expression appears sometimes to be used as synonymous with "by reference to", and sometimes as synonymous with "because of". In *Andrews v Law Society (British Colombia)* [1989] 1 SCR 143 at 173 McIntyre J defined discrimination in the following terms:

> *"... discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed."* (emphasis added)

It appears from the passage set out above that his Lordship would regard the phrase "based on" as meaning "by reference to", though it might also be read as "because of". The last sentence could easily read "distinctions by reference to personal characteristics … rarely be so classed".

New Zealand has two principal anti-discrimination statutes – the *Human Rights Act* 1993 and the *Bill of Rights Act* 1990.

The *Bill of Rights Act* 1990 contains a section entitled "Non discrimination and Minority Rights". Section 19 is couched in terms of a right to freedom from discrimination "on the ground of" colour, race, ethnic or national origins, sex, marital status or religious or ethical belief. The *Human Rights Act* 1993 describes unlawful discrimination in terms of

"prohibited grounds of discrimination". Section 22 of the Act, in proscribing discrimination in employment, describes unlawful actions as those done "by reason of any of the prohibited grounds".

Interestingly, s 25(1) of the Act provides an exception to s 22 and uses the words "by reference to" when describing characteristics which can be the subject of permissible restrictions. That subsection provides as follows:

> *"(1) Nothing in s 22 of this Act shall apply to any restrictions on the employment of any person on work involving the national security of New Zealand –*
>
> *(a) by reference to his or her –*
>
> *(i) religious or ethical belief; or ..."* (emphasis added)

Section 26 provides another exception in relation to work performed outside New Zealand, but it uses the words "based on" instead of "by reference to" in its text:

> *"Nothing in s 22 of the Act shall prevent different treatment based on sex, religious or ethical belief ..."* (emphasis added)

It seems, therefore, that in New Zealand the phrase "based on" is regarded as being interchangeable with the expression "by reference to". However, neither expression is regarded as being significantly different from "by reason of".

Returning then to the position in Australia, it must be remembered that s 9(1) of the Act is, in truth, *sui generis*. It is a provision of general application. Within its ambit of "public life", it is a comprehensive section proscribing racial discrimination. It is subject neither to exceptions nor to defences. In this regard, it stands in stark contrast to s 9(1A), and the other proscriptions in the Act.

I do not believe that s 9(1) should be construed in such a way as to confine its proscription of racial discrimination to circumstances where there is an element of improper motive in the "distinction" etc. The Commissioner himself stated that his inquiry was not one as to motive. That statement was undoubtedly correct, having regard to the state of the authorities. However, in construing s 9(1) as though the expression "based on" required proof of a causal nexus, the Commissioner seems to me, with great respect, to have permitted considerations of motive to intrude into his determination, albeit indirectly, and under the

rubric of causation.

The Commissioner's finding that the Premier's directive had been issued to promote peace and harmony, and for no other purpose, did not, in my view, dispose of the threshold question whether issuing that directive constituted an act involving a distinction etc "based on … descent … or ethnic origin". Had the Commissioner construed the words "based on" in s 9(1) as though they meant "by reference to", it is possible that he would have been satisfied that the complainant had discharged the onus which it bore in relation to the first element of the subsection. The Commissioner did, after all, find discrimination "implicit" in the directive. Had that first element been satisfied, the Commissioner would then have been required to turn to the second element, namely whether the act in question had the purpose or effect therein set out. That might have posed considerable difficulties for the complainant since the hurdle raised by the second element may well be one which it is not easy to overcome. The Commissioner did not, however, reach that point.

This being an application for judicial review, it would not be proper for present purposes to say any more than that, upon a proper construction of s 9(1), it would be open to the Commissioner to find that the Premier's decision to issue the directive was an act involving a distinction based on descent or ethnic origin.

There was material before the Commissioner to suggest that though Macedonian belongs to the Slavic group of languages, it was not "linguistically accurate" to refer to Macedonian as a Slavonic language. According to this material, to require the Macedonian language to be identified always by reference to its language group is linguistically inaccurate because it assumes that there is another Macedonian standard language when the evidence suggests that there is not. There was also evidence before the Commission to suggest that no other language spoken by any other ethnic group had been required to be identified by affixing to it a suffix describing the family to which it belonged whether with the consent of, or against the will of, those who speak that language.

The material before the Commission suggested that the Premier's directive had produced a "distinction" in the treatment accorded to a particular ethnic group. All other ethnic groups were entitled to have their language described by Government Departments and agencies by its linguistically accepted and standard name. This ethnic group was not so entitled.

Subsection 9(1), upon its proper construction, entitles individuals or groups not to be singled out for identification by Government Departments or agencies by reference to their descent or ethnic origin, at least where other individuals or groups are not so treated. The Commissioner's finding that the directive was "based on a desire to preserve peace and harmony" may well have been unexceptionable. For present purposes I am prepared to assume that it was correct. However, that finding is irrelevant if it be established that the distinction imposed by the directive in the treatment of the Macedonian language was "based on", (in the sense of made "by reference to") the ethnic origin or descent of those who spoke that language.

The facts of *Australian Medical Council v Wilson (supra)* illustrate the point. In that case it was held that the restriction imposed by the Australian Medical Council on the admission to practice in Victoria of overseas trained doctors was not based on ethnic or national origins, but on the fact that those applicants were graduates of overseas medical schools, irrespective of their ethnic or national origin. A person of Australian national origin who graduated from an overseas medical school would be in precisely the same position – see Sackville J at 77. The same cannot be said in this proceeding. Persons whose descent is other than Slavic who may identify as "Macedonian" (eg ethnic Greeks from that part of Northern Greece historically called Macedonia) are not affected by the directive. Nor are people of an ethnic origin other than Macedonian.

The terms of the directive make express reference to the "language spoken by the people living in FYROM, or originating from it". That language is the language spoken by ethnic Macedonians. Moreover, the terms of the directive make express reference to the descent of those who speak that language – "Slavonic", as the basis for the distinction. In making the distinction by adding the suffix "Slavonic" to the designation "Macedonian" it is at least arguable that the criteria which are applied are those of descent and ethnic origin. Whether or not that is in fact the case is a matter for the Commission, and not for the Court. It is, however, a matter with which the Commission must deal correctly, and in accordance with the terms of the statute.

It is not correct, in my view, to say that in assessing the "true basis" of the distinction brought about by the directive it is relevant to consider the second respondent's purpose in having

issued it. That simply draws the assessment back to motive. It is an approach which conflicts with the views expressed by Mason CJ and Gaudron J in *Waters v Public Transport Corporation (supra);* by Kirby J in *IW v City of Perth (supra);* by Deane, Gaudron and Dawson JJ in *Australian Iron and Steel Pty Ltd v Banovic (supra)*, and by Sackville J in *Australian Medical Council v Wilson (supra)*.

The observations of Lockhart J in *Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd (supra)* as to the use which may be made of evidence of intent and motive in the limited circumstances identified by his Honour do not, in my view, provide any support for the approach taken by the Commissioner in the present case.

I turn then to the remaining grounds of appeal which were fully argued before me. I believe that it is desirable that I say something about them because the consequence of my finding in relation to the principal ground will be that the matter must be remitted to the Commission for further consideration.

The irrelevant considerations ground

The primary thrust of this ground is that the Commission took into account matters irrelevant to the decision whether the Premier's directive contravenes the Act, namely that the Victorian Government was motivated by a desire to ease tension between two communities in conflict, and to attempt to bring about peace and harmony between those communities.

To the extent that this ground is predicated upon the Commissioner's having erred in law in having construed the phrase "based on" in s 9(1) of the Act as though that phrase required a relationship of cause and effect between the racial characteristic, and the fact of issuing the directive, it is merely a reiteration of the matters already dealt with in this judgment. The applicant complains that the Commission also erred by taking into account an additional matter which was irrelevant to the decision whether the Premier's directive contravened the Act, namely that there was insufficient evidence before the Commission to establish "bad faith" and an "ulterior agenda" on behalf of the Victorian Government. There is, in my opinion, no substance in this contention.

The Commissioner was entitled to find, as he did, that the material before him did not disclose "bad faith" or "an ulterior agenda" on the part of the Victorian Government. That

finding seems to have been viewed by the Commissioner as part of his general analysis of the issue of causation, or the "true basis" (in a cause and effect sense) of the directive. However, the real source of any reviewable error on the part of the Commission lay in the erroneous construction which it adopted of s 9(1), and not in its having taken into account the insufficiency of evidence in relation to the matters in question.

The onus of proof ground

The applicant contended that in deciding that for the complainant to discharge its onus of proof in relation to the "true basis" of the decision the complainant must meet an onus higher than the balance of probabilities and must satisfy the test outlined in *Briginshaw v Briginshaw* (1938) 60 CLR 336, the Commission erred in law.

The passage in the Commissioner's reasons for decision which is said to demonstrate the existence of this error is that which was set out earlier in this judgment. However, it bears repeating. The Commissioner stated:

> *"What then, was the true basis for the directive? A consideration which may be of critical importance is that the onus of substantiating the complaint rests upon the complainant. Applying the test enunciated in* Briginshaw v Briginshaw *(1938) 60 CLR 336, if a finding in support of the complainant means that the Government must be found to have deliberately discriminated against one section of the community in order to favour another section and therefore be deserving of wide condemnation for such a lack of probity in office, then such a finding would surely call for proof based on more than a mere balance of probabilities."*

The applicant submitted that, properly understood, this passage suggested that the Commissioner had erred in several ways. In the first place, a finding that the second respondent had contravened s 9(1) of the Act could not possibly be described as one which would render the Victorian Government deserving of wide condemnation for lack of probity in office. A finding that there has been a contravention of the subsection may be made notwithstanding the absence of any intent to discriminate, and in circumstances where the motives of the government are, in fact, laudatory. It was not appropriate, therefore, to approach the fact finding task as though the test enunciated in *Briginshaw* had any application to that task.

A second error which the particular passage was said to reveal lay in the stated assumption of the Commissioner that there was a standard of proof higher than that of "a mere balance of

probabilities". In truth, it was contended, there are only two standards of proof recognised in our law – that of "beyond reasonable doubt" in criminal cases, and that of "the balance of probabilities" in civil cases. Contrary to the Commissioner's finding, the *Briginshaw* principle does not recognise any intermediate standard of proof. It merely provides guidance as to how the civil standard of proof is to be approached when serious allegations are made in the course of civil proceedings.

In *Briginshaw* Dixon J stated the famous principle at 361-362. His Honour said:

> *"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 inferences. 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."*

The applicant drew attention to the observations of their Honours Deane, Dawson and Gaudron JJ in *G v H* (1994) 181 CLR 387 at 399:

> *"It has been clear since the decision in* Briginshaw v Briginshaw *that in civil cases the standard of proof is on the balance of probabilities, with due regard being had to the nature of the issue involved so that* "[t]he seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from 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". *Thus, if there is an issue of* "importance and gravity" *to use the words of the trial judge, due regard must be had to its important and grave nature.*
>
> *Not every case involves issues of importance and gravity in the* Briginshaw v. Briginshaw *sense. The need to proceed with caution is clear if, for example,*

> *there is an allegation of fraud or an allegation of criminal or moral wrongdoing, as in* Briginshaw v. Briginshaw *where the allegation was adultery by a married woman, an allegation involving serious legal consequences when that case was decided. Paternity is a serious matter, both for father and for child. However, it is not clear that the question of paternity should be approached on the basis that it involves a grave or serious allegation in the* Briginshaw v. Briginshaw *sense when what is at issue is the maintenance of a child and the evidence establishes that the person concerned is more likely that anyone else to be the father."*

The applicant submitted that the manner in which the complaint had been formulated before the Commissioner demonstrated that it was no part of the complainant's case that the Premier's directive had been issued for an improper purpose, or for other than laudatory objectives. It was the method by which that directive sought to achieve those objectives which was said to contravene s 9(1) of the Act. It was not until the second respondent had sought to make an issue of the reasons underlying the directive that the complainant had, in its reply, raised the possibility that the motives of the Victorian Government may not have been as laudatory as those contended for by its Counsel. The second respondent does not accept this as an accurate summary of what occurred. This is not an issue which I am required to resolve.

The second respondent refers to the decision of Drummond J in *Ebber v Human Rights and Equal Opportunity Commission* (1995) 129 ALR 455. There the applicants were German nationals who held academic qualifications in architecture from German institutions. These qualifications were not accepted as sufficient to satisfy the requirements for registration in Queensland. The applicants complained of unlawful discrimination under s 9(1) of the Act. The complaint was dismissed summarily by the Commission, and the applicants sought review of that decision.

Drummond J dealt with the power of summary dismissal and the nature of an inquiry under s 25A of the Act at 467-468. His Honour stated:

> *"Although he never got to the stage of evaluating the evidence, Mr Carter* [the Commissioner] *was I think correct, contrary to what was said by the applicants, in appreciating that a finding of unlawful conduct could only be made against the respondent if it was proved to the standard referred to in* Briginshaw v Briginshaw *(1938) 60 CLR 336; see* Department of Health v Arumugam *[1988] VR 319 at 330-1 and cf* Ealing Borough Council v Race Relations Board *[1972] AC 342 at 355."*

In *Arumugam (supra)* Fullagar J in dealing with a complaint of racial discrimination under

the *Equal Opportunity Act* 1984 (Vic) stated at 330-1:

> *"I should say that, in my opinion, the Board was correct in saying that the burden of proof lying on the complainant was of the standard applicable in civil cases, although, of course, the degree of satisfaction must be up to the seriousness of the allegations in all the circumstances; see the oft-cited remarks of Dixon J in* Briginshaw v. Briginshaw *... It is, of course, a serious allegation that two prominent and highly-qualified medical men, in government positions of trust and responsibility, and engaged in the task of selecting the best man for a very important job which involved the highly-skilled care and management of sick people, deliberately rejected the best man and appointed a person known to them to be a far less suitable man, and did that substantially, if not entirely, on the ground that the better qualified professional man belonged to a particular race of human beings. Of course, it may nevertheless happen and, if it happens in the case of intelligent trained minds, one might expect some skilled attempt at concealment as well. But it is not lightly to be inferred."*

In my view, it was open to the Commissioner to conclude that the nature of the complaint made against the second respondent was such that, at least in its final form, it called for the application of the *Briginshaw* principles when making findings of fact. It is no badge of honour for any government to be found to have contravened a provision of an anti-discrimination statute. The fact that such a contravention may be found to have occurred without any intent on the part of that government to discriminate, and for laudatory motives, does not significantly diminish the gravity of any such finding.

As for the contention that the Commissioner erroneously construed the *Briginshaw* principle by treating it as though it sanctioned the adoption of a third standard of proof, mid way between the civil and criminal standards of proof, I do not accept that this was what the Commissioner intended to convey when he said that "such a finding would surely call for proof based on more than a mere balance of probabilities". In my view, this statement was no more than a convenient shorthand method of articulating the *Briginshaw* principle, perhaps infelicitously expressed, but not to be pored over and scrutinised with the type of over-zealous pedantry criticised by the High Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272:

> *".. the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed."*

The s 18 ground

The applicant contends that in deciding that ethnic origin was not the reason giving rise to the directive, but rather the need to alleviate the community tension, the Commissioner failed to have regard to the provisions of s 18 of the Act.

That section provides as follows:

> *"18. Where:*
> *(a) an act is done for 2 or more reasons; and*
> *(b) one of the reasons is the race, colour, descent or national or ethnic origin of the person (whether or not it is the dominant reason or a substantial reason for doing the act);*
> *then, for the purposes of this Part, the act is taken to be done for that reason."*

The short answer to this submission is that the Commissioner did not find that the Premier's directive had been issued for two or more reasons. He found that it had been issued for one reason only. That was to restore peace and harmony to the community. Section 18 was, therefore, inapplicable.

While it is true that other reasons had on other occasions been advanced by the second respondent to justify the Premier's directive, including the desire to achieve consistency with the earlier Commonwealth directive, and the desire to avoid confusion in relation to a university course offered at La Trobe University, the Commissioner concluded, as he was entitled to do, that the sole reason for the directive was that ultimately given by both Mr Honeywood, and by the Premier, in their correspondence with Ministers in the Federal Government.

The Commissioner did not find that one of the reasons for the Premier having issued the directive was to draw a distinction based on the descent or ethnic origin of those who lived in, or came from the FYROM. The application before the Court is one for judicial review. It is no part of that process to engage in a review of the merits of the Commissioner's decision, or to consider whether his findings of fact were correct. In my opinion, the Commissioner did not err in the manner alleged. There is no substance in this ground.

Conclusion

It was accepted on behalf of the second respondent that if I found that the Commissioner had

misconstrued the phrase "based on" in s 9(1) of the Act by interpreting that subsection erroneously in the manner contended for by the applicant that would be an error which would be amenable to judicial review under the *Administrative Decisions (Judicial Review) Act* 1977. I have found that the Commissioner did misconstrue the relevant phrase. That led him to approach the threshold question before him upon an erroneous basis. It follows that the application must be allowed, and the matter remitted to the Human Rights and Equal Opportunity Commission to be further dealt with in accordance with these reasons.

I do not believe that it would be appropriate to burden the Commission with any additional material beyond that which it had before it when it considered the matter previously.

The applicant has been successful in this application upon the principal ground relied upon. The second respondent should pay the applicant's costs.

I certify that this and the preceding forty-eight (48) pages are a true copy of the Reasons for Judgment herein of the Honourable Justice Weinberg

Associate:

Dated:

Counsel for the Applicant:	Mr B Zichy-Woinarski QC Ms D Mortimer
Solicitor for the Applicant:	Erskine Rodan & Associates
Counsel for the Second Respondent:	Mr R Tracey QC Mr T Ginnane
Solicitor for the Second Respondent:	Victorian Government Solicitor
Dates of Hearing:	19 & 20 October 1998
Date of Judgment:	21 December 1998