Commonwealth of Australia & Anor v Human Rights & Equal Opportunity Commission & Ors [1997] 664 FCA (18 July 1997)
FEDERAL COURT OF AUSTRALIA>>

DISCRIMINATION LAW - Sex Discrimination Act 1984 (Cth) - National Health Act 1953 (Cth) - availability of drug for treatment of osteoporosis restricted under the pharmaceutical benefits scheme ("PBS") to a certain category of women - determination upholding complaints against the <<Commonwealth>> and Minister for Health and Family Services for discrimination on the ground of sex - whether the Commissioner erred in making the determination without hearing evidence relating to the circumstances in which the drug came to be listed under the PBS and reasons for the limited `indications' listed - whether a factual inquiry is necessary to establish the causal relationship contemplated by s 5(1) of the Sex Discrimination Act 1953 - whether a factual inquiry is necessary to establish whether circumstances are the same or not materially different under s 5(1).

ADMINISTRATIVE LAW - judicial review - review of decision of <<Human Rights and Equal Opportunity>> Commission - whether decision reviewable.

National Health Act (Cth), ss 85(1), 85(2), 85(2A), 101.

Sex Discrimination Act 1984 (Cth), ss 3, 4, 5, 22, 26, 44, 81.

Therapeutic Goods Act 1989 (Cth), ss 3, 4, 6(1), 16, 20, 21.

Therapeutic Goods Regulations, reg 36(1), 36(2).

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321, cited.

New South Wales Land Council v Aboriginal and Torres Strait Islander Commission (1995) 131 ALR 559, cited.

Australian Medical Council v Wilson (1996) 137 ALR 653, cited.

Waters v Public Transport Corporation (191) 173 CLR 349, cited.

Australian Iron & Steel Pty Ltd v Banovic (1989) 168 CLR 165, cited.

Waterhouse v Bell (1991) 25 NSWLR 99, cited.

<<Human Rights and Equal Opportunity>> Commission v Mount Isa Mines Ltd (1993) 46 FCR 301, followed.

James v Eastleigh Borough Council [1990] 2 AC 751, cited.

<<Commonwealth of Australia v Human Rights and Equal Opportunity>> Commission (1993) 46 FCR 191, cited.

Northern NSW FM Pty Ltd v Australian Broadcasting Tribunal (1990) 26 FCR 39, applied.

<<COMMONWEALTH OF AUSTRALIA & ANOR v HUMAN RIGHTS AND EQUAL OPPORTUNITY>> COMMISSION & ORS

NG 203 of <<1997>>

SACKVILLE J

SYDNEY

<<18 JULY 1997>>

IN THE FEDERAL COURT OF <<AUSTRALIA
)

)
NEW SOUTH WALES DISTRICT REGISTRY
) NG 203 of 1997>>

)
GENERAL DIVISION
)

BETWEEN:
<<COMMONWEALTH OF AUSTRALIA>>

First Applicant

MINISTER FOR HEALTH AND FAMILY SERVICES

Second Applicant

AND:
<<HUMAN RIGHTS AND EQUAL OPPORTUNITY>> COMMISSION

First Respondent

DAVID HAGAR

Second Respondent

DOUGLAS MORRISH

Third Respondent

VICTOR MARINARO

Fourth Respondent

JUDGE(s):
SACKVILLE J.
PLACE:
SYDNEY
DATED:
<<18 JULY, 1997>>

MINUTES OF ORDER

THE COURT ORDERS THAT:

1. The decision of the <<Human Rights and Equal Opportunity Commission ("HREOC"), dated 19 February 1997>>, in relation to the complaints made by the second, third and fourth respondents against the applicants, be set aside.

2. The matter be remitted to HREOC, differently constituted, for determination according to law.

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

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REASONS FOR JUDGMENT

INTRODUCTION

This is an application under the Administrative Decisions (Judicial Review) Act 1977 (Cth) ("ADJR Act") to review a decision made on 19 February <<1997 by a Commissioner of the Human Rights and Equal Opportunity>> Commission ("HREOC"). The decision was made in relation to three separate complaints that the pharmaceutical benefits scheme ("PBS"), conducted under the National Health Act 1953 (Cth) ("National Health Act 1984 "), discriminates against men, by restricting the availability of a drug for the

treatment of osteoporosis, known as Calcitriol, to a certain category of women suffering from that condition.

The complainants are all males suffering from osteoporosis, which is a degenerative bone disease commonly characterised by decreased bone mass and increased susceptibility to fracture. Their complaint is that Calcitriol is available under the PBS for "established post-menopausal osteoporosis in patients with fracture due to minimal trauma". Each of the complaints (who are aged, respectively, 56, 72 and 85) has been diagnosed as suffering from osteoporosis, and has sustained bone fractures due to minimal trauma. In each case, the complainant's doctor has prescribed Calcitriol for the complainant's diagnosed condition. But because the complainants cannot satisfy the indications for which Calcitriol can be prescribed under the PBS, they have to pay a higher price for the drug than women suffering from osteoporosis who are eligible to obtain the drug at a subsidised price under the PBS.

The Commissioner did not make a final determination under the Sex Discrimination Act (Cth) ("SD Act 1995 "). However, he made findings designed (as he said) to allow the parties to reach a common view as to appropriate orders for relief. In substance, he found that, in making Calcitriol available to persons with established post-menopausal osteoporosis with fracture due to minimal trauma, the <<Commonwealth had discriminated against men on the ground of their sex and had contravened ss 22 and 26 of the SD Act. Accordingly, the Commissioner upheld the complaints made against the Commonwealth and the Minister for Health and Family Services (the "Minister"). (Although the complaints were originally made against the Minister, the Commonwealth>> was added as a party to the proceedings in the course of the hearing before the Commissioner.)

The application to review the Commission's decision is brought by the <<Commonwealth>> and the Minister (to whom I shall refer collectively as the "applicants"). The first respondent is HREOC, which has entered a submitting appearance. The second, third and fourth respondents were the complainants in the proceedings determined by the Commissioner. I shall refer to them collectively as the "complainants", even though they are respondents to the present proceedings.

The applicants' main contention is that the Commissioner erred in making his decision without hearing evidence they wished to adduce. This evidence was said to relate to the circumstances in which Calcitriol came to be listed under the PBS and why its listing is limited to a particular group of persons suffering from osteoporosis. The Commissioner decided that the applicants had discriminated against the complainants, in contravention of the SD Act, and that any evidence the applicants might wish to adduce could not alter this conclusion. Other issues were raised by the parties, and I shall refer to those later.

One of the difficulties presented by the case is that the parties reached agreement before the Commissioner on only a limited number of facts. The Commissioner made his decision on the basis of what were said to be agreed facts, although the parties were in dispute as to whether all the facts found or assumed by the Commissioner had in fact been agreed. Having regard to these circumstances, it will be necessary to consider the procedural history of the proceedings before the Commissioner. First, however, I shall consider a jurisdictional question and refer to the relevant legislation.

JURISDICTION

The complainants did not dispute the jurisdiction of the Court to entertain the application under the ADJR Act. However, I raised with Mr Hilton SC, who appeared with Dr Gelbart for the applicants, whether there had been a "decision" to which the ADJR Act applies, having regard to the fact that the Commissioner had made no final orders. Mr Hilton submitted that, although the Commissioner had not made final orders, he had made findings on matters of substance for which the statute provides, as an essential preliminary to the making of the ultimate decision. Those findings constitute a "decision" to which the A DJR Act applies: Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321, at 339, per Mason CJ; New South Wales Land Council v Aboriginal and Torres Strait Islander Commissioner (1995) 131 ALR 559 (FCA/Hill J), at 566-568.

Section 81(1)(b) of the SD Act empowers HREOC, after holding an inquiry into a complaint referred to it by the Sex Discrimination Commissioner under s 57 of the SD Act, to "find the complaint substantiated and make a determination". The determination can include any one or more of a number of orders, such as a declaration that the respondent has engaged in conduct rendered unlawful by the SD Act: s 81(1)(b)(i). In this case, the Commissioner hearing the complaints explicitly made findings that the complaints made against the applicants were substantiated. Whether or not these findings amount to a final and operative decision, they at least constitute findings on matters of substance for which the SD Act expressly provides as preliminary to the making of the ultimate decision. It follows that the Court has jurisdiction to entertain the applications.

THE LEGISLATION

Sex Discrimination Act

The objects of the SD Act, as stated in s 3, include the following:

"(a) to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women; and

(b) to eliminate, so far as is possible, discrimination against persons on the ground of sex, marital status, pregnancy or potential pregnancy in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of <<Commonwealth>> laws and programs; and

...

(d) to promote recognition and acceptance within the community of the principle of the equality of men and women."

The concept of "sex discrimination" is addressed in s 5:

"5(1) For the purposes of this Act, a person (in this subsection referred to as the "discriminator") discriminates against another person (in this subsection referred to as the "aggrieved person") on the ground of the sex of the aggrieved person if, by reason of:

(a) the sex of the aggrieved person;

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

(c) a characteristic that is generally imputed to persons of the sex of the aggrieved person;

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

(2) For the purposes of this Act, a person (the "discriminator") discriminates against another person (the "aggrieved person") on the ground of the sex of the aggrieved person if the discriminator imposes, or proposes to impose, a condition, requirement or practice has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person.

(3) This section has effect subject to sections 7B and 7D."

Section 7B imposes a reasonableness test in respect of "indirect discrimination" covered by s 5(2):

"7B(1) A person does not discriminate against another person by imposing, or proposing to impose, a condition, requirement or practice that has, or is likely to have, the disadvantaging effect mentioned in subsection 5(2)...if the condition, requirement or practice is reasonable in the circumstances."

Sections 5(2) and 7B were introduced by the Sex Discrimination Amendment Act (Cth), which came into force on 16 December 1995. Prior to that enactment, s 5(2) took a different form. See Australian Medical Council v Wilson (1996) 137 ALR 653 (FCA/FC), at 678, per Sackville J.

The complainants rely on ss 22 and 26 of the SD Act 1989 . Relevantly, these sections provide as follows:

"22(1) It is unlawful for a person who, whether for payment or not, provides...services... to discriminate against another person on the ground of the other person's sex, marital status, pregnancy or potential pregnancy:

(a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person....

...

26(1) It is unlawful for a person who performs any function or exercises any power under a <<Commonwealth law or for the purposes of a Commonwealth program, or has any other responsibility for the administration of a Commonwealth law or the conduct of a Commonwealth>> program, to discriminate against another person, on the ground of the other person's sex...in the performance of that function, the exercise of that power or the fulfilment of that responsibility."

The definition of "services", in s 4 includes:

"(a) services relating to banking, insurance and the provision of grants, loans, credit or finance;

...

(e) services of the kind provided by a government, a government authority or a local government body".

The SD Act provides a number of exemptions. For example, s 31 provides that nothing in Divisions 1 and 2 of Part 2 (ss 22 and 26 are within Division 2) renders it unlawful to discriminate against a man on the ground of his sex by reason only of the fact that the alleged discrimination grants to a woman <<rights>> or privileges in connection with pregnancy or childbirth. Section 32 states that neither Division 1 nor Division 2 of Part 2 applies to "the provision of services the nature of which is such that they can only be provided to members of one sex". Again, discrimination on the ground of sex by an insurer against a client is not unlawful if the discrimination is based on actuarial and statistical data on which it is reasonable for the insurer to rely, and if the insurer complies with other specified conditions: s 41(1).

Section 44 of the SD Act empowers the HREOC, on an application made by a person or class of persons, to grant the person or class of persons an exemption from the operation of provisions of the SD Act, including ss 22 and 26. The exemption may be granted subject to terms and conditions, but cannot be granted for a term exceeding five years: s 44(3). A decision made by HREOC in relation to an exemption may be reviewed by the Administrative Appeals Tribunal: s 45.

National Health Act

The PBS operates under the National Health Act. As the Commissioner pointed out, the National Health Act does not refer to the "listing" of a drug. Rather, the Minister is empowered by s 85(2)(a) to declare Part 7 of the Act to apply to declared drugs and medicinal preparations. The Minister has power, in a declaration made under s 85(2), to specify the circumstances in which the writing of a prescription for the supply of the pharmaceutical benefit is to be authorised under Part 7: s 85(2A).

A declaration under s 85(2) of the National Health Act attracts s 85(1), which is in the following terms:

"85(1) Benefits shall be provided by the <<Commonwealth>>, in accordance with this Part, in respect of the drugs and medicinal preparations in relation which this Part applies."

The Minister cannot exercise the power to declare a drug or medicinal preparation under s 85(2)(a) unless, relevantly, the Pharmaceutical Benefits Advisory Committee ("PBAC") recommends that it be so declared: s 101(4). The PBAC consists exclusively of medical practitioners, pharmacists and a pharmacologist: s 101(1), (2). Its tasks include making recommendations to the Minister from time to time as to the drugs and pharmaceutical preparations which it considers should be made available as a pharmaceutical benefit under Part 7: s 101(3). Section 101(3A) provides as follows:

"101 (3A) For the purpose of deciding whether to recommend to the Minister that a drug of medicinal preparation, or a class of drugs and medicinal preparations, be made available as pharmaceutical benefits under this Part, the Committee shall give consideration to the effectiveness and cost of therapy involving the use of the drug, preparation or class, including by comparing the effectiveness and cost of that therapy with that of alternative therapies, whether or not involving the use of other drugs or preparations."

Where the PBAC is of opinion that a drug or medicinal preparation should be made available as pharmaceutical benefits under Part 7, but only in certain circumstances, the PBAC must, in its recommendation under s 101(3), specify those circumstances: s 101(3C).

As the Commissioner noted in his determination, the "benefits" referred to in s 85 are not precisely defined. However, the National Health Act provides that an approved pharmacist or medical practitioner may, in respect of each supply of a pharmaceutical benefit, charge the person to whom the benefit is supplied an amount specified in the legislation (subject to indexation): ss 87(2), 99G. In general, the pharmacist or medical practitioner is entitled to be paid by the <<Commonwealth the amount (if any) by which the "Commonwealth>> price" of the pharmaceutical benefit exceeds the amount the pharmacist or medical practitioner is entitled to charge the person receiving the benefit. The agreed facts indicate that at least one of the complainants has generally paid over $70 for 100 capsules of Calcitriol, while the maximum amount chargeable by pharmacists to the patient under the PBS was $17.40 as from 1 August 1996.

Therapeutic Goods Act

Reference was made in the course of argument to the Therapeutic Goods Act (Cth) ("Therapeutic Goods Act"). Mr Hilton referred to the legislation because of what was said to be the practice of the PBAC not to recommend the listing of products on the PBS for indications other than those therapeutic indications for which products are registered on the Australian Register of Therapeutic Goods (the "Register").

The object of the Therapeutic Goods Act 1977 is set out in s 4:

"The object of this Act is to provide, so far as the Constitution permits, for the establishment and maintenance of a national system of controls relating to the quality, safety, efficacy and timely availability of therapeutic goods that are:

(a) used in <<Australia, whether those goods are produced in Australia>> or elsewhere; or

(b) exported from <<Australia>>."

The Therapeutic Goods Act applies to things done by corporations and to things done by natural persons, inter alia, in the course of overseas or interstate trade or under a law of the <<Commonwealth>> relating to the provision of pharmaceutical benefits: s 6(1).

The Therapeutic Goods Act provides for the maintenance of the Register "for the purpose of compiling information in relation to, and providing for evaluation of, therapeutic goods for use in <<humans>>": (s 17(1)). The expression "therapeutic goods" is defined in a manner that includes drugs represented to be for "therapeutic use": s 3. The latter term is defined to include use in connection with preventing, diagnosing, curing or alleviating a disease, ailment, defect or injury in persons: s 3.

For the purposes of Part 3 of the Therapeutic Goods Act (which includes s 17), therapeutic goods are to be taken to be separate and distinct from other therapeutic goods if they have different "indications" or "directions for use": s 16(1)(e),(f). "Indications", in relation to therapeutic goods means the specific therapeutic uses of the goods: s 3. Although the point was not argued, it would seem to follow, as the Commissioner was prepared to accept, that a drug which has several specific therapeutic uses constitutes, for the purposes of Part 3 of the Therapeutic Goods Act, several separate and distinct "therapeutic goods".

In general, it is an offence to import, manufacture or supply therapeutic goods for use in <<humans unless the goods are registered, or are exempt from the requirement of registration: ss 20, 21; see also s 22. The Therapeutic Goods Act provides a procedure by which an application may be made for registration of therapeutic goods: ss 23, 24. The key body in the evaluation process is the Australian Drug Evaluation Committee ("ADEC"). ADEC is not established by the Therapeutic Goods Act, but by reg 36(1) of the Therapeutic Goods Regulations (the "Regulations"). It is an expert committee, whose functions include making medical and scientific evaluations of any drugs referred for evaluation and giving advice about the manufacture and distribution within Australia >> of therapeutic goods that have been the subject of evaluation: reg 36(2)(a), (d).

Neither the Therapeutic Goods Act nor the Regulations expressly limits the power to place drugs on the Register to those drugs in respect of which ADEC has made a positive recommendation.

THE PROCEEDINGS BEFORE THE COMMISSIONER

The Procedural History

The respondents made separate complaints to HREOC, the first on 27 June 1995 and the last on 20 December 1995. On 5 March 1996, the complaints were referred by the Sex Discrimination Commissioner for inquiry by HREOC, pursuant to s 57(1)(a) of the SD Act.

The hearing commenced on 30 October 1996. On that date, although a legal representative for the respondents was present for a time, she withdrew. The transcript shows that lengthy discussion took place between the Commissioner and counsel for the Minister (the <<Commonwealth>> not then being a party to the proceedings), in an attempt to identify the issues for resolution. At one point, the Commissioner asked whether the case might not fall squarely within ss 5(1) and 22 of the SD Act, because post-menopausal osteoporosis was arguably a characteristic appertaining generally to persons of one sex. Counsel for the Minister replied that that issue could be resolved only after evidence had been adduced, including expert evidence as to whether there was a material difference between the circumstances of post-menopausal osteoporotics, and other osteoporotics, particularly in their responses to therapeutic intervention (Ts 49-50). Counsel also suggested that there might be preliminary issues which, if determined in the Minister's favour, would resolve the matter. He identified one such issue as whether the fact of a particular registration under the Therapeutic Goods Act was a material difference, for the purposes of s 5(1) of the SD Act (Ts 70). Another issue identified by counsel was whether the Therapeutic Goods Act, as a matter of construction, overrides the SD Act.

During the course of the hearing on 30 October 1996, counsel for the Minister handed up a document described as "Outline of Respondent's Evidence". This document addresses the operation of the Register maintained under the Therapeutic Goods Act, and explains the operation of the PBS under the National Health Act. It also provides some information on the consideration given to Calcitriol by the ADEC and the PBAC, and on the cost of the drug. The Commissioner marked the document as an exhibit, "for the purposes of the present application". The outline includes the following passages:

"With regard to postmenopausal osteoporosis, this condition (including fractures) usually appears many years after the menopause, after oestrogen deficiency has been associated with loss of significant amounts of bone mineral. Osteoporosis in other populations (eg. premenopausal women) may be associated with other pathologies, but in the case of premenopausal women simple oestrogen deficiency would not be one of them. In males, especially the very elderly, osteoporosis can occur. No efficacy or safety data have been

examined on these populations to date so it has not been possible to extend the registered indications for [C]alcitriol to cover these cases.

...

Nevertheless, the evaluated data presently available only support its use by established post-menopausal osteoporotics who have suffered fracture due to minimal trauma. It is not available for those patients who are not post-menopausal, or who, though post-menopausal have bone mineral density in the osteoporotic range but have not suffered such fractures. It is therefore only available to a limited subset of women with osteoporosis."

The outline does not explain the term "established post-menopausal osteoporosis". In particular, it does not explain whether a post-menopausal woman who has osteoporosis is necessarily an "established post-menopausal osteoporotic". It does not consider, for example, whether a post-menopausal woman, who has suffered from osteoporosis since before menopause (a condition apparently not associated with simple oestrogen deficiency), would necessarily be regarded as "an established post-menopausal osteoporotic" and, if not, in what circumstances she would be so regarded.

Towards the conclusion of the hearing on 30 October 1996, the Commissioner suggested that the appropriate course was to adjourn the proceedings, in order to enable the questions or issues for determination to be formulated and to try and reach some agreement as to the facts relevant for the purposes of determining those issues (Ts 82). However, he indicated that he anticipated no expert medical evidence at this stage and that, if it became necessary to hear expert medical evidence, the parties would be given an <<opportunity>> to put that material on (Ts 83). The Commissioner also gave directions for the appointment of counsel assisting, for the purpose of participating in a preparation of a statement of issues.

Before the hearing resumed, a number of documents were filed by the parties. On about 27 November 1996, the Minister filed a list of fifteen "preliminary issues" for decision. This was accompanied by a short document entitled "[Minister's] Statement of Facts (for the determination of the preliminary issues)". This document set out, among other matters, the indications for which Calcitriol was a therapeutic good registered under the Therapeutic Goods Act and for listing under the PBS, but did not address the questions to which I have referred arising out of the "Outline of Evidence". For their part, the complainants in the proceedings supplied a series of questions for determination. They disputed that some of the issues raised by the Minister were "real issues". They foreshadowed that they would ask the Commissioner to consider "direct and indirect discrimination in the alternative".

The complainants prepared a statement of facts. This document recounted their individual circumstances, but also addressed other issues, including the nature of osteoporosis, the use of Calcitriol to treat osteoporosis, and the form of the listing of the drug on the PBS. By a reply dated 16 December 1996, the Minister admitted some of the alleged facts, but did not admit others. For example, the Minister admitted that the doctor for one of the respondents had stated that Calcitriol would be an appropriate therapy for his patient's osteoporosis, but did not admit that the statement was true. The Minister made no admissions about the factors said to be associated with the risk of osteoporosis in men and women.

Prior to the hearing, the complainants prepared an additional statement of facts. This statement included the following allegations:

"1. Osteoporosis occurs in both men and women.

2. The pathophysiological mechanisms of osteoporosis are similar in men and women.

3. The mechanisms of action of Calcitriol on bone and mineral metabolism are similar in men and women.

4. The effects of the menopause and oestrogen deficiency in women do not have an impact on the therapeutic effects of Calcitriol in osteoporosis."

None of these "facts" was admitted by the Minister.

At the hearing on 17 and <<18>> December 1996, the respondents were legally represented. The Commissioner had before him a draft order that identified a large number of issues for determination. Counsel for the complainants noted (Ts 91) that the parties were ad idem that it would be beneficial if the case could be resolved without "digging into the medical evidence", and that neither party would be in a position to lead medical evidence during the two days set aside for the hearing. The Commissioner observed that there were a number of issues not agreed, including the efficacy of Calcitriol for the treatment of osteoporosis in men.

In the course of the argument before the Commissioner it was clearly contemplated by both counsel and by the Commissioner that, depending upon what view was taken of the law, there might be several different outcomes. The issues to be decided might be determined in favour of the complainants, in favour of the Minister or deferred on the basis that more facts were needed (Ts 156). The Commissioner identified (Ts 163-165) a number of issues that might be considered as preliminary questions, independently of further facts. He indicated that the second day of the hearing would be devoted to those separate questions, without seeking to deal with evidentiary issues, other than the agreed facts. Towards the conclusion of the hearing, the Commissioner repeated that he was not looking at factual matters. He indicated that he would address only legal questions, on the basis of facts that had been agreed (Ts 257).

The Commissioner's Decision

In his reasons handed down on 19 February <<1997>>, the Commissioner summarised the position as follows:

"Although it seemed possible at one stage that the Commission might need to consider expert medical evidence to determine the issues before it, at the hearing the case was run largely on the basis of agreed facts and the task of the Commission is thus to identify the legal consequences which follow from those facts. If necessary, any disputed issues of facts requiring resolution were to be left to a future date."

The Commissioner did not make any specific findings concerning the history of the consideration of Calcitriol by ADEC and the PBAC. He said it appeared that the manufacturer of the drug did not originally apply to ADEC or to the PBAC for inclusion of Calcitriol as a suitable drug for the treatment of osteoporosis in men. He referred to possible reasons for this omission, but did not make any findings. The Commissioner also said that, after the complaints had been filed, the manufacturer had apparently applied to include male osteoporosis among the indications for which Calcitriol is registered. However, he observed that the details of that application were not before him.

The Commissioner found that the PBAC had specified particular indications for the use of Calcitriol. The Minister had exercised the powers conferred by subss 85(2)(a) and (2A) of the National Health Act by listing Calcitriol as a drug available under the PBS with an "Authority Required" in respect of the following indications:

"(a) Established post-menopausal osteoporosis in patients with fracture due to minimal trauma...;

(b) hypocalcaemia due to renal disease;

(c) hypoparathyroidism;

(d) hypophosphataemic rickets; and

(e) vitamin D resistance rickets."

The Commissioner found that each of the complainants suffered from osteoporosis and had suffered fractures due to minimal trauma. He also pointed out that none of the complainants suffered from any of the

conditions in pars (b) - (e) of the listing of Calcitriol under the PBS. The Commissioner continued as follows:

"Accordingly, they would qualify under the first indication, were it not for the fact that their osteoporosis is not `post-menopausal'. Their complaint is that, although their condition is in all relevant respects identical to that of women with post-menopausal osteoporosis with fracture due to minimal trauma, they do not qualify because they are not women and cannot suffer from a post-menopausal condition." [Emphasis added.]

It is not clear whether the Commissioner, by the bolded words, intended to make a finding or whether he was simply reciting the complainants' case. If the former, it is not clear on what evidence the Commissioner was relying. The Minister's "Outline of Evidence", in my view, cannot be read as establishing that a woman suffering long term osteoporosis, upon reaching or passing through menopause, is necessarily to be regarded as having the condition of "established post-menopausal osteoporosis". It simply does not address that issue. The Minister was not asked to admit that the pathophysiological mechanisms of osteoporosis are the same for all women, or for all post-menopausal women. And of course there was no expert evidence on the subject. Mr Robertson, who appeared for the complainants, did not suggest that the applicants expressly conceded or agreed that the only reason the complainants did not qualify to receive Calcitriol under the PBS was that they were incapable of experiencing menopause. He did contend that this was the effect of the Outline of Evidence, but I do not read the document as making such a concession.

The Commissioner, having explained the workings of the PBS, addressed an argument put by the applicants that there was an inconsistency between the National Health Act and the SD Act, which required the latter to be read down so as not to apply to the conduct of the Minister or the PBAC under Part 7 of the National Health Act. The Commissioner rejected this argument, holding that there was no necessary inconsistency between the two enactments.

Next, the Commissioner considered whether the conduct complained of was capable of being regarded as the provision of goods and services, within ss 22 of the SD Act. He rejected the applicants' argument, that the conduct could not be so regarded, on the following basis:

"In my view, Part VII of the National Health Act involves the provision of social services by the <<Commonwealth to recipients of pharmaceutical products, those services having amongst their characteristics, the prescription of a subsidised rate at which the therapeutic product may be obtained and a proscription on the levying of any additional charge. Such services do not involve a payment of money, nor are they rendered to third parties. Accordingly, I am satisfied that the pharmaceutical benefits scheme involves the provision of services by theCommonwealth >> to members of the public in need of prescription drugs."

The Commissioner then addressed the question of whether the conduct of the <<Commonwealth>>, in failing to make Calcitriol available to the respondents as a pharmaceutical benefit, at a subsidised rate, constituted unlawful discrimination within the meaning of the SD Act. This involved a consideration of the terms of s 5 of the SD Act. The Commissioner concluded that the terms of s 5(1) were satisfied.

The Commissioner expressed the view that par (a) of the PBS indications for Calcitriol had to be considered independently of the other paragraphs of the indications. On that basis it was a sex-based differentiation.

"Although it may be said that there is no reference to gender in that provision, but only to being `post-menopausal', that term inevitably applies only to women and is accordingly sex-based differentiation".

Alternatively, the reference to "post-menopausal" was appropriately classified as a reference to "a characteristic that appertains generally" to women. Section 5(1)(b) of the SD Act requires the characteristic to appertain generally to persons of the sex of the aggrieved person. "Not being post-menopausal" is a characteristic universal to men, but is not unique to men (obviously, a large proportion of women also

answer that description). Nonetheless, "not being post-menopausal" is "a characteristic that appertains generally" to males for the purposes of s 5(1)(b) of the SD Act.

The Commissioner identified the next sub-issue as whether the complainants were treated less favourably than women. He simply said that

"[t]his issue does not appear to give rise to any real dispute: women obtain the service, whereas in this instance men do not."

The next question was whether the circumstances were relevantly "the same or [were] not materially different", within s 5(1) of the SD Act. The complainants' case was that the SD Act assumes that sex and sex-based characteristics are put to one side for the purposes of this aspect of the comparison. According to the complainants, the applicants (the Minister and the <<Commonwealth>>) were seeking to rely on a characteristic appertaining to persons of the sex of the aggrieved person ("not being post-menopausal") as a basis for showing that the circumstances were materially different for the purposes of s 5(1) of the SD Act.

The Commissioner's conclusion on this aspect of the case was as follows:

"In substance the case for the [applicants] is that women are physiologically different in a way which would justify a pharmaceutical product being made available to them and not to men. Or to put the issue more precisely, for present purposes, there is a factual dispute as to whether that analysis is correct. For reasons already given, I do not think it is open to the [applicants] to seek to establish such a factual difference, there being no specific exemption which would allow them to discriminate on the basis of an identified physiological difference of this kind. Again, if there is a difference and it is relevant for the legitimate purposes of administering the pharmaceutical benefits scheme, it is open to the Minister or the <<Commonwealth>> to satisfy the Commission of this fact and seek an exemption under s 44."

It followed that, if there were discrimination in relation to the failure to supply Calcitriol to the complainants under the PBS, it was discrimination on the ground of the sex of the applicants or on the ground of a characteristic pertaining generally to men. Since the conduct fell within s 5(1) of the SD Act, it was excluded from s 5(2). The authorities, notably Waters v Public Transport Corporation (1991) 173 CLR 349 and Australian Medical Council v Wilson, established that the two provisions were mutually exclusive. There was therefore no occasion to consider the application of s 5(2) of the SD Act.

The Commissioner had already decided that the <<Commonwealth and the Minister had contravened s 22 of the SD Act. He nonetheless went on to consider whether s 26 of the SD Act had also been infringed. He rejected an argument that the Commonwealth was excluded from s 26 because (so it had been argued) the Commonwealth was not a "person". Furthermore, the Commissioner held that the conduct complained of by the complainants involved the performance of a function or the exercise of a power for the purposes of aCommonwealth >> program. Accordingly, s 26 of the SD Act had been contravened.

The Commissioner said that, because he had not heard argument on the question of relief, he would not make a final determination under s 81 of the SD Act. However, he issued his findings in a form designed to allow the parties to reach a common view as to appropriate orders for relief. The findings were as follows:

"(1) The provision of pharmaceutical benefits (as defined in s 84 of the National Health Act) in accordance with the scheme established under Part VII of that Act constitutes the provision of a service by the <<Commonwealth>> for the purposes of s 22 of the [SD Act].

(2) In making the drug Calcitriol available to persons with established post-menopausal osteoporosis with fracture due to minimal trauma, the <<Commonwealth>> discriminates against men with established osteoporosis with fracture due to minimal trauma on the ground of their sex.

(3) In the alternative to (2) the conduct of the <<Commonwealth>> as described discriminates against men on the ground of a characteristic appertaining generally to men, namely that they do not experience menopause and cannot be `post-menopausal'.

(4) Such conduct involves less favourable treatment of men than women in that, insofar as Calcitriol is available to men with the condition identified in (1) above, it is only available at a cost in excess of that at which it is available to women in circumstances which are the same or not materially different.

(5) Accordingly, each of the complaints against the <<Commonwealth>> under s 22 of the [SD Act] is substantiated.

(6) The findings in (2) or (3) constitute discriminatory conduct in the performance of functions and exercises of power under a <<Commonwealth law, namely the National Health Act and for the purposes of a Commonwealth>> programme, namely the administration of the pharmaceutical benefits scheme established by Part VII of that Act.

(7) Both the Minister, in making a declaration under s 85 of the Act, and the <<Commonwealth>> in administering the scheme through appropriate officers, have discriminated against the complainants within the terms of s 26(1) of the [SD Act].

(8) Accordingly, each of the complaints against the Minister and the <<Commonwealth>> under s 26 of the [SD Act] is substantiated."

The Application to Rescind Findings

The Commissioner handed down his reasons for decision on 19 February <<1997. On 13 March 1997>>, the applicants' solicitors wrote to counsel assisting HREOC requesting the Commissioner to rescind the finding that the applicants had contravened ss 22 and 26 of the SD Act. The ground of the application was stated as follows:

"I am instructed to inform you that it was the [applicants'] understanding, and indeed it would appear to have been the agreement and the common understanding of the parties, that the hearing on 17 and <<18>> December 1996 would be and was confined to consideration of the preliminary questions as set out in the order for hearing....

It would appear that the Commissioner has departed from the agreement and common understanding of the parties and proceeded to decide the ultimate issue of contravention of ss 22 and 26 of the Sex Discrimination Act 1984 without notifying the [applicants] that he proposed to make a decision on this ultimate issue and without granting to the [applicants] the <<opportunity>> to adduce the evidence which they had foreshadowed and which they considered to be relevant to the issue of contravention. That the [applicants] intended to adduce evidence is apparent from the transcript...".

The letter requested the Commissioner to disqualify himself from hearing the complaints further because he had "already formed a concluded view that the [applicants] have contravened ss 22 and/or 26 of the [SD Act]".

On <<18 March 1997, the Commissioner provided what he described as a "preliminary response", reserving to the parties the opportunity>> to make further submission if they wished to do so. The Commissioner declined to rescind his findings or to disqualify himself. In his reasons, the Commissioner recounted some of the procedural history of the matter. He observed that he had entertained no doubt that if some questions were answered favourably to the complainants it would not be necessary to go beyond the agreed facts. The Commissioner could

"find no indication that the [applicants] were of the view that the complainants could not succeed on the basis of particular answers being given to particular questions, nor that, if they could succeed on such a basis, I would not so find."

The Commissioner then dealt with the proposed evidence. He said this:

"It was common ground that Calcitriol was available to women who suffered osteoporosis with fracture due to minimal trauma if they were post-menopausal. It was also accepted that the Complainants suffered from the condition so identified, but were not post-menopausal. Accordingly, some women, but no men, would receive the drug under the [PBS] if it were prescribed by a medical practitioner with the relevant authority. It was in these circumstances that I found, as a matter of law, that unlawful discrimination occurred. The purpose of the evidence referred to by the [applicants] would be to demonstrate that there were innate differences between men and women, and that in relation to men the drug had not been demonstrated to be safe, effective and more effective than other treatments available under the [PBS].

...

For reasons indicated in my decision, I took the view that even were that the case, there would still be unlawful discrimination. The [SD Act] is posited upon an assumption that men and women are, for all relevant purposes, the same and accordingly must be treated in the same manner. We know as a matter of fact that men and women do differ in particular ways. Where those differences are treated as relevant by the Act, exceptions are provided to the general proscription. Other cases may be dealt with by way of specific exemption sought from the Sex Discrimination Commissioner. Evidence that demonstrates that men and women are innately different will not avoid the conclusion that, in the absence of an exception or exemption, differential treatment is unlawful. Accordingly, on the view that I took of the law, the evidence in question would not have been relevant in any event."

The statement that "it was common ground that Calcitriol was available to women who suffered osteoporosis with fracture due to minimal trauma if they were post-menopausal" was, as I have previously noted, not accepted by the applicants. With respect, I do not think the statement is accurate, although it may well be that there was some confusion in relation to the issue because of the procedural history of the matter.

The Commissioner pointed out that, since he did not intend to receive further evidence, the question of disqualification did not strictly arise. However, he addressed the issue as follows:

"The only basis upon which disqualification is sought is that I have formed a particular view of the matter before me. The conclusions that I have reached so far are based entirely upon certain agreed facts and argument as to the law. I have formed no views as to the credit of witnesses, nor made any findings on disputed questions of fact. There is no suggestion that, before hearing from the parties, I had in any way prejudged the issues. Even if it were now necessary for me to hear evidence, there is no basis put forward which would justify me declining to continue to deal with the matter."

SUBMISSIONS

The Principal Contentions

The applicants' principal submission was that the Commissioner erred in law in deciding, without hearing the evidence the applicants sought to adduce, that the reference to "established post-menopausal osteoporosis" in par (a) of the indications for Calcitriol necessarily meant that there was discrimination by reason of the sex of the complainants or of a characteristic appertaining generally to men. Mr Hilton contended that the words "by reason of" in s 5(1) required a relationship of cause and effect to be established between the criteria in pars (a) and (b) of s 5(1) of the SD Act and the less favourable treatment of the aggrieved person. Unless the circumstances in which Calcitriol came to be listed for certain indications, but not for others, were explored, it could not be established whether the necessary causal relationship existed.

Mr Hilton did not produce or tender draft statements or reports on which the applicants intended to rely. He indicated that the fact that the case had come on quickly for hearing had contributed to the absence of draft statements or reports. However, he stated that this evidence would be likely to address a number of topics, including the medical reasons why the listing for Calcitriol under the PBS, in relation to osteoporosis, was confined to persons suffering the condition identified in par (a) of the listing; whether the therapeutic

efficacy of Calcitriol is limited to persons suffering the condition identified in par (a); whether questions of toxicity or safety arise if Calcitriol is used to treat osteoporosis, other than in the circumstances identified in par (a) of the listing; whether ADEC had evaluated the drug and made recommendations, for example, that it should not be made available for particular forms of osteoporosis; and, whether post-menopausal osteoporosis in patients with fracture due to minimal trauma is a condition which differs from "non-established post-menopausal osteoporosis in patients with fracture due to minimal trauma" (that is, whether post-menopausal osteoporosis is a condition different from long-term osteoporosis in women who happen to be post-menopausal).

Mr Hilton also submitted that the evidence was relevant to the issue of whether the applicants had treated the complainants less favourably than, in circumstances that are the same or not materially different, the applicants treat or would treat men. The evidence foreshadowed was at least capable of showing that the circumstances of men suffering from osteoporosis are materially different from persons suffering from the condition identified in par (a). If, for example, the drug is not clinically effective for men suffering from osteoporosis (despite the opinions of the complainants' doctors) or exposes them to a significant risk of serious harm, to which sufferers of established post-menopausal osteoporosis are not exposed, then the circumstances are materially different.

Moreover, the Commissioner was in error in stating that there was no issue that the men had been treated less favourably than women, since the issue had been flagged. The evidence was relevant to this question, because it might demonstrate that even post-menopausal women with osteoporosis and fracture due to minimal trauma would not necessarily be entitled to Calcitriol under the PBS. Thus men with osteoporosis and fracture due to minimal trauma were not necessarily treated less favourably than post-menopausal women.

The applicants next contended that, far from the complainants being entitled to succeed under s 5(1) of the SD Act regardless of the applicants' foreshadowed evidence, it was inevitable that the complainants could not make out a case of discrimination under the sub-section, regardless of what further evidence might establish. As I understood this submission, it rested on two grounds. First, s 5(1) directs a comparison between the treatment accorded to the aggrieved person and that accorded to a person of the opposite sex, that is, in this case, a woman. The complainants in the present case were not treated less favourably than a woman would have been treated, because women with osteoporosis and fracture due to minimal trauma were not necessarily entitled to receive the drug under the PBS. Secondly, the fact that Calcitriol had not been registered under the Therapeutic Goods Act for the treatment of osteoporosis in circumstances other than those specified in par (a) of the listing under the PBS is, of itself, enough to render the circumstances materially different. The non-registration of Calcitriol means that it could not be lawfully supplied to the complainants for the treatment of their osteoporosis (even though the agreed facts indicated that the complainants obtained prescriptions for Calcitriol from their doctors and had received the drug for the treatment of their osteoporosis).

I should note that, although the applicants' written submissions contended that the Commissioner had breached the requirements of procedural fairness, by not giving the applicants the <<opportunity>> to adduce their foreshadowed evidence, that contention was not pressed. Mr Hilton accepted that the central issue turned on whether the Commissioner had erred in law, by holding that the foreshadowed evidence could not be relevant to the question of whether the applicants had discriminated against the complainants, within the meaning of s 5(1) of the SD Act.

Mr Robertson, on behalf of the complainants, submitted that the SD Act, like other anti-discrimination legislation, should be given an expansive interpretation. This was necessary to give effect to the statutory objects. While the Convention referred to in s 3 of the SD Act addresses only discrimination against women, the legislation explicitly aims at eliminating, so far as is possible, discrimination against persons on the ground of sex and at promoting the principle of the equality of men and women. Approaching s 5(1) of the SD Act in this light, its terms are satisfied whenever the alleged discriminator draws a distinction based on sex, or on a characteristic that only one sex can satisfy. Being post-menopausal is a characteristic that only women can satisfy. Making a benefit available only to persons who are post-menopausal therefore necessarily discriminates against men, since they are incapable of satisfying the condition of eligibility.

Evidence is incapable of altering this conclusion. To the extent that this creates practical difficulties (for example, because a drug might be potentially toxic to male users, but not females), difficulties can be overcome by seeking an exemption from HREOC under s 44 of the SD Act.

Further, Mr Robertson submitted that evidence could not be relevant to the question of whether the applicants treated the complainants less favourably than they treat or would treat women, in circumstances that are the same or are not materially different. This was because sex and sex-based characteristics must not be taken into account in determining whether the circumstances are materially different. To do so would frustrate the objects of the legislation. In this case, but for the fact that they were men, the complainants would have received Calcitriol on the PBS. The foreshadowed evidence could only relate to sex-based differences.

REASONING

The Terms of the SD Act, s 5(1)

In considering the complainants' argument, it is useful to start with the structure and language of the SD Act. Section 5(1) of the SD Act is concerned with what is usually described as "direct discrimination", in the sense that it addresses acts involving differential treatment of men and women. Section s 5(2), in its existing or previous form, deals with so-called "indirect discrimination", or acts having a disparate impact on men and women. The latter category covers acts or decisions made by reference to criteria or standards which are apparently non-discriminatory, but have a discriminatory effect: Australian Iron & Steel Pty Ltd v Banovic (1989) 168 CLR 165, at 175, per Deane and Gaudron JJ. If the terms of s 5(1) are satisfied, there is discrimination whether or not the treatment is reasonable, although an application can be made to HREOC for an exemption under s 44. By contrast, there can be no indirect discrimination under s 5(2) of the SD Act, in its amended form, if the condition, requirement or practice which disadvantages persons of the same sex as the aggrieved person is "reasonable in the circumstances": s 7B. (Compare s 5(2)(b), prior to the 1995 amendments.) As the Commissioner recognised, it seems to have been established that subss 5(1) and (2) are mutually exclusive in their operation: Waters v Public Transport Corporation, at 392-393, per Dawson and Toohey JJ, at 402, per McHugh J; Australian Medical Council v Wilson, at 679-680, per Sackville J.

While s 5(1) of the SD Act is concerned with direct discrimination, the sub-section does not say that any distinction drawn by reference to sex or to a characteristic pertaining to sex constitutes discrimination on the ground of sex. The provision says that a person (the "discriminator") discriminates against another (the "aggrieved person") on the ground of the sex of the aggrieved person if,

* by reason of the sex of the aggrieved person or a characteristic pertaining generally to persons of the sex of the aggrieved person (in this case, males);

* the discriminator treats the aggrieved person less favourably than the discriminator treats or would treat a person of the opposite sex (in this case, a female);

* in circumstances that are the same or are not materially different.

Considering the question independently of authority, the language of s 5(1) suggests that there is no discrimination on the ground of sex unless a causal relationship is established between the sex of the aggrieved person, or a characteristic pertaining generally to persons of that sex, and any less favourable treatment accorded to the aggrieved person. A condition or entitlement may refer, for example, to a characteristic appertaining generally to persons of one sex. Yet the circumstances may show that the less favourable treatment accorded to the aggrieved person cannot be attributed to that characteristic, but to other factors. In other words, the evidence may establish that the reason for the less favourable treatment is not be the characteristic appertaining generally to persons of one sex, but some factor (or factors) operating independently of that characteristic. Of course, any factual inquiry must take into account the direction in s 8 of the SD Act that an act can be done by reasons of a particular matter, even though it is not the dominant or substantial reason for the act. Even so, the language of s 5(1) does not suggest that mere fact that a

distinction is drawn, at least in part, by reference to a characteristic appertaining generally to persons of one sex of itself necessarily establishes the causal relationship contemplated by the sub-section. The facts need to be examined to ascertain whether the less favourable treatment experienced by the aggrieved person was "by reason of" any of the matters specified in paras (a), (b), or (c) of s 5(1).

Similarly, the language of s 5(1) suggests that it is ordinarily necessary to examine the circumstances of the particular case to ascertain whether the aggrieved person has been treated less favourably than the discriminator treats or would treat persons of the opposite sex in the same circumstances or in circumstances that are not materially different. Discriminatory conduct is not established unless the aggrieved person has been treated less favourably (by reason of one of the matters specified in par (a), (b) or (c) of s 5(1)) than the discriminator treats or would treat a person of the opposite sex. This implies that a factual inquiry must be conducted to ascertain whether less favourable treatment has occurred. A decision maker can only find that there has been discrimination against the aggrieved person if the less favourable treatment experienced by that person occurs in circumstances that are the same or not materially different than those in which persons of the opposite sex receive more favourable treatment. This, too, would seem to imply that a factual inquiry is ordinarily necessary to establish whether the circumstances are indeed the same or are not materially different.

I do not think that a different construction of s 5(1) is warranted by reason of HREOC's statutory power to grant exemptions from the operation of Divisions 1 and 2 of Part 2 of the SD Act. The existence of such a general power cannot control the language of s 5(1), which defines the concept of "discrimination" for the purposes of the SD Act. Nor, in my opinion, do other specific exemptions in Division 4 of Part 2 of the SD Act lead to a different construction of s 5(1). For example, s 31 states that it is not unlawful for a person to discriminate against a man on the ground of his sex only by reason of that person granting a woman <<rights or privileges in connection with pregnancy or childbirth. Section 31 is intended to give effect to a policy that rights>> or privileges granted in connection with pregnancy or childbirth are to be outside the scope of the prohibitions in Divisions 1 and 2 of Part 2 of the SD Act. I do not think that s 31 implies that any distinction drawn, in whatever manner and whether in whole or part, by reference to sex or to characteristics appertaining generally to sex is necessarily discriminatory for the purposes of s 5(1) of the SD Act.

The Authorities

The authorities support the general approach which I have suggested flows from the statutory language. In Waterhouse v Bell (1991) 25 NSWLR 99, Clarke JA, with whose judgment Kirby P and Hope AJA agreed, considered the operation of s 39(1) of the Anti-Discrimination Act (NSW). That sub-section, which is directed to discrimination on the ground of marital status, is framed in very similar terms to those employed in s 5(1) of the SD Act 1984 : see <<Human Rights and Equal Opportunity>> Commission v Mount Isa Mines Ltd (1993) 46 FCR 301 (FCA/FC), at 324, per Lockhart J. In Waterhouse v Bell, Clarke JA said this in relation to s 39(1) (at 105-106):

"The inquiry for which the section calls is a factual one involving essentially, two separate questions. The first, has A been treated less favourably than a person of different marital status was, or would have been, treated in the same circumstances, or in circumstances which are not materially different? The second, if so, was the ground of the differential treatment one of those mentioned in (a), (b) or (c)?

These are straightforward factual inquiries with which the courts are familiar. If attention is focused on these questions the factual determination will rarely lead to complications. In particular it will usually be possible to determine on the evidence, as a matter of fact, the ground of the decision." [Emphasis added.]

The judgment of Clarke JA in Waterhouse v Bell was referred to by Lockhart J in HREOC v MIM, in a judgment which is of some importance to the present case. One issue in HREOC v MIM was whether sections of a proposed standard and code, to be considered by the National Occupational Health and Safety Commission, contravened s 14 of the SD Act. The standard and code specified criteria for exclusion from working in a "lead-risk job". Section 14 of the SD Act makes it unlawful, inter alia, for an employer to discriminate against an employee on the ground of the employee's sex in the terms and conditions of

employment that the employer offers. To determine whether there was a contravention of s 14 of the SD Act, Lockhart J had to consider the operation of s 5 of the SD Act.

Lockhart J made a number of observations relevant to the present case. In summary, the observations were these:

* The words "by reason of", in s 5(1) of the SD Act imply 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 (at 321-322).

* As Clarke JA had said in Waterhouse v Bell, the question of whether there had been a contravention of the SD Act involved a straightforward factual inquiry. When an inquiry is being held into alleged discrimination on the ground of the sex of an employee "all the relevant circumstances surrounding the alleged discriminatory conduct should be examined" (at 324).

* In determining whether conduct is discriminatory, it is relevant to consider the alleged discriminator's reasons for doing an act - that is, the reason why the alleged discriminator treated the complainant less favourably (at 322). Lockhart J expressed disagreement with the view of at least two members of the majority of the House of Lords in James v Eastleigh Borough Council [1990] 2 AC 751, that the subjective reasons for differential treatment of men and women are irrelevant (see at 765, per Lord Bridge). Lockhart J agreed with the dissenting view of Lord Lowry in James v Eastleigh (at 779-780), that to treat the subjective reasons of the alleged discriminator as irrelevant dispenses with an essential ingredient required by the legislation, namely, the ground on which the discriminator acts (at 322-323).

* Lockhart J accepted that there might be cases where the criterion applied by the alleged discriminator is so "inherently discriminatory" that the only conclusion possible is that there is unfair discrimination (at 323-325). James v Eastleigh was such a case. The criterion applied by the Council in that case allowed women over 60 to be admitted free to a leisure centre, but imposed a charge on men unless they had attained the age of 65. Lockhart J said this (at 325) about the circumstances in James v Eastleigh:

"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). That is the view which the majority of the House of Lords adopted. 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 others 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 a proper test to determine if an alleged discriminator's conduct is discriminatory is not advanced by formulating objective or causative tests (on the one hand) and subjective tests (on the other) as though they were irreconcilable (at 325):

"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 and generally would be expected to diminish in cases such as Eastleigh where the policy of an official body has been formulated and is faithfully applied by the decision-maker and where generally there will be little room for questions of intent, motive or purpose or reason save that the intent of the decision-maker doubtless is to give effect to the policy."

In HREOC v MIM, separate judgments were delivered by Black CJ and Lee J. Black CJ agreed (at 307-308) with certain aspects of Lockhart J's reasoning, but did not find it necessary to consider the broader questions of construction of s 5(1) of the SD Act. Lee J expressed (at 331) general agreement with the

conclusion of Lockhart J, subject to certain additional comments. As I read the reasons of Lee J, his Honour would not have regarded evidence of intention or motive, or of the circumstances surrounding the actions of the alleged discriminator, as having less relevance than Lockhart J suggested. Indeed, it would seem that Lee J might have been prepared to go further as the following passage (at 333) indicates:

"Before it could be said that discrimination had occurred under ss 5(1) of the SD Act, it would be necessary to show that the actions of the employer arose out of ill-disposition or lack of partiality or even-handedness towards an employee or applicant for employment, such attitude being grounded upon the sex of that person or upon a characteristic appertaining or imputed thereto."

Lockhart J repeated the analysis he put forward in HREOC v MIM in <<Commonwealth of Australia v Human Rights and Equal Opportunity Commission (1993) 46 FCR 191 (FCA/FC) ("Dopking (No 1)"), at 202-204. Dopking (No.1) involved a claim of discrimination on the ground of marital status (SD Act, s 6(1)), in that (so it was said) a member of the Defence Force, Mr Dopking, had been denied a home purchase allowance because he was single. Lockhart J said that the intention, motive or purpose of the officers who had denied the complainant the allowance, although not irrelevant, did not carry the matter very far. That was because they simply applied the text of the official determination, which made the allowance available only to members accompanied by their "family". It was the determination that had to be analysed to ascertain whether the criteria on which it was founded were "inherently or essentially discriminatory" (at 204). His Honour concluded that the criteria did not differentiate according to marital status, but according to whether the person normally resided with another family member. Wilcox J reached a similar conclusion (at 212). Black CJ dissented. For subsequent proceedings see Commonwealth v Human Rights and Equal Opportunity>> Commission (1995) 63 FCR 74 ("Dopking (No 2)").

In my view, the general approach taken by Lockhart J in HREOC v MIM gives effect both to the language of s 5(1) of the SD Act and the objects in s 3. Not every distinction necessarily amounts to discrimination, in the sense used by the SD Act. As Mason CJ and Gaudron J said in Waters v Public Transport Corporation (at 363):

"The discrimination with which the Act is concerned with which the Act is concerned is discrimination against, rather than discrimination between, persons with different characteristics. The notion of `discrimination against' involves differentiating by reason of an irrelevant or impermissible consideration. Anti-discrimination legislation operates on the basis that certain characteristics or conditions are declared to be irrelevant or impermissible....

The notion of `discrimination between' involves differentiating on the basis of a genuine distinction, which, in the context of anti-discrimination legislation, must be a characteristic that has not been declared an irrelevant or impermissible consideration."

These observations, while made in the context of the <<Equal Opportunity>> Act (Vic), apply to the SD Act 1995 .

The Present Circumstances

In the present case the Commissioner identified the discriminatory conduct as:

* the <<Commonwealth>>'s action in making Calcitriol available under the PBS to persons with established post-menopausal osteoporosis with fracture due to minimal trauma; and

* the Minister's action in making a declaration under s 85(2) and (2A) of the National Health Act, relating to the availability of Calcitriol under the PBS, and the <<Commonwealth>>'s actions in administering the scheme through its officers.

The less favourable treatment said to have been received by the complainants was their inability to obtain Calcitriol at the subsidised rate provided under the PBS for persons suffering from established post-menopausal osteoporosis with fracture due to minimal trauma.

I have described the nature of the evidence which the applicants say they wish, or might wish, to adduce. I am not, of course, in a position to assess its strength or otherwise. Nonetheless, I do not think it was open to the Commissioner to make the findings he did without receiving the foreshadowed evidence (subject to the usual principles governing the reception of evidence by HREOC) and considering its significance, if any, to the question of whether the applicants had discriminated against the complainants, within s 5(1) of the SD Act.

The Commissioner took the view that no evidence the applicants wished to adduce could detract from the conclusion that there had been discrimination. In my opinion, the foreshadowed evidence (bearing in mind that, like the Commissioner, I have only been informed of its likely general character) might lead to a different conclusion on this issue. In particular, the foreshadowed evidence is capable of bearing materially on at least two questions:

* whether the necessary causal relationship exists between the sex of the complainants, or a characteristic pertaining generally to persons of their sex (that is, males), and the less favourable treatment alleged by the complainants; and

* whether the less favourable treatment accorded to the complainants, when compared with a female, took place in circumstances that are the same or are not materially different.

The foreshadowed evidence is plainly capable of elucidating the intention or motive of the decision-makers responsible for making the declaration under s 85(2) of the National Health Act and for making Calcitriol available under the PBS to a limited class of persons affected by osteoporosis. On Lockhart J's analysis in HREOC v MIM, evidence of intention or motive is relevant, although his Honour recognised that there are cases in which a criterion is so essentially discriminatory that evidence of intention or motive adds little or nothing. I do not think it can be said that the criterion embodied in par (a) of the listing for Calcitriol is "so essentially discriminatory in its nature" that evidence of intention or motive could not be of some significance to the question whether the causal relationship required by s 5(1) of the SD Act has been established. The PBS listing, on its face, refers to a medical condition. The Minister's declaration of a drug for the purposes of the PBS can only occur on the recommendation of an expert body, the PBAC. The National Health Act, s 101(3A) specifically requires the PBAC to consider, inter alia, the effectiveness of therapy involving the use of the drug. The outline of the applicant's evidence showed that the applicants at least asserted that there is a very close link, in practice, between the process of registration of drugs under the Therapeutic Goods Act and a declaration under the National Health Act for the purposes of the PBS. Registration under the Therapeutic Goods Act occurs, in practice if not as a matter of law, upon recommendation of ADEC, which assesses the quality, safety and efficacy of therapeutic goods. In these circumstances, the mere fact that the medical condition identified in par (a) of the listing under the PBS includes the word "post-menopausal" does not, in my view, necessarily mean that the par (a) is "essentially discriminatory in its nature". Whether it is essentially discriminatory or not requires the nature of the medical condition and the circumstances underlying the listing of Calcitriol under the PBS to be examined.

In any event, this is not a case where the foreshadowed evidence goes merely to intention or motive. The foreshadowed evidence, as outlined by Mr Hilton (and outline of which, in general terms, was put to the Commissioner) shows that the evidence may be capable of supporting a contention that any less favourable treatment received by the complainants was not causally related to their sex or to a characteristic appertaining generally to males. The evidence might show, for example, that "established post-menopausal osteoporosis" is different from other forms of osteoporosis, whether suffered by males or females. It might also show that clinical trials indicate that Calcitriol is an effective treatment only for that type of osteoporosis or that the drug creates unacceptable risks when used for other kinds of osteoporosis (whether administered to men or women). If the evidence were to this effect, it might support a finding that the apparently unfavourable treatment accorded to the complainants was not caused by their sex, or their inability to become post-menopausal, but (relevantly) by the fact that their form of osteoporosis, which they share with some (perhaps many) women, cannot be effectively treated with Calcitriol or, alternatively, exposes them to unacceptable risks. I repeat that I am not in a position to evaluate the precise nature or cogency of the evidence. Moreover, it is not for me to foreclose any conclusion HREOC might reach on the

evidence. The point is that, in my opinion, until the evidence is considered, the question of causation presented by s 5(1) cannot be resolved.

I also think that the foreshadowed evidence might be relevant to the question of whether the less favourable treatment received by the complainants, when compared with a woman, occurred in the same circumstances, or in circumstances not materially different. The foreshadowed evidence might conceivably demonstrate that a post-menopausal woman with the same kind of osteoporosis as the complainants (and the same type of bone fractures) is not entitled to receive Calcitriol under the PBS. This could be the case, for example, if "established post-menopausal osteoporosis" is a particular form of osteoporosis, arising by virtue of the onset of menopause. The evidence might show that this form of osteoporosis is, or might be, different from the form of osteoporosis occurring in pre-menopausal women, which continues after menopause, and from the form of osteoporosis occurring in men. The significance of evidence to this effect is that it might show that Calcitriol is an effective and safe drug for "established post-menopausal osteoporosis", but is neither effective nor safe for any other form of osteoporosis, whether suffered by men or women (including post-menopausal women). The circumstances of the complainants might therefore be materially different from those of a woman eligible to receive Calcitriol under the PBS for treatment of osteoporosis.

Mr Robertson challenged this approach, on the ground that the matters identified in the SD Act as constituting unacceptable bases for differential treatment (relevantly, the matters specified in s 5(1)(a) and (b)) cannot themselves be relied upon to render the circumstances materially different. The principle to which Mr Robertson referred was expressly accepted by two members of the Court in HREOC v MIM, at 307-308, per Black CJ; at 327, per Lockhart J. It was also accepted by all members of the Court in Dopking (No 1), at 194, per Black CJ; at 205-206, per Lockhart J; at 209, per Wilcox J. As Wilcox J said (at 209), to the extent that the <<Commonwealth>> argued that

"there is a material difference between single people and married people in that the former tend not to have `family' where the latter do, the difference is the proscribed discrimination itself."

If the evidence in this case demonstrates that the circumstances of women entitled to Calcitriol under the PBS are different from those of the complainants only in one respect, namely, that the complainants are incapable of becoming post-menopausal, the principle stated in HREOC v MIM and Dopking (No 1) would seem to be squarely in point. But the foreshadowed evidence goes, or at least might go, well beyond this. It might, as I have said, show that some (perhaps many) post-menopausal women with osteoporosis and bone fractures are not entitled to receive Calcitriol under the PBS. It might also show that the form of osteoporosis experienced by these women is substantially the same as that experienced by the complainants, and that Calcitriol is either ineffective or carries unacceptable risks as a treatment for this form of osteoporosis. If this were the case, the differences between circumstances of the complainants and those of women with osteoporosis who are eligible to receive Calcitriol under the PBS, in my opinion, would go beyond the fact that the former are incapable of being post-menopausal. The differences would include the fact that the complainants' form of osteoporosis, like that suffered by some post-menopausal women, cannot effectively or safely be treated by Calcitriol. I stress again that the evidence may not support factual findings of the kind to which I have referred. However, in my view, the Commissioner erred in holding that none of the applicants' foreshadowed evidence was capable of affecting his conclusion that the applicants had discriminated against the complainants.

Are the Complainants Doomed to Fail Under s 5(1) of the SD Act?

Mr Hilton's submission that the complainants' case, insofar as it rests on s 5(1) of the SD Act, is bound to fail rests on two separate grounds. I shall deal first with the contention that s 5(1) directs a comparison between the treatment accorded to the complainants and that accorded to women generally. Mr Hilton's argument is that, since women with osteoporosis who experience bone fracture due to minimal trauma are not necessarily entitled to Calcitriol under the PBS, the complainants could not establish that they had been treated less favourably than the applicants treated or would treat women.

In support of this submission, Mr Hilton relied on the judgments of Lockhart J and Wilcox J in Dopking (No 1). It will be recalled that s 6(1) of the SD Act follows the language of s 5(1), except that s 6(1) is concerned with discrimination on the ground of marital status. Lockhart J in Dopking (No 1) emphasised that the concluding words of s 6(1) require a comparison to be made between the alleged discriminator's treatment of the aggrieved person and the treatment accorded to "a person of a different marital status". His Honour said this (at 204-205):

"In this case s 6(1) requires the comparison to be made between Mr Dopking as a person with the characteristics mentioned in par (b) or (c) of subs (1) and a person of a different marital status. There is no extension of that other person's marital status for the purposes of the section. In other words, the comparison is not made with a person having a characteristic that appertains generally to or is generally imputed to persons of another marital status; it is made with a person of a different marital status - for example a married person."

Wilcox J agreed with this conclusion. His Honour considered that a literal approach should be adopted to the construction of the concluding words of ss 5(1) and 6(1) (at 211-212):

"On a literal reading of s 6(1), for conduct to fall within the subsection the alleged discriminator must treat the aggrieved person less favourably than he or she treats, or would treat, a person of a different marital status. The subsection merely requires a comparison between the treatment of an aggrieved person having a particular marital status (or characteristic which appertains generally, or is perceived to appertain generally, to persons of a particular marital status) and the treatment accorded to persons having a different marital status, without reference to the characteristics that generally appertain, or are imputed, to that marital status.

I have considered whether the words `different marital status' should be construed literally, in this way. A literal construction reduces the scope of subs (1). To revert to the hypothetical employer who wished to exclude women employees and gave the reason that they could not lift heavy weights. Could the employer escape the reach of s 5(1) by adopting a policy of employing, not men as such, but women who could lift 40 kilos; the employer knowing that most, but not all, men - and few, if any, women - could pass this test? In order to avoid what the learned President, in a different context, referred to as `fatally frustrat(ing) the purposes of the Act' should the comparison be, not with males, simpliciter, but with persons having characteristics that generally appertain, or are imputed to, males; that is, persons having greater physical strength?

But for the presence of s 5(2), I would answer the last question affirmatively. Otherwise it would be easy for a person to avoid the operation of the section, by discriminating indirectly rather than directly. However, s 5(2) does exist and has an important role to play. It would cover my hypothetical case. The employer would be requiring the prospective female employee to comply with a requirement with which she is not able to comply (par (c)), but with which a substantially higher proportion of the opposite sex (men) do comply (par (a)). Whether or not the requirement was discriminatory would depend on whether or not it was reasonable in the circumstances of the case (par (b)); this being an objective matter requiring a balancing of the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced for the requirement on the other: see Secretary, Department of Foreign Affairs and Trade v Styles (1989) 23 FCR 251 at 263. This provides a sensible result. Fulfilment of the purposes of the Act would not be imperilled by giving a literal interpretation to the concluding words of s 5(1) `a person of the opposite sex'."

It follows from Dopking (No 1) that s 5(1) of the SD Act requires a comparison to be made between the treatment accorded to the complainants and that accorded to a woman, without reference to characteristics that generally appertain to women. Nonetheless, in the absence of further factual findings, I do not think it can necessarily be said that the complainants could not show that they had been treated less favourably than a woman would have been treated. It is true that some women suffering from osteoporosis and bone fracture are not entitled to receive Calcitriol under the PBS. But the criterion specified in par (a) of the listing for the drug makes it clear that only women are eligible to receive the drug under the PBS. The evidence may ultimately show that the only difference between women entitled to receive Calcitriol for the treatment of osteoporosis under the PBS and the complainants who are not so eligible, is that the former

have gone through menopause. For example, there may be no difference in the aetiology or characteristics of the disease or condition, nor in the efficacy, safety and cost of Calcitriol as a treatment for the disease or condition. The evidence might further show, that for one or more of the complainants, they are of such an age that, if they were females, they would necessarily be post-menopausal, and thus entitled to Calcitriol under the PBS. In short, but for the fact that they are not females, the complainants would (on the assumed facts) be entitled to receive Calcitriol under the PBS for the treatment of their osteoporosis.

In these circumstances, I think it would at least be open to a decision-maker to conclude that the complainants have received less favourable treatment, in circumstances that are the same or not materially different, than that accorded to a woman. This is so notwithstanding that not all women suffering from osteoporosis and associated bone fractures are entitled to receive the drug under the PBS. If a woman of the same age and with the same disease as the complainant is entitled to receive a drug under the PBS, while the complainant is not and can never be so entitled, notwithstanding that the drug is equally safe and effective for the treatment of his disease, it seems to me that the treatment accorded to the complainant is less favourable than, in circumstances that are the same or are not materially different, the treatment that is or would be accorded to a woman. The comparison required by s 5(1) makes it necessary to identify the circumstances that are the same or are not materially different and to attribute to the "notional" woman the characteristics that make the circumstances the same or not materially different.

On the facts that I have assumed might be found, the case is similar to a scheme which provides benefits to all women suffering from asthma who are over a certain age, but which excludes all male asthma sufferers. It would be difficult to dispute that male asthma sufferers over the specified age have been treated less favourably than women, notwithstanding that some female asthma sufferers are not entitled to the benefit. It is perhaps relevant to note that, in James v Eastleigh, not all women were entitled to free entry into the leisure centre.

I should add that the facts I have assumed are, in my view, different from those in the illustration given by Wilcox J in Dopking (No 1). A policy of employing only persons who can lift at least forty kilograms does not, in terms, exclude women. The criterion specified in par (a) of the listing for Calcitriol under the PBS necessarily excludes all male osteoporosis sufferers from eligibility for the drug. If the evidence shows that the only relevant difference between the complainants, and females eligible to receive Calcitriol under the PBS for their osteoporosis, is that the latter are post-menopausal, I think it is open to conclude that the male complainants have been treated less favourably than a woman would have been treated in the same circumstances or in circumstances not materially different.

Mr Hilton also submitted that the complainants' case, insofar as it is based on s 5(1) of the SD Act, is bound to fail, because Calcitriol has not been registered under the Therapeutic Goods Act for the treatment of osteoporosis in circumstances other than those specified in par (a) of the listing under the PBS. Since Calcitriol has not been registered under the Therapeutic Goods Act for the treatment of males suffering from osteoporosis, it cannot lawfully be imported, manufactured or supplied for use for that purpose: Therapeutic Goods Act, ss 20, 21. Further, the effect of s 6(1)(b)(ii) of the Therapeutic Goods Act is to apply the Act to things done by natural persons under a law of the <<Commonwealth>> relating to the provision of pharmaceutical benefits. According to Mr Hilton, it follows that the drug cannot lawfully be prescribed as a pharmaceutical benefit for the treatment of osteoporosis in males, even if it were listed for that purpose pursuant to Part 7 of the National Health Act. Moreover, it would be an offence against the Therapeutic Goods Act for a doctor to write a prescription for the supply of the drug as a pharmaceutical benefit if the use of the drug were not "relevantly registered" under the Therapeutic Goods Act.

The absence of registration of Calcitriol as a drug for the treatment of osteoporosis, except for established post-menopausal osteoporosis in patients with fracture due to minimal trauma, may be an important factor in determining the factual issues I have previously identified. However, I do not think that on the material before me I can or should determine that the non-registration of Calcitriol under the Therapeutic Goods Act for use in the treatment of osteoporosis in males necessarily makes the circumstances of the complainants different from those of women generally, for the purposes of s 5(1) of the SD Act. Mr Hilton's construction of the legislation appears on the face of it to be plausible, but the point was not argued in any depth and, because of the course the proceedings took before the Commissioner, could not be based on detailed factual

findings by HREOC. Perhaps more importantly, the agreed facts make it clear that at least one complainant has been prescribed Calcitriol by a doctor and has received the drug for the treatment of his osteoporosis, albeit not under the PBS. The evidence does not address the circumstance in which the drug was prescribed or dispensed. It may be that the evidence will provide an explanation as to how the drug came to be prescribed and dispensed for this purpose without infringing the Therapeutic Goods Act. The incompleteness of the factual material is reinforced by the fact that Mr Robertson informed me, without objection from Mr Hilton, that the complainants are now receiving Calcitriol free of charge. Again, the evidence does not address how this state of affairs has come about and how it can be reconciled with the apparent effect of the Therapeutic Goods Act.

In all the circumstances, I think the appropriate course is for HREOC to make findings on any facts that may be necessary to determine the effect of the Therapeutic Goods Act on the prescription and dispensing of drugs for uses not placed on the register under the Therapeutic Goods Act. Any such findings would need to be taken into account with the other factors that I have mentioned elsewhere in this judgment in order to determine whether the relevant circumstances are "materially different" for the purposes of s 5(1) of the SD Act.

It follows that, in my opinion, the complainants may be able to demonstrate that they have been treated less favourably than women, in circumstances that are the same or are not materially different. Whether they can do so will depend on the factual findings made in the course of further proceedings before HREOC.

Additional Submissions

The applicants made two additional submissions:

(i) The Therapeutic Goods Act effects a partial repeal of the SD Act. In particular, to the extent that s 5(1) of the SD Act prohibits consideration being given to considerations of efficacy and safety in the registration of drugs under the Therapeutic Goods Act, the latter effects an implied repeal of the former. This argument was not included in the applicants' written submissions, and Mr Hilton did not develop it in any detail.

(ii) Section 22 of the SD Act could not have been infringed by the applicants because neither the <<Commonwealth>> nor the Minister "provides services" to the recipients of benefits under the National Health Act. They simply pay money to pharmacists, thereby indirectly subsidising persons who are entitled to pharmaceutical benefits.

The applicants invited me to address these submissions even if (as I have decided) the proceedings were to be remitted to HREOC to enable the applicants' evidence to be considered.

I do not think I should accept this invitation. The first submission was not developed and I am reluctant to address such a potentially important question in the absence of full argument. Indeed, it was not made entirely clear what significance the argument had for the present application, having regard to the fact that Mr Hilton expressly did not pursue a contention put to the Commissioner, namely, that the National Health Act effects a partial repeat of the SD Act. In any event, I think it better for the question to be considered after the relevant factual findings have been made. Of course, the question will not arise for decision if the applicants succeed in their contention that there was no discriminatory conduct within s 5(1) of the SD Act and also succeed in resisting the complainants' case insofar as it is based on s 5(2) of the SD Act.

The significance of the second submission is also not entirely clear, since Mr Hilton did not challenge the Commissioner's ruling that s 26 of the SD Act (assuming that the applicants had discriminated on the ground of sex) could apply to the applicants' conduct. Mr Hilton, as I followed him, suggested that the submission could be relevant, because some of the applicants' conduct pre-dated the insertion of the new s 5(2) into the SD Act by the Sex Discrimination Amendment Act (Cth). Mr Hilton did not explain precisely how the submission would then be relevant. In any event, I think that the construction of s 22 of the SD Act should be addressed only if it is necessary to do so. Again, the issue arises only if the applicants fail in their contention that they did not discriminate against the applicants. Even if they do fail on this issue, it still

may not be necessary to decide the question, depending on the findings of fact that are ultimately made and the effect of s 26 of the SD Act.

CONCLUSION

The decision made by the Commissioner should be set aside and the matter remitted to HREOC for determination according to law. Mr Hilton, on behalf of the applicants, submitted that the rehearing should be before HREOC differently constituted. In support of this submission he referred to Northern NSW FM Pty Ltd v Australian Broadcasting Tribunal (1990) 26 FCR 39 (FCA/FC) ("Northern Rivers"), at 42-43, per Davies and Foster JJ, with whom Burchett J agreed.

As in Northern Rivers, there is, in my view, nothing to suggest that the Commissioner conducted himself otherwise than with due propriety and impartiality. A submission that there had been a departure from standards of procedural fairness was not pressed. Nonetheless, the Commissioner strongly expressed the view that none of the evidence which the applicants might adduce could be relevant to the question of discriminatory conduct. While the Commissioner (as he said) has clearly formed no view as to the credit of witnesses or the findings of fact that should be made, it may seem fairer to the parties, in particular to the applicants, that the evidentiary issues be determined by HREOC, differently constituted. As the Court said in Northern Rivers (at 43), a direction that a Tribunal be differently constituted

"imports no criticism whatever of the member who originally constituted the Tribunal but simply recognises that, when decisions in judicial and administrative proceedings are set aside in toto and the matter remitted to be heard and decided again, justice is in general better seen to be done if the court or the Tribunal is reconstituted for the purposes of the rehearing."

Accordingly, I think that the matter should be remitted to HREOC for determination with a direction that HREOC be differently constituted.

The applicants do not seek any order as to costs. In these circumstances, I think that the appropriate course is that there be no order as to costs.

I certify that this and the preceding

twenty-nine (29) pages are a true copy

of the Reasons for Judgment herein

of the Honourable Justice Sackville.

Associate:

Dated: <<18 July, 1997>>

Counsel for the Applicants: Mr J S Hilton SC and Dr A Gelbart

Solicitor for the Applicants: Australian Government Solicitor

The First Respondent entered

a submitting appearance.

Counsel for the Second, Third

and Fourth Respondents: Mr D A C Robertson

Solicitor for the Second, Third

and Fourth Respondents: Tress Cocks & Maddox

Date(s) of Hearing: 25 and 26 June <<1997