HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION v. <<MOUNT ISA>> MINES LIMITED; LOU MARKS; EDWARD EMMETT; JENNIFER GEORGE AND OTHERS and NATIONAL OCCUPATIONAL HEALTH AND SAFETY COMMISSION No. NG173 of 1992 FED No. 796
Discrimination Legislation - Administrative Law (1993) 118 ALR 80 (1993) 46 FCR 301

COURT
IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION
BLACK CJ(1), LOCKHART(2) AND LEE(3) JJ
HRNG
SYDNEY, 29 September 1992
#DATE 9:11:1993

Counsel for the Appellant: D.M. Bennett QC and R.S. McColl

Solicitor for the Appellant: M.L. Chalmers (The Human Rights and Equal Opportunity Commission)

Counsel for the First Respondent: S.P. Charles QC and A.H. Bowne

Solicitor for the First Respondent: R.P. Woods

Solicitor for the Second - Twentieth Respondents: Australian Government Solicitor

Counsel for Applicant on Motion: J. Basten and S. Winters

Solicitor for Applicant on Motion: Public Interest Advocacy Centre
ORDER
The Court orders that:
1. The appeal be dismissed
2. The appellant pay two-thirds of the costs of the first respondent of the appeal.
3. The appellant pay the costs of the second to twentieth respondents of the appeal as submitting respondents.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.
JUDGE1
BLACK CJ This appeal raises important questions about the impact of the Sex Discrimination Act 1984 (Cth) ("the SDA") upon the work of the National Occupational Health and Safety Commission ("the Commission") in performing the function given to it by the National Occupational Health and Safety Commission Act 1985 (Cth) ("the NOHSC Act") of declaring national standards and codes of practice relating to occupational health and safety matters.

2. The issues have arisen in the context of the Commission's preparation of a draft National Inorganic Lead Control Standard ("the proposed standard") and a draft National Code of Practice for the Control and Safe Use of Inorganic Lead at Work ("the proposed code").

3. The way in which the issues have arisen and the course of the litigation are described in detail in the reasons for judgment prepared by Lockhart J which I have had the advantage of reading and it is sufficient if I set out the paragraphs of the proposed standard and the proposed code that lie at the centre of this case. Paragraphs 14(1) and 14(2) of the proposed standard are

in the following terms:

"14 (1) Criteria for exclusion from working in a lead-risk job are:

(a) personal medical condition;

(b) pregnancy;

(c) breast feeding; and

(d) such other basis as may be permitted under relevant anti-discrimination legislation.

(2) These exclusions do not apply to non lead- risk jobs."

4. Paragraph 12.1 of the proposed code reads:

"12.1 Regarding exclusion from working in a lead-risk job:

(a) Individuals with certain medical conditions (such as impaired renal function, anaemia, haemoglobinopathies, neuropathies and reproductive problems) may be more susceptible to the adverse effects of lead on health. Exclusion from working a lead-risk job on such grounds should be in accordance with section 15 of the standard, Health Surveillance.

(b) Lead is a particular health risk to the fetus. A pregnant employee should keep her blood lead level below 30 g/100 mL and as low as possible.

(c) Infants are more susceptible to the health effects of lead than adults. A breastfeeding employee should keep her blood lead level below 30 g/100 mL and as low as possible.

(d) We are advised by HREOC that employers wishing to exclude women, other than those pregnant or breastfeeding, from lead-risk jobs will need to seek an exemption from the relevant Sex Discrimination legislation."

5. The blood level of 30 g/100mL referred to in paragraph 12.1(b) of the proposed code is lower than the blood level proposed by paragraph 15(24) of the proposed standard for the immediate removal of an employee from a lead-risk job to a job that is not a lead-risk job. The latter blood level is 60 g/100mL.

6. As Lockhart J has noted, the learned primary judge, Davies J, declared that paragraph 14(1)(d) of the proposed standard and paragraph 12.1(d) of the proposed code would be invalid if they were adopted essentially because: (a) the Commission appeared to have abrogated part of its function to the Human Rights and Equal Opportunity Commission ("HREOC") by accepting that HREOC should, through the exemption process, establish proper safety precautions for the lead industry and (b) because the Commission appeared to be overborne by the consideration of matters with which the SDA was concerned, and thereby had failed to develop a proper and adequate standard and code. Davies J also made an order that the Commission and its members, before adopting a standard and code for the lead industry, consider further whether there are any appropriate provisions which, in their opinion, should, from the point of view of occupational health and safety, be included in the standard and the code.

7. The Commission is established by s. 6 of the NOHSC Act for the objects set out in s. 7. The functions of the Commission are set out in s. 8 and the

functions specified in s. 8(1) include the following:

"(a) To formulate policies and strategies relating to occupational health and safety matters;

. . .

(d) to review laws and awards relating to occupational health and safety matters;

(e) to consider, and to make recommendations in relation to, proposals for the making of laws and awards relating to occupational health and safety matters;

(f) to declare national standards and codes of practice;

(g) to encourage and facilitate implementation of:

(i) . . .

(ii) . . .

(ii) national standards and codes of practice;

(h) to evaluate the effectiveness and implementation of:

. . .

(iv) national standards and codes of practice

. . .

(r) to consult and co-operate with other persons, organisations and governments on occupational health and safety matters.

8. Other functions of the Commission relate to research concerning occupational health and safety matters and s. 8(6) provides that in the performance of its function relating to research and testing the Commission shall pursue a policy directed towards the maintenance of scientific objectivity.

9. Section 38(1) of the NOHSC Act provides:

"38. (1) The Commission may, by writing, declare national standards and codes of practice relating to occupational health and safety matters."

10. The primary judge rejected a submission that occupational health and safety was the sole consideration of the Commission and that the Commission ought to put concepts of sex discrimination totally from its mind. In rejecting that submission, his Honour said that the Commission could not look at matters of health and safety in the abstract and that its task was to prepare standards which would be a guide to the industry. Its task was, therefore, to prepare standards and codes which were practical and acceptable. His Honour, however, accepted the submission made on behalf of <<Mount Isa>> Mines Limited that it was not the task of the Commission to concern itself with the implementation of the SDA.

11. In his Honour's view, whilst the Commission was entitled to take account of the object which the SDA was designed to achieve and should, in any event, attempt to formulate a standard that was fair to employees whether male or female, the Commission was not limited in its consideration by the terms of the SDA.

12. On this appeal, HREOC contended that the Commission was obliged to be concerned with the SDA whereas <<Mount Isa>> Mines Limited contended that the Commission's functions were directed solely to health and safety issues and did not encompass any matters relating to equal opportunity or discrimination on the ground of sex. It was submitted that there was nothing in the NOHSC Act that suggested that the Commission, in declaring standards and codes of

practice, should or need take into account the SDA.

13. The NOHSC Act does not specify any matters that the Commission must or must not take into account for the purpose declaring national standards and codes of practice relating to occupational health and safety matters, but limits to the matters that may be taken into account may of course be implied from the subject-matter, scope and purpose of the legislation: see Minister for Aboriginal Affairs v. Peko-Wallsend Ltd (1986) 162 CLR 24 at 40.

14. When considering whether the SDA is outside the legitimate area for the Commission's consideration it is important to examine carefully the nature of the function that the Commission carries out and the power that it exercises when it declares standards and codes under s. 38 of the NOHSC.

15. As Davies J pointed out, the Commission cannot look at matters of health and safety in the abstract and its task is to prepare standards that will be a guide to the industry. Therefore, its task is to prepare standards and codes that are practical and acceptable. This follows from the nature of the national standards and codes of practice for which the NOHSC Act provides and also from the circumstance that the Commission's functions under s. 8(1) include those of encouraging and facilitating the implementation of national standards and codes and evaluating their effectiveness and implementation.

16. Since the national standards and codes of practice that the Commission may declare under s. 38 of the NOHSC Act are intended to operate as practical instruments in Australian workplaces, advisory in character but such that their implementation is to be encouraged by the Commission, the laws applying in those workplaces cannot be outside the area of relevance to the Commission's task. In fact, they may be of great importance to the Commission's function of declaring minimal standards and codes. This is particularly the case where the law in question is one that directly affects employment and is aimed at eliminating, so far as possible, discrimination on the ground of sex, marital status or pregnancy in the area of work. In my view there is no basis for any implication that the SDA is outside the scope of the Commission's consideration when preparing national standards and codes.

17. The Commission's functions in relation to such matters as testing and research and the publication of reports relating to occupational health and safety matters (as to which see ss. 8 (1)(k), (n), (t), (ta), (u) and (v)) raise quite different considerations. In the performance of its research and testing functions the Commission must pursue a policy directed towards the maintenance of scientific objectivity: s. 8(6). If the Commission's research shows that conditions in the workplace may impact differently upon men and women in ways that are relevant to occupational health and safety the Commission would obviously report upon that matter in accordance with proper standards of scientific objectivity. But the functions of research and report are quite distinct from the function of preparing standards for practical implementation in workplaces to which laws prohibiting discrimination apply.

18. In taking into account the SDA when preparing national standards and codes the Commission would of course be obliged to take into account the whole legislative scheme of the SDA including, most importantly in a case such as the present, the provisions of the SDA with respect to exemptions. Section 44 of the SDA provides that HREOC may grant exemptions from the operation of a provision of Division 1 (Discrimination in Work) or Division 2 (Discrimination in Other Areas). Exemptions or further exemptions under s. 44 may be granted

subject to terms and conditions and they must be granted for a specified period not exceeding 5 years. There is a right of review by the Administrative Appeals Tribunal of decisions made by HREOC under s. 44.

19. Section 44 is a very important provision and it was submitted by senior counsel for HREOC that in determining whether to grant an exemption under s. 44, HREOC could take into account conflicts between the objects of the SDA and economic factors affecting the applicant for an exemption. Choices of that nature obviously involve difficult questions, and decisions about them are committed by the SDA to HREOC and to the Administrative Appeals Tribunal by way of a review.

20. The Commission, in formulating a standard or a code in circumstances in which the SDA may be relevant, should recognise that the power to grant exemptions rests with HREOC and that a workplace standard that might involve unlawful discrimination on the ground of sex in the general case might, by reason of the grant of an exemption under s. 44, not be unlawful at all under Commonwealth law in the specific case and for the period of time to which the exemption applied.

21. It cannot have been intended that in cases where conditions in the workplace impact upon men and women differently the Commission should ignore the SDA, or on the other hand, out of concern for the policy of the SDA, fail to set standards. Nor can it have been intended that the Commission should leave it to HREOC to set occupational health and safety standards.

22. In my view the interaction between the SDA and the NOHSC Act is such that Commission may declare standards and codes that fully recognise the impact of the SDA both insofar as it prohibits discrimination in employment and insofar as the SDA provides for the grant of exemptions by HREOC and, on review, by the Administrative Appeals Tribunal. The Commission may thus declare standards and codes of practice that are applicable where no exemption has been granted and which are set in such a way as not to involve any discrimination. At the same time the Commission may also declare other standards and codes as being applicable if, but only if, by reason of an exemption from the SDA or equivalent legislation, differences in the application of the standards or codes that turn on a person's sex do not involve unlawful discrimination.

23. In this way the Commission's standards and codes will be capable of lawful implementation in the workplace under all circumstances so that if, in the exercise of its powers, the HREOC considers it appropriate to grant an exemption there may be an applicable standard and code appropriate to those circumstances. If no exemption is granted, there will still be an appropriate standard and code, formulated by reference to relevant occupational health and safety considerations but on the footing that there is no exemption from operation of the SDA. Each such standard and code would reflect the proper concerns of the Commission with occupational health and safety matters and its recognition of the application, to the workplaces to which its standards and codes are intended to apply, of laws prohibiting discrimination in the area of work on grounds that include the ground of sex.

24. In my view, the Commission did err in law in proposing paragraph 14(1)(d) of the proposed standard. Its function was, relevantly, to declare national standards relating to occupational health and safety matters. By taking the approach revealed by paragraph 14(1)(d) the Commission, on a mistaken view

about the interaction between the NOHSC Act and the SDA, in effect transferred to another body, HREOC, the performance of part of its functions. The SDA does not require this and the NOHSC Act does not authorise it.

25. Paragraph 12.1(d) of the proposed code may seem at first sight to be free from the problem revealed by paragraph 14(1)(d) of the proposed standard. However, on closer examination, what it reveals is that the Commission, again on a mistaken view about the interaction between the two Acts, has not dealt with the position of women who are neither pregnant nor breast-feeding. In taking this approach the Commission made an error of law concerning the scope of its functions.

26. There was no challenge to paragraphs 14(1)(b) (pregnancy) or 14(1)(c) (breast feeding) of the proposed standard so I express no opinion about whether conduct is in accordance with them might, in some circumstances, involve a contravention of the SDA. I would merely observe that what is reasonable (see for example s. 7(1)(b), as to pregnancy) will obviously vary according to time and circumstance.

27. I should mention some other questions that were raised in argument. I agree with Lockhart J for the reasons he gives that the presence of intention, motive or purpose relating to health does not detract from the conclusion that there is discrimination on the ground of sex where a women is excluded from work in the lead industry in the circumstances to which his Honour refers.

28. I also agree with Lockhart J in his rejection of the view that the matters the SDA specifies as constituting unacceptable bases for differential treatment (relevantly s. 5 (1)(a), (b) and (c)) can be relied upon to support the conclusion that the circumstances are not "the same" or are "materially different" for the purposes of s. 5(1).

29. The primary judge did not find it necessary to deal with the question whether there was any inconsistency between the provisions of the NOHSC Act and the SDA although the question was raised in argument before us on the appeal. It follows from what I have said about the interaction of the two Acts that in my view there is no inconsistency between them.

30. For the reasons I have given, I would dismiss the appeal. I agree with the orders for costs proposed by Lockhart J.
JUDGE2
LOCKHART J This appeal from the judgment of a Judge of the Court (Davies J) raises interesting and important questions under the Sex Discrimination Act 1984 (Cth) ("the SD Act") and concerns its relationship with the National Occupational Health and Safety Commission Act 1985 (Cth) ("the NOHSC Act"). Mt <<Isa Mines Limited ("Mt Isa>>") (the applicant at first instance and the first respondent to this appeal) sought orders of review under the Administrative Decisions (Judicial Review) Act 1977 (Cth) ("the ADJR Act") and s. 39B of the Judiciary Act 1903 (Cth) in respect of an alleged decision made or conduct leading to a decision to be made by the National Occupational Health and Safety Commission ("the Commission") concerning the adoption of a standard and code for the lead industry in Australia. The other parties to the application at first instance were the eighteen members of the Commission, the Commission itself and the Human Rights and Equal Opportunity Commission ("the HREOC").

2. The Commission had been considering for some time the publication under s. 38 of the NOHSC Act of a standard and code of practice for persons and

companies engaged in the lead industry in which the presence of lead poses a risk to health. Mt <<Isa>>, a producer of lead, is one such company. The learned primary Judge declared that paragraph 14(1)(d) of the proposed National Inorganic Lead Control Standard ("the proposed standard") and paragraph 12.1(d) of the proposed National Code of Practice for the control and safe use of inorganic lead at work ("the proposed code"), each dated 4 December 1991, would be invalid if they were adopted, essentially on two grounds: (a) that the Commission appeared to have abrogated part of its function to the HREOC by accepting that the HREOC should, through its exemption process, establish proper safety precautions for the lead industry and (b) the Commission appeared to have been overborne by consideration of matters with which the SD Act is concerned, and thereby failed to develop a proper and adequate standard and code. His Honour ordered that the Commission and its members, before adopting a standard and code for the lead industry, consider further whether there are any appropriate provisions which in their opinion should from the point of view of occupational health and safety be included therein. His Honour ordered the Commission to pay the costs of Mt <<Isa>> of the proceeding.

3. The HREOC appealed to this Full Court from Davies J's judgment. The Commission and its members submitted to such order as the Court may see fit to make on the appeal and did not take part in argument. The active parties to the appeal were the HREOC and Mt <<Isa>>. The Court granted leave to the Public Interest Advocacy Centre ("the PIAC") to assist the Court as amicus curiae on a limited basis and had the benefit of the submissions of its counsel.

4. The Commission is a body corporate established under the NOHSC Act (s. 6). Section 7 of that Act defines the objects of the establishment of the Commission in these terms:

> "(a) the development among the members of the community of an awareness of issues relevant to occupational health and safety matters and the facilitation of public debate and discussion on such issues;
>
> (b) the provision, in the public interest, of a forum by which representatives of the Government of the Commonwealth, the Governments of the States and of employers and employees may consult together in, and participate in the development and formulation of policies and strategies relating to, occupational health and safety matters; and
>
> (c) the provision of a national focus for activities relating to occupational health and safety matters."

5. The functions of the Commission are specified in s. 8 and are numerous; but so far as presently relevant they include the following:

> "(a) to formulate policies and strategies relating to occupational health and safety matters;
>
> (b) to consider, and to make recommendations in relation to, the action that should be taken by, and to facilitate co-operation between, the Government of the Commonwealth, the Governments of the

States, employers, persons engaged in occupational activities and organizations of employers or of persons engaged in occupations on occupational health and safety matters;
...
(d) to review laws and awards relating to occupational health and safety matters;
...
(f) to declare national standards and codes of practice;
...
(r) to consult and co-operate with other persons, organizations and governments on occupational health and safety matters;
..."

6. The expression "occupational health and safety matters" is defined in the interpretation section (s. 3) in the following terms:

"'occupational health and safety matters' means matters relating to occupational health or occupational safety and, without limiting the generality of the foregoing, includes matters relating to one or more of the following:
(a) the physiological and psychological needs and well-being of persons engaged in occupations;
(b) work-related death;
(c) work-related trauma;
(d) the prevention of work-related death or work-related trauma;
(e) the protection of persons from, or from risk of, work-related death or work- related trauma;
(f) the rehabilitation and re-training of persons who have suffered work-related trauma; ..."

7. The expressions "occupation", "work-related death" and "work-related trauma" are also defined in s. 3, but I need not recite the definitions.

8. Part VI of the NOHSC Act is concerned with "National Standards and Codes of Practice". Section 38, which is included in Part VI, provides as follows:

"(1) The Commission may, by writing, declare national standards and codes of practice relating to occupational health and safety matters.
(2) Except as otherwise provided by a law other than this Act or by an award or instrument made under such a law, a national standard or code of practice is an instrument of an advisory character.
(3) A national standard or code of practice shall be published in the prescribed manner.
(4) Before declaring a national standard or code of practice, the Commission shall, by notice published in accordance with the

regulations -

(a) set out the standard or code of practice the Commission proposes to declare;

(b) invite interested persons to make representations in connection with the proposed standard or code of practice by such date as is specified in the notice; and

(c) specify an address or addresses to which representations in connection with the proposed standard or code of practice may be forwarded.

(5) A person may, not later than the date specified in the notice, make representations to the Commission in connection with the proposed standard or code of practice, and the Commission shall give due consideration to any representations so made and, if the Commission thinks fit, alter the proposed standard or code of practice.

(6) The Commission shall, as soon as practicable after declaring a national standard or code of practice, give a copy of the national standard or code of practice to the Minister."

9. The Commission is empowered to direct that inquiries be conducted in respect of occupational health and safety matters (s. 39); and the procedures for the conduct of those inquiries are specified in Part VII: "Public Inquiries".

10. In the course of considering the publication under s. 38 of an appropriate standard and code of practice for persons and companies engaged in the lead industry, the Commission conducted extensive inquiries and consulted people and government agencies. The Sex Discrimination Commissioner (appointed pursuant to s. 96 and subsequent sections of the SD Act) addressed a National Occupational Health and Safety Lead Forum on 9 August 1990 and he criticised an early draft of the proposed standard in these terms:

"The Proposed Standard is discriminatory. It discriminates against women. The discriminatory aspects of the Proposed Standard are contained in the requirements for medical certification. These passages are:

19.3 Medical certification for suitability to commence work should take into account age, potential for foetal exposure, general health and target organ susceptibility.

19.5 Criteria for exclusion from medical certification include:

a. Age less than 16 years. An employer shall not permit a person below the age of 16 years to be present in a lead process area;

b. Potential for a foetus to be exposed

to an elevated maternal blood level of greater than 30 g/100 ml at conception or at any stage of development (overtly discriminatory and offensive to women)

c. Target organ susceptibility, including: i. impaired renal function, ii. anaemia, haemoglobinopathies, iii. neuropathies, and iv. reproductive problems.

(NOSHC 1990, p 140 - emphasis added)

The proposed standard calls for the identification of 'non lead risk' jobs, and for non-discriminatory employment practices in relation to these.

This is welcome as far as it goes.

But for jobs identified as 'lead risk' the draft Code takes an approach which is completely unacceptable.

It fails to protect the rights of all workers to the safest working conditions feasible.

It fails to respect the right of women to work without discrimination."

11. At the same forum an address was given by an officer of the Affirmative Action Agency who referred to a 1978 standard of the USA Occupational Safety and Health Administration which stated:

"Exposures to lead can have serious effects on the reproductive function in males and females ... because of the demonstrated adverse effects of lead on reproductive function in male and female, as well as the risk of genetic damage of lead on both ovum and sperm, it recommends a g/ml maximum permissible blood lead level in both males and females who wish to bear children."

12. On 11 October 1990 Mt <<Isa>>, being concerned with the constitution of an Expert Review Group or Lead Expert Working Group, wrote a letter to the Commission stating that the Commission "seriously misunderstood and exceeded its statutory purpose and powers" and requested the Commission to seek advice from the Department of the Attorney-General. The Commission took advice from the Attorney-General's Department which was to the effect that occupational health and safety matters did not encompass the health of the unborn foetus. The advice from the Department also said:

"35. Accordingly, in exercising your powers under the NOHSC Act you are obliged to avoid treating women less favourably then, in circumstances that are the same or not materially different you would treat men by reason of a characteristic that appertains generally to women (eg the capacity to become pregnant)."

13. The advice referred also to s. 26 of the SD Act, a section which renders it unlawful for any person who performs any function or exercises any power under a Commonwealth law to discriminate against any other person on the ground of the other person's sex, marital status or pregnancy in the performance of that function.

14. Meetings of the NOHSC Standards Development Standing Committee Expert Working Group on Lead were held from time to time including a meeting on 24 April 1991 when its members discussed "whether to exclude certain women on the grounds of pregnancy and breast-feeding". A Ms P Hall, who represented the Department of Industrial Relations, Employment, Training and Further Education, NSW, advised members that the issue would not conflict with the SD Act.

15. On 13 June 1991 there was a meeting of the Lead Expert Working Group, the minutes of which record:

> "Ms P Hall presented a summary paper of issues involved, including legal opinion on the proposed removal levels for employees planning to have a family. Ms P Hall's paper is attached to these minutes. Members AGREED that the proposed standard should be modified so that it will not be in conflict with the Sex Discrimination Act 1984."

16. On 25 June 1991 there was a further meeting of the NOHSC Standards Development Standing Committee Expert Working Group on Lead.

17. On 3 July 1991 Dr Cathy Mead, the chairperson of the Lead Expert Working Group, wrote a lengthy report to the Commission which included the following:

> "Anti-discrimination law prohibits treating men and women differently. Discriminating against women on the basis of 'child-bearing capacity' would amount to sex discrimination, and it would not be open to Worksafe to promulgate a standard which was discriminatory in that way. This is irrespective of whether there is a toxicological or health-based reason for such action. Obviously, it would have been simpler if the reproductive effects on men and women occurred at the same blood lead level. The LEWG doesn't believe this has been demonstrated to be the case."

18. On 17 September 1991 the Commission met and the minutes of its meeting record, inter alia, the following:

> "19. The National Commission CONSIDERED the issues of the accommodation of equal opportunity and employers' and employees' duties in the lead standard; the implications of the potential to compromise the employer's duty of care by imposition of a duty on the employee to inform the employer of risk; and the legal liability of all involved parties. Copies of preliminary legal advice from a Queen's Counsel briefed at the request of the National Commission were made available to members."

19. On 17 October 1991 Mt <<Isa>> wrote a letter to the Commission referring to its establishment of a "task force" to develop a plan to accommodate equal opportunities and health and safety in the lead industry. The letter said, inter alia:

"We do not believe that Worksafe Australia (a reference to the Commission) is legally obliged to give sex discrimination issues the same consideration as occupational health and safety issues and in doing so is in breach of its statutory responsibilities.
In our submissions to Worksafe Australia opposing a gender-neutral code and standard, we have stressed our social and legal obligations to employees and their children. Ms Beazley Q.C.'s advices affirm that a duty of care can be owed by an employer to a foetus carried by a female employee and notes that by imposing a gender-neutral standard Worksafe may thereby be causing employers to breach a duty of care owed to unborn children."

20. On 25 October 1991 an officer of the Attorney-General's Department advised the Commission that it was bound to comply with the provisions of the SD Act and that the health of an unborn foetus was not the concern of the Commission for an unborn foetus was not a person and had no rights. This view was not adopted by officers of the Commission. It also attracted the following observations of Davies J:

"I merely wish to make it clear that, in my view, the Commission's task is to concern itself not merely with 'persons engaged in occupations' but also with the impact which their occupations may have upon the health of members of their families, the effect of lead upon reproduction, the effect of lead upon an unborn foetus, the effect of lead upon a child who breastfeeds and like matters. These are all matters which are very much the concern of the Commission. The definition of 'occupational health and safety matters' is not to be read in any technical or limited way ... The effect which a worker's employment may have upon the health of his or her children is within that concept."

I agree with those observations of his Honour.

21. The HREOC played an active role in discussions with officers of the Commission; this appears from the affidavit by the secretary of HREOC, Mr Sidoti, who stated, inter alia:

"10. In relation to the preparation of the lead standard the Commission (HREOC) has been involved as follows:
...
iii) In November 1988 Worksafe (the National Occupational Health and Safety Commission) held a national workshop on the safe use of lead which was attended by the Sex Discrimination Commissioner. At the conclusion of the Workshop it was agreed that a draft discussion paper and a Proposed National Standard and

Code of Practice would be further developed taking into account the views expressed at the workshop and that a tripartite study group, which would include a representative of the Commission, would visit workplaces employing lead processes.

iv) On 16 and 17 March 1989 the Sex Discrimination Commissioner visited the <<Mount Isa>> mines of the applicant together with representatives from the ACTU, CAI, State Occupational Health Commissions, the Australian College of Occupational Medicine, State Equal Opportunity bodies and Worksafe.

v) In March 1990 the South Australian Equal Opportunity Commission convened a National Workshop on Women and Lead. The Sex Discrimination Commissioner presented a paper to that Workshop.

vi) In March 1990 Worksafe released 'Lead - A Public Discussion Paper' and called for public submissions in response to the document. The Sex Discrimination Commissioner prepared and forwarded a detailed submission in response.

vii) On 9 August 1990 Worksafe held a 'Lead Forum' where discussion of the Worksafe document took place. The Sex Discrimination Commissioner addressed that forum.

viii) In July 1991 the Sex Discrimination Commissioner delivered a paper on the lead industry and foetal protection policies in the United States and Australia to the Women, Management and Industrial Relations Conference held at Macquarie University.

ix) On 14 November 1991 the Sex Discrimination Commissioner and I attended a meeting of the Worksafe Lead Task Force to discuss further the provisions in the proposed National Standard and Code dealing with the employment of women in the lead industry. At that meeting the Task Force reached substantial agreement on the provisions."

22. Following these discussions the proposed standard and code were prepared for the purpose of being considered by the Commission at its meeting on 4 December 1991. The adoption of the proposed standard and code has been deferred pending the conclusion of this proceeding.

23. The proposed standard includes the following paragraphs which are of particular relevance in this case:

"14(1) Criteria for exclusion from working in a lead-risk job are:

(a) personal medical condition;

(b) pregnancy;

(c) breast feeding; and

(d) such other basis as may be permitted under relevant anti-discrimination legislation.

(2) These exclusions do not apply to non lead-risk jobs.

...

15(24) If the results of biological monitoring reveal that the confirmed blood lead level is at or above 2.9 mol/L (60 g/100 mL); or the employer or employee considers that an excessive exposure to lead has occurred, the employer shall:

(a) immediately remove the employee from the lead-risk job to a job that is not a lead-risk job;

(b) arrange for the employee to have a medical examination by an authorised medical practitioner within seven days; and

(c) provide the authorised medical practitioner with a copy of the form in Schedule 4 with Part A filled in, signed and dated by the employer.

(25) If an employee advises the employer that she is pregnant or is breast feeding, the employer shall immediately remove the employee from the lead-risk job to a job that is not a lead-risk job."

...

17(6) An employee knowingly pregnant or breast feeding shall advise the employer as soon as practicable."

24. It is paragraph 14(1)(d) that is the principal subject of Mt <<Isa>>'s attack on the proposed standard.

25. The proposed code includes the following paragraphs:

"7.1 Employers shall ensure that the information supplied to job applicants includes as a minimum the following:

(a) lead is a toxic substance which is retained within the body long-term;

(b) lead can affect the nervous and reproductive systems, reproductive system, kidneys and interfere with the ability of the body to make haemoglobin;

(c) the unborn child is particularly susceptible to the effects of lead and on this basis employees who are pregnant or breastfeeding are excluded from working in

lead-risk jobs;

...

12.1 Regarding exclusion from working in a lead-risk job:

(a) Individuals with certain medical conditions (such as impaired renal function, anaemia, haemoglobinopathies, neuropathies and reproductive problems) may be more susceptible to the adverse effects of lead on health. Exclusion from working in a lead-risk job on such grounds should be in accordance with section 15 of the standard, Health Surveillance.

(b) Lead is a particular health risk to the fetus (sic). A pregnant employee should keep her blood lead level below 30 g/100 mL and as low as possible.

(c) Infants are more susceptible to the health effects of lead than adults. A breastfeeding employee should keep her blood lead level below 30 g/100 mL and as low as possible.

(d) We are advised by HREOC that employers wishing to exclude women, other than those pregnant or breastfeeding, from lead-risk jobs will need to seek an exemption from the relevant Sex Discrimination legislation."

26. It is paragraph 12.1(d) that is the principal target of attack by Mt <<Isa>> on the proposed code.

27. Davies J observed that the proposed standard and code did not distinguish between male and female employees otherwise than as set out above notwithstanding the view expressed by Dr Mead that the Expert Working Group considered that the effects on reproduction did not occur at the same blood levels for both males and females or at least that it had not been demonstrated that that was so.

28. There appears to be some controversy as to the relative degree of risk created by industrial exposure to lead of fertile men on the one hand and fertile or breast-feeding women on the other. Mt <<Isa>> expresses concern that women working in the lead industry may become pregnant or be pregnant at a time when their lead levels are unduly high. It appears to be accepted by the parties, at least for the purposes of this case, that the reproductive capacity of women may be damaged by a lower lead level than is the case with males. HREOC took an active interest in the problems in the lead industry with a view to persuading employers to introduce protective measures applicable to all employees which would reduce the level of exposure to such an extent that neither male nor female employees nor members of their families would be at risk. HREOC therefore introduced a practice of receiving applications under s. 44 of the SD Act from employers in the lead industry for exemption from the operation of that Act. Section 44 is an important section; it empowers the Commission by instrument in writing to grant to persons or classes of persons exemption from the operation of provisions of Division 1 or 2 specified in the instrument. Division 1 (of Part II) relates to discrimination in work and Division 2 to discrimination in other areas.

29. HREOC appears to have granted such exemptions to various employers; but seeks to persuade employers to introduce protective measures suitable to cover the whole of the workforce in an equal manner. Thus HREOC took an active interest in the alleged discriminatory effect of practices adopted in the lead industry.

30. Davies J said in his reasons for judgment:

> "The task of the Commission is a controversial one for exposure to lead may affect reproductive capacity and women may be more at risk than men. Lead may be harmful to the unborn foetus and undue lead levels in a mother who breastfeeds a child may affect the health and welfare of the child. Thus, exposure to lead has a tendency to affect women more than men. In the result, a view has developed that the imposition of too strict health precautions can lead to discrimination against women in employment in lead risk industries."

31. The correctness of this passage from his Honour's judgment was not disputed in argument before us.

32. The case of Mt <<Isa>> was essentially that in the preparation of the draft standard and code intended to be adopted by the Commission and published pursuant to s. 38(3) of the NOHSC Act, officers of the Commission were overborne by sex discrimination considerations and failed to give proper attention to what shall be the concern of the Commission, namely, the adoption of proper standards and codes to guide persons in lead risk industries in the protection of health and safety.

33. Davies J rejected the submission of counsel for Mt <<Isa>> that occupational health and safety was the sole consideration of the Commission and that the Commission ought to put concepts of sex discrimination totally from its mind. His Honour said:

> "However, the Commission cannot look at matters of health and safety in the abstract. Its task is to prepare standards which will be a guide to the industry. Therefore the Commission's task is to prepare standards and codes which are practical and acceptable. The Commission is entitled, when preparing a standard or code for the lead industry, to take into account the part which women do and can play in that industry and therefore to propose and adopt a standard and code which, in the view of the Commission, is fair to women, whilst setting proper and adequate standards and practices for adoption throughout the lead industry."

This passage was not challenged on appeal and I agree with it.

34. His Honour accepted, however, the submission of counsel for Mt <<Isa>> that it is not the task of the Commission to concern itself with the implementation of the SD Act; that is the task of the Sex Discrimination Commissioner, HREOC and the Federal Court. That finding was challenged on appeal.

35. Counsel for HREOC argued before the primary Judge that for the purposes of s. 5 of the SD Act it is a characteristic of women that they may become pregnant and bear children (paragraphs (b) and (c) of sub-s. (1) of s. 5) and that, if it is a characteristic of women that their reproductive capacity may be damaged by a lower lead level than is the case with males (a view which officers of the Commission appear to accept), then that also is a characteristic of women within the meaning of those same paragraphs. HREOC argued before his Honour that, subject to the exceptions for which s. 44 of the SD Act provides, it is unlawful to discriminate by reason of such characteristics.

36. His Honour made the following findings which were strongly challenged in argument before us:

> "I would not myself read s.5 in such absolute terms. If discrimination is on the basis of danger either to the health of a woman employee, by reference to the level of lead which may affect reproductive capacity, by reason of the danger of lead to an unborn foetus or by reference to the danger of lead to a child who breastfeeds, I doubt that such discrimination is discrimination on the basis of sex as defined in s.5 of the Sex Discrimination Act. Rather it would be discrimination on the basis of health. Nor would I describe the position of a woman who was seeking to become pregnant or a woman who was pregnant or a woman who was breastfeeding a child as a circumstance that was the same or not materially different from that of a male employee in the lead industry. Nor on a prima facie basis, would I regard any proper practice recommended by the Commission in a standard or code for the lead industry as being one which was "not reasonable" having regard to the circumstances of the case, for the purposes of ss.5 and 7 of the Sex Discrimination Act. It seems to me that compliance by employers in the lead industry with any reasonable and appropriate standard and code which the Commission thought it proper to publish would not be likely to infringe any provision of the Sex Discrimination Act. Thus, I do not accept that exemption from the Sex Discrimination Act is required by an employer who desires to lay it down as a rule of practice that a woman who is breastfeeding a child should not work in a lead risk environment."

37. Later in his reasons for judgment his Honour referred to the submission of counsel for Mt <<Isa>> in these terms:

> "Sir Maurice Byers submitted that, if it limited its consideration in this way, the Commission would fail to deal with matters that were clearly before it and which were its function to consider. Sir Maurice submitted that officers

of the Commission had, by deferring to HREOC, abrogated the Commission's function or a part of its function to deal with the health and safety aspects of employment in lead risk industries and to lay down, in the form of a recommendatory standard and code, what it considered to be proper and appropriate safeguards for employees in the workplace."

38. His Honour then said this with respect to the submission of counsel for Mt <<Isa>>:

"I agree with Sir Maurice's submission in this respect. It seems to me that those who drafted the proposed standard and code did so under a mistaken view that they were precluded from going further by the Sex Discrimination Act. In my opinion, the Commission has a duty to perform and, if it is of the view that certain practices are desirable in the interests of health and safety, then its function is to recommend what those practices should be.

For the reasons I have already given, it is doubtful that discrimination on health grounds would infringe the Sex Discrimination Act. But even if it would, a statement by the Commission of appropriate safety precautions cannot infringe the Sex Discrimination Act. If an employer is of the view that exemption from the Sex Discrimination Act must be obtained under s.44 of the Sex Discrimination Act from HREOC before compliance with the standard and code, then the employer would be able to seek exemption from HREOC on the ground that it wished to comply with the safeguards which the Commission had recommended as desirable. HREOC would then consider whether to grant such an exemption. But it would have before it the standard and code of practice issued by the Commission and would no doubt take that into account.

In brief, the Commission is entitled to take account of the object which the Sex Discrimination Act is designed to achieve, namely lack of discrimination on grounds of sex and it should, in any event, attempt to formulate a standard that is fair to employees whether male or female. But the Commission is not limited in its consideration by anything set down in the Sex Discrimination Act.

Sex discrimination is a matter for the Sex Discrimination Commissioner, for HREOC and for the Federal Court. Occupational health and safety is a matter for the Commission. Those who drafted the proposed code and standard appear to have abrogated a part of the function of the Commission by accepting that HREOC should through its exemption process establish proper

safety precautions for the lead industry. Yet the task of establishing occupational health and safety standards is specifically conferred upon the Commission. Its function is to form its view about those matters and to state its views in the standards and codes which it publishes under s.38 of the Act.
Thus, the officers of the Commission who have drafted the proposed standard and code have done so under a misapprehension of law as to the effect and ambit of the Sex Discrimination Act."

39. Counsel for the HREOC submitted on this appeal that the primary Judge erred in three major respects in his reasons for judgment, namely:

(1) in expressing the view that discrimination on the ground of health would not constitute an infringement of s. 14 of the SD Act;
(2) in holding that the fact that a pregnant woman or breast-feeding mother might be at greater risk from lead exposure meant that "the circumstances" were "materially different" within the meaning of s. 5(1) of the SD Act;
(3) in finding that it is not the task of the Commission to concern itself with the SD Act.

40. Counsel for the HREOC also argued that, if it is necessary for the Court to consider any question of inconsistency between the SD Act and the NOHSC Act (his Honour did not find it necessary to resolve this question), the preferred view is that there is no such inconsistency.

41. Counsel for Mt <<Isa>> supported his Honour's primary findings and in particular contended as follows:-

. the Commission's functions are directed solely to health and safety issues;
. in preparing and publishing the proposed standard and code, the Commission's approach was determined by the provisions of the SD Act rather than by its own statutory functions under the NOHSC Act;
. the Commission, in deferring to the HREOC:-
  (a) abrogated the Commission's function, or a part of its function, to deal with the health and safety aspects of employment in lead risk industries;
  (b) failed to lay down in the form of a recommendatory standard and code what it considered to be proper and appropriate safeguards for employees in the workplace;
  (c) transfered the Commission's functions at least in part to the HREOC, a body which is established for different purposes which do not include the promulgation of occupational health and safety standards;
  (d) acted on a mistaken view of the law that the Commission was precluded from performing part of its function by the SD Act;
  (e) failed to consider whether certain practices are desirable in the interests of health and safety and, if so, what those practices should be; and
  (f) acted on the mistaken view of the law that the Commission was obliged in the performance of its functions to implement the SD Act;
. the provisions of the NOHSC Act are not inconsistent with the provisions of the SD Act; but if they are thought to be

inconsistent then the provisions of the NOHSC Act should prevail.

42. Counsel appearing for the PIAC as amicus curiae supported generally the argument advanced on behalf of the HREOC.

43. Before turning to the issues in the appeal I shall say something about the Court's jurisdiction to hear this matter. The primary Judge accepted that the acts and decisions of the Commission did not constitute a final decision by it or an ultimate and operative decision in the sense explained in Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321. His Honour took the view that the subject matter of the proceeding was concerned with conduct undertaken before the adoption of the proposed standard and code. The complaint of Mt <<Isa>> before his Honour was that, as a result of a misapprehension of law, far too much attention had been given by the Commission to matters of sex discrimination and not enough to matters which should be the concern of the Commission under the NOHSC Act. His Honour therefore found jurisdiction existed under s. 6 of the ADJR Act (relating to conduct engaged in, or proposed to be engaged in, for the purpose of making a decision to which the ADJR Act applies). I agree with his Honour's observations on the question of jurisdiction.

44. I turn to the relevant provisions of the SD Act.

45. The SD Act prohibits discrimination of various kinds, principally discrimination on the ground of sex, marital status and pregnancy.

46. Section 3 recites the objects of the SD Act and they include the following:-

> "(a) to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women;
> (b) to eliminate so far as is possible, discrimination against persons on the ground of sex, marital status or pregnancy in the areas of work, accommodation ... and the administration of Commonwealth laws and programs; ...
> (d) to promote recognition and acceptance within the community of the principle of the equality of men and women."

47. Section 14 provides:

> "14.(1) It is unlawful for an employer to discriminate against a person on the ground of the person's sex, marital status or pregnancy:
> (a) in the arrangements made for the purpose of determining who should be offered employment;
> (b) in determining who should be offered employment; or
> (c) in the terms or conditions on which employment is offered.
> (2) It is unlawful for an employer to discriminate against an employee on the ground of the employee's sex, marital status or pregnancy:
> (a) in the terms or conditions of employment

that the employer affords the employee;

(b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment;

(c) by dismissing the employee; or

(d) by subjecting the employee to any other detriment.

(3) Nothing in paragraph (1)(a) or (b) renders it unlawful for a person to discriminate against another person, on the ground of the other person's sex, in connection with employment to perform domestic duties on the premises on which the first-mentioned person resides."

48. Section 5 of the SD Act describes discrimination on the ground of sex in the following terms:

"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 (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 the discriminator requires the aggrieved person to comply with a requirement or condition:

(a) with which a substantially higher proportion of persons of the opposite sex to the aggrieved person comply or are able to comply;

(b) which is not reasonable having regard to the circumstances of the case; and

(c) with which the aggrieved person does not or is not able to comply."

49. Section 7 deals with discrimination on the ground of pregnancy as follows:

"7.(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 pregnancy of the aggrieved person if:

(a) by reason of:

(i) the pregnancy of the aggrieved person;

(ii) a characteristic that appertains generally to persons who are pregnant; or

(iii) a characteristic that is generally imputed to persons who are pregnant;

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 who is not pregnant; and

(b) the less favourable treatment is not reasonable in the circumstances.

(2) 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 pregnancy of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition:

(a) with which a substantially higher proportion of persons who are not pregnant comply or are able to comply;

(b) which is not reasonable having regard to the circumstances of the case; and

(c) with which the aggrieved person does not or is not able to comply."

50. For a person to engage in discriminatory conduct on the ground of sex, he or she must "by reason of" the sex of the aggrieved person (or other characteristics appertaining or imputed to persons of that sex) treat that person less favourably than, in circumstances that are the same or not materially different, the discriminator treats or would treat a person of the opposite sex.

51. The expression "by reason of" has been considered in many cases in a variety of contexts: see, for example, R v Steel (1876) 1 QBD 482; The Diamond (1906) P 282; R v Justices of the Peace at Yarram; Ex parte Arnold (1964) VR 21; Main Electrical Pty Limited v Civil and Civic Pty Limited (1978) 19 SASR 34; Vickers v Minister for Business and Consumer Affairs (1982) 43 ALR 389 at 407; Mitty's Authorised Newsagency v Registrar of Trade Marks (1983) 78 FLR 217 at 229-230; Kanbur Pty Limited v Adams (1984) 55 ALR 158 at 172; Kimberly-Clark Limited v Commissioner of Patents (1988) 84 ALR 685 at 695.

52. In the United States the expression was interpreted as meaning "by virtue of": United States v William Cramp and Sons Ship and Engine Building Co 206 US 118 at 127-8.

53. Equal opportunity legislation has also used the expression "by reason of"

and was considered by the High Court in Waters v Public Transport Corporation (1991) 173 CLR 349 per Mason CJ and Gaudron J at 359 and interpreted in the sense of "based on". See also R v Birmingham City Council; Ex parte Equal Opportunities Commission (1989) AC 1155 per Lord Goff of Chieveley (with whose speech the other members of the House agreed) at 24.

54. The expression has been considered in the context of State anti-discrimination legislation: the cases include Director General of Education v Breen (1984) EOC 92-015 per Street CJ at 75,428, 75,429; Boehringer Ingelheim Pty Ltd v Reddrop (1984) 2 NSWLR 13; Waterhouse v Bell (1991) 25 NSWLR 99 per Clarke JA at 105. See also Hart v Jacobs (1981) 39 ALR 209 per Smithers J at 214; Allders International Pty Limited v Anstee (1986) 5 NSWLR 47 at 56-58; and James v Eastleigh Borough Council (1990) 1 QB 61 (Court of Appeal); reversed by majority of House of Lords (1990) 2 AC 751.

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

56. What is the test to be applied to determine whether conduct is discriminatory under s. 5(1) of the Act? Similar legislation in the United Kingdom has received considerable judicial scrutiny and two schools of thought have emerged there. One is that the test requires causation in the sense that there must be a causative link between the defendant's behaviour and detriment to the complainant and does not necessarily involve any consideration of the reason which led the alleged discriminator to treat the complainant less favourably than he treats or would treat a person of a different sex or status. Put another way, one asks the question: would the complainant have received the same treatment from the alleged discriminator but for his or her sex (it was thus expressed by Lord Goff of Chieveley in Eastleigh)? This test was adopted by the House of Lords in Birmingham confirming earlier English authorities and reaffirmed by the House in Eastleigh Borough Council by a majority (Lord Bridge of Harwich, Lord Ackner, and Lord Goff of Chieveley; Lord Griffith and Lord Lowry dissenting).

57. The other view which appealed to the three members of the Court of Appeal of the United Kingdom in Eastleigh Borough Council and to the minority in the House of Lords is what is there referred to as the subjective test, namely, that what is relevant is the defendant's reason for doing an act, not (or perhaps not merely) the causative effects of the act done by the defendant. This view was expressed in the following passage from the speech of Lord Lowry in Eastleigh Borough Council at 779-780:

> "... the causative construction not only gets rid of unessential and often irrelevant mental ingredients, such a malice, prejudice, desire and motive, but also dispenses with an essential ingredient, namely, the ground on which the discriminator acts. The appellant's construction relieves the complainant of the need to prove anything except that A has done an act which results in less favourable treatment for B by reason of B's sex, which reduces to insignificance the words 'on the ground of.'

> The causative test is too wide and is grammatically unsound, because it necessarily disregards the fact that the less favourable treatment is meted out to the victim on the ground of the victim's sex."

58. There is, in my view, less divergence between these schools of thought than some may opine. Also, I must confess that certain of the reasoning in the speeches of their Lordships in Eastleigh troubles me. For example, Lord Bridge said in Eastleigh at 765 with respect to both Birmingham City Council and Eastleigh (the case then before the House) that:

> "... the subjective reason for the differential treatment in both cases is quite irrelevant."

Lord Lowry disagreed. He said that to treat subjective reasons of the alleged discriminator as irrelevant "dispenses with an essential ingredient, namely, the ground on which the discriminator acts". I find this observation of Lord Lowry persuasive. The plain words of the legislation before the House, in Eastleigh, and, indeed before this Court in the present case necessarily render relevant the defendant's reason for doing an act, that is the reason why the defendant treated the complainant less favourably. Lord Bridge's statement mentioned earlier is expressed in general terms; but it may be his Lordship had in mind that, because in Birmingham and Eastleigh the criterion applied by the alleged discriminators was so "inherently discriminatory" (to use the phrase of Lord Ackner in Eastleigh at 769), the only conclusion possible in his view was that the discriminator did unfairly discriminate, so that evidence of subjective reason could not have affected that conclusion. It is plain from Lord Goff's speech that his Lordship did not rule out as irrelevant a defendant's reason for his action including his intention or motive.

59. His Lordship said that words such as intention or motive, if they are to be used as a basis for decision,

> "... require the most careful handling, and it also follows that their use in one context may not be a safe guide to their use in another context".

But he plainly did not regard subjectivity as irrelevant. See also, his Lordship's speech (at 772) where he said:

> "but it does not follow that the words 'on the ground of sex' refer only to cases where the defendant's reason for his action is the sex of the complainant ..." (my emphasis)

60. In Eastleigh, which is an important case for present purposes, the plaintiff and his wife were both aged 61. They went one day in November 1985 to the Fleming Park Leisure Centre where there was a public swimming pool operated by the respondent council. Being of pensionable age (60 for a woman) the plaintiff's wife was admitted free. Not being of pensionable age (65 for a man) the plaintiff had to pay 75p for admission. The plaintiff sued the council claiming that they had unlawfully discriminated against him on the ground of his sex contrary to s. 1(1)(a) and s. 29 of the Sex Discrimination Act 1975 (UK). The claim was dismissed at first instance and his appeal was dismissed by the Court of Appeal, but allowed by the House of Lords. Section 1(1) provided:

> "1(1) A person discriminates against a woman in any circumstances relevant for the purposes of

any provision of this Act if -

(a) on the ground of her sex he treats her less favourably than he treats or would treat a man, or

(b) he applies to her a requirement or condition which he applies or would apply equally to a man but -

(i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and

(ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and

(iii) which is to her detriment because she cannot comply with it ..."

61. Section 2(1) provided that s. 1 and certain other provisions of the Sex Discrimination Act 1975 are to be read as applying equally to the treatment of men and for that purpose shall have effect with such modifications as are requisite.

62. Section 29(1) provided that it is unlawful for any person concerned with the provision of facilities or services to the public to discriminate against a person who seeks to obtain or use those facilities or services by refusing or deliberately omitting to provide the person with facilities or services of the like quality, in the like manner, and on the like terms as are normal in his or her case in relation to members of the public of the same sex.

63. In Waterhouse the Court of Appeal of the Supreme Court of New South Wales considered the Anti-Discrimination Act 1977 (NSW) which prohibited discrimination on the ground of marital status in terms similar to those appearing in the SD Act with which this case is concerned. There is this difference that, whereas the expression "if, by reason of" appears in s. 5(1) of the SD Act, the equivalent expression in s. 39(1) of the New South Wales Act is "if, on the ground of"; but in my view that is not a distinction of substance.

64. Clarke JA, with whose reasons for judgment Kirby P and Hope AJA agreed, analysed Eastleigh and the earlier decision of Birmingham and said (at 108) that the words used in the statute "direct attention to the ground" of discrimination. His Honour said:

"It may be that where a policy decision affecting a large number of people is involved (such as in James) the identification of the ground may involve an inquiry that is not identical with that which is appropriate where the complaint is that one person has been the victim of discrimination (such as the present case). In the latter case the relevant question directs attention at the particular characteristic of the complainant which, in fact, led to the decision or action of which complaint is made. It may be that even in this

> instance it may be wrong to generalise. Notwithstanding, I am of the firm opinion that upon the facts of this case the Court is required to inquire whether the decision was grounded on particular characteristics of the plaintiff and, if so, whether those characteristics fell, relevantly, within s. 39(1)(c). In this context I believe that the search is for the factors, or reasons, which led the first defendant to act as it did. Speaking generally it may be that proof of the defendant's motive for his action may establish a case of discrimination. As, for example, where the defendant deliberately discriminated against women because of a dislike for them. In cases of this nature the motive will provide the ground but there may nonetheless be cases in which the ground of the discrimination is sex when the defendant's reason for applying the discriminatory test was not intentionally to discriminate against men or women. James is a case in point."

65. I agree with these observations of Clarke JA and with his statement (at 105) that inquiries into whether there has been a contravention of legislation of the kind with which Waterhouse and the present case is concerned "are straightforward factual inquiries with which the courts are familiar".

66. In my view the Act requires that when an inquiry is being held into alleged discrimination prohibited by s. 14(2) on the ground of the sex of an employee, all the relevant circumstances surrounding the alleged discriminatory conduct should be examined. The intention of the defendant is not necessarily irrelevant. The purpose and motive of the defendant may also be relevant. The law draws distinctions between the concepts of intention, motive and purpose for various purposes, some of which were adverted to by Lord Goff in Eastleigh at 773. In some cases they may be central to the case. An obvious example is where a man refuses to employ women because he does not like women. In other cases, of which Birmingham and Eastleigh are examples, intention, motive or purpose may be of little, if any, relevance. A public authority may have a policy which determines its conduct such as the criterion adopted in Eastleigh admitting women free of charge to the leisure centre if they were over 60 but not admitting men free of charge until they reached the age of 65. In that case, the criterion was so essentially discriminatory in its nature that evidence of the Council's intention, motive or purpose would have added little or nothing to save the policy from inevitable conflict with the Sex Discrimination Act 1975 (UK). 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.

67. 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: see Waters per Mason CJ and Gaudron J at 359.

68. The search for the proper test to determine if a defendant's conduct is

discriminatory is not advanced by the formulation of tests of objective or causative on the one hand and subjective on the other as if they were irreconcilable or postulated diametrically opposed concepts. The inquiry necessarily assumes causation because the question is whether the alleged discrimination occurs because of the conduct of the alleged discriminator; and the inquiry is objective because its aim is to determine on an examination of all the relevant facts of the case whether discrimination occurred. This task may involve the consideration of subjective material such as the intention or even motive, purpose or reason of the alleged discriminator; but its significance will vary from case to case 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. Objective, causative and subjective are well known expressions in various branches of the law but must be used with caution as they can lead to polarization of thought. If an objective test requires the exclusion of the intention, state of mind, purpose, reason or motive of the alleged discriminator then it offends the language of the section itself (as Lord Lowry pointed out in a similar context in Eastleigh at 779-780) and in addition offends common sense. It seems obvious to me that the search for the reason for or ground of the decision or conduct of the alleged discriminator must take the inquiry into the state of his mind as well as an analysis of his own acts.

69. Difficulties may arise in some cases where the alleged discriminator adopts more than one ground or reason for the alleged discriminatory action. Clarke JA adverted to this question in Waterhouse (at 106) where his Honour said (and I agree with him):

> "I tend to doubt that, if the attention of the tribunal is firmly focused on the search for the real ground, there will be many cases in which the presence of more than one ground will create a problem. If the focus is correctly held then the factual determination of the operative ground will, in general, provide a clear answer to the question before the tribunal."

70. But the law has grappled with this problem in many areas and found sensible solutions: in R v Commission for Racial Equality, Ex parte Westminster City Council (1984) ICR 770 it was held that there was direct discrimination within s. 1(1)(a) of the Race Relations Act 1976 (UK) if the substantial or effective, though not necessarily the sole or intended, reason was the person's race. Clarke JA in Waterhouse adopted the test that it was sufficient to find "that marital status was a ground of the discriminatory action" (my emphasis) to constitute discriminatory conduct. I agree with this test propounded by Clarke JA provided the ground of marital status had an operative effect so as to achieve the discriminatory conduct (see the SD Act, s. 8). Another way of expressing the same point is to say that the marital status must be a material ground of the discriminatory conduct.

71. Ultimately the question must be decided by determining whether there is a relationship of cause and effect between the sex (or characteristic of the kind mentioned in s. 5(1)(b) or (c) of the Act) of the aggrieved person and the less favourable treatment of that person, but I do not accept that this inquiry necessarily rejects the motive, intention or purpose of the alleged

discriminator.

72. I am not attracted by the proposition (which appears to have been favoured by the majority of the House in Eastleigh) that the correct test involves simply asking the question what would the position have been but for the sex (or marital status) of the complainant. The "but for" test may be a useful practical guide in many cases; but I share the reservations expressed by Lord Griffiths in Eastleigh (at 768). It is a test to be handled with care as its beguiling simplicity masks the real inquiry that must be conducted. Let me give a simple example. Assume a man and a woman apply for a particular job and the employer, a male, employs the male applicant. The female applicant was treated less favourably than the male applicant in that he got the job and she did not. Can it be said that she would have got the job but for the fact that she is a woman. Plainly not, if all she relies on is the fact that the man was the successful applicant and she was not. There could be a number of reasons why the employer chose the man and not the woman and they must be examined which involves an inquiry into all the relevant circumstances. The answer may simply be that the male employer dislikes women in the workforce and would never employ them - a clear case of discrimination. But the answer may be more complex and involve a number of matters which on analysis may or may not reveal discriminatory conduct on the ground of sex. Provided the "but for" test is understood as not excluding subjective considerations (for example, the motive and intent of the alleged discriminator) it may be useful in many cases; but I prefer to regard it as a useful checking exercise to be engaged in after inquiring whether in all the relevant circumstances there has been discriminatory conduct.

73. Anti-discrimination legislation must be understood, not only by statutory bodies that enforce it, but by all sections of the community because the implications and effects of the legislation could touch us all. It is important that the legislation is not approached and construed with fine and nice distinctions which will not be comprehended by any except experts in the field; nor is there any need for them.

74. If an employer in the lead industry took the view that it was dangerous to employ a female in the lead industry because of its perception of the level of lead which may affect reproductive capacity by reason of the danger of lead to an unborn foetus or to a baby who is being breast-fed, this may constitute discrimination both on the ground of health and the ground of sex. To put the point another way, it would be the intention or motive of the employer, for the purpose of safeguarding the health of women in the employer's workforce, that led it to discriminate against women. The presence of intention, motive or purpose relating to health does not necessarily detract from the conclusion that there is discrimination on the ground of sex. I respectfully differ from the primary Judge's opinion that discrimination on grounds of health would necessarily preclude a finding of discrimination of s. 5 of the SD Act.

75. I also reject the view that the matters which the SD Act specifies as constituting unacceptable bases for differential treatment (i.e. relevantly s. 5(1)(a), (b) and (c)) can be relied upon to support the conclusion that the circumstances are not "the same" or are "materially different" for the purposes of s. 5(1).

76. I agree with the President of the HREOC in Sullivan v Department of Defence (1992) EOC 92-421 at 79,005 that:

> "It would fatally frustrate the purposes of the

> Act if the matters which it expressly identifies as constituting unacceptable bases for differential treatment (i.e. s. 6(1)(a), (b) and (c)) could be seized upon as rendering the overall circumstances materially different, with the result that the treatment could never be discriminatory within the meaning of the Act."

I agree with the President of the HREOC in Proudfoot v Australian Capital Territory Board of Health (1992) EOC 92-417 at 79,980 that, if the matter which the SD Act expressly identifies as constituting the unacceptable bases for differential treatment could themselves render the circumstances materially different:

> "the exemption provisions of s. 31-33 of the Act (ie the SD Act) would be rendered superfluous by such a construction, as presumably all of the circumstances contemplated by those sections would constitute material differences, with the consequence that the actions identified did not even pass through the threshold requirement of constituting discrimination. In my opinion, this construction could not have been intended. I therefore conclude that a difference to be material cannot be referable to the prohibited basis for less favourable treatment, namely, sex. The purpose of s. 5(1) is to identify less favourable treatment of one sex than the other in essentially the same circumstances, which circumstances are external to the question of sex."

77. The words in s. 5 (they also appear in other sections: see ss. 6 and 7) "in circumstances that are the same or are not materially different" are not in my opinion directed to the differences between men and women. If differences between men and women are capable of being material for the purposes of s. 5 then the effect of those words would remove from the ambit of discrimination many cases of less favourable treatment occurring by reason of sex.

78. What is the relationship between ss. 5, 6 and 7 of the SD Act? Section 5 relates to sex discrimination, s. 6 to discrimination on the ground of marital status and s. 7 to discrimination on the ground of pregnancy. Section 7 assumes that the aggrieved person is pregnant or has a characteristic that appertains generally to or is generally imputed to persons who are pregnant. If the facts of a particular case concern an aggrieved person who is pregnant or who has a characteristic that appertains generally to or is generally imputed to pregnant women, in my opinion s. 7 operates exclusively of s. 5. But s. 7 would not cover the case of discrimination against a woman on the ground, for example, that it is a characteristic of women that they may become pregnant or bear children. If an employer refused to employ a woman on that ground, his conduct would not be discriminatory on the ground of pregnancy under s. 7 because the woman is not in fact pregnant. But it would be discriminatory on the ground of sex under s. 5 as it is a characteristic appertaining generally to women that they have the capacity to become pregnant. In that case the extended definition of sex provided by paragraph (b) (also (c)) of sub-s. (1) of s. 5 applies.

79. Certain practices are prohibited by the SD Act subject to an exception

relating to reasonableness: see for example ss. 5(2)(b), 6(2)(b) and 7(1)(b) and 7(2)(b). Most relevant for present purposes is s. 7(1)(b), so that the less favourable treatment of the aggrieved person will not constitute discrimination on the grounds of pregnancy unless that treatment is not reasonable in the circumstances; but no such exception applies with respect to sex discrimination under s. 5(1). Thus discrimination falling within s. 5(1) is prohibited by s. 14 notwithstanding that the discrimination may be "reasonable". Of course it is always open to the HREOC to grant exemptions under s. 44 in appropriate cases as apparently it has done. I mention this matter because it was submitted to us that his Honour found to the contrary. I doubt if his Honour did intend to make a contrary finding when he made the following statement in his reasons for judgment:

> "Nor on a prima facie basis, would I regard any proper practice recommended by the Commission in a standard or code for the lead industry as being one which was 'not reasonable' having regard to the circumstances of the case, for the purposes of ss. 5 and 7 of the Sex Discrimination Act."

Although his Honour did refer to s. 5 he did not necessarily have in mind specifically sub-s. (1). If his Honour did, contrary to my reading of his judgment, express the view that reasonableness was a ground for exemption under s. 5(1) then I would respectfully disagree.

80. The Commission, in furtherance of its objects, is empowered to declare national standards and codes of practices relating to occupational health and safety matters (s. 38(1) of the NOHSC Act). National standards or codes of practice declared by the Commission are instruments of an advisory character except as otherwise provided by a law other than the NOHSC Act or by an award or instrument made under such a law (s. 38(2)). The Commission is charged with the important statutory functions of developing awareness in the community of matters relating to occupational health and safety, facilitating public debate and discussion on those matters and assisting governments, employers and employees in the development and formulation of policies and strategies relating to such matters. If in the course of its deliberations and following the making of extensive inquiries which the Commission undertakes it comes to the conclusion that certain standards or codes are necessary to ensure the observance of proper occupational health and safety measures by employers, then in my opinion it has a duty to say so and to express its views in the declaration by it of national standards and codes of practices.

81. If the Commission forms the view that the adoption of proper national standards and codes may nevertheless involve employers in contravention of the SD Act, it cannot be right that it is required to remain silent or to defer its statutory functions to the HREOC or anybody else. This would involve an abrogation by the Commission of its function to declare proper national standards and codes relating to the health and safety aspects of employment in lead risk industries.

82. What the Commission should do in those circumstances is to declare what it regards as appropriate standards and codes, but to point out clearly that the adoption of them or certain of them (and the Commission should specify which) may involve employers in contraventions of the SD Act unless exemptions are obtained by them under s. 44 of the SD Act. The Commission should not create an impression by the words it uses in its declarations of standards and

codes that, if employers act pursuant to them, they will not thereby run the risk of contravening relevant laws of the Commonwealth or of any State or Territory. On the other hand, the Commission is not a legal adviser to employers. It must not, however, create a misleading impression by what it declares in its standards and codes.

83. The Commission's task is to declare what it perceives as proper national standards and codes of practice relating to occupational health and safety matters; but the Commission does not carry out its functions in a vacuum, isolated from other relevant laws of the nation - Federal, State or Territorial. The NOHSC Act operates in the milieu of other relevant legislation.

84. When a body such as the Commission is performing a statutory function it has an obligation to examine other relevant law. It may be necessary to interpret statutes, including the SD Act, for this purpose. In determining its proposed national standards and codes of practice relating to occupational health and safety matters in this case the Commission should do no more than this. It must not contravene the SD Act, but it must recognize its presence and alert relevant persons, particularly employers to it and its pitfalls.

85. Plainly the determination of appropriate standards and codes of practice concerning occupational health and safety matters is a task which the Commission should carry out after appropriate consultation with other statutory authorities, as indeed it has done in this case by consulting the HREOC. But the Commission must never lose sight of the fact that it is its function and not the function of the HREOC or any other body, to decide what it regards in the interests of occupational health and safety as appropriate standards and codes of practice. It must never delegate its function to another body charged with a different function. On the other hand, for the Commission to ignore relevant legislation such as the SD Act, may constitute error on its part. It would also be erroneous for the Commission to fail to declare an appropriate standard or code because, if implemented, an employer might be exposed to a contravention of the SD Act.

86. Similarly the Commission cannot aid and abet or procure or induce a breach of the law, whether State or Federal. Indeed, a person who causes, instructs, induces, aids or permits another person to do an act that is unlawful under Division 1 or 2 of Part II of the SD Act shall for the purposes of that Act be taken also to have done the Act (s. 105). The Commission may resolve this apparent dilemma (and it is apparent only) by declaring appropriate standards and codes, but drawing attention to the community, in particular employers, that the adoption of some of them may involve conflict with the SD Act unless appropriate exemptions are obtained under the Act. This could not in my view constitute a contravention by the Commission of s. 105.

87. Section 14 (which is the relevant section of the SD Act) proscribes discrimination by an employer against the employee on the ground of the employee's sex or pregnancy. Generally, employers are not bound to adopt advisory standards of the Commission; but obviously the Commission should caution employers where appropriate about the implementation of its standards if it may involve conflict with other legislation such as the SD Act. It is then for the employer to decide what to do, whether to seek an exemption from the HREOC under s. 44 or not to adopt the recommended standard or code.

88. In the present case, by recommending the criteria mentioned in paragraph 14(1)(d) of the proposed National Inorganic Lead Control Standard and paragraph 12.1(d) of the proposed National Code of Practice for the Control and Safe Use of Inorganic Lead at Work, the Commission has abrogated its function or part of its function to deal with the health and safety aspects of employment in lead risk industries. No challenge is made to paragraph 14(1)(a) or (b) relating to personal medical conditions and pregnancy or (c) concerning breast-feeding; but it is the expression in 14(1)(d) "such other basis as may be permitted under relevant anti-discrimination legislation" that is at the heart of the problem. The Commission must itself lay down a proper recommendatory standard and code, not transfer a part of its functions to the HREOC. I agree with the primary Judge that in relation to clause 14(1)(d) of the proposed standard the Commission has erred in law.

89. I have more difficulty with clause 12.1(d) of the proposed code because standing on its own it seems to me to be unexceptionable. It is not so much sub-clause (d) that is the problem, but the fact that in the proposed code the Commission has not itself dealt with the circumstances, in addition to pregnancy or breast-feeding, in which women may be particularly exposed to the risk of their health or the health of the foetus or a breast-feeding baby. It is in this sense that, as I understand the primary Judge's reasons for judgment, he held that clause 12.1(d) would be invalid if adopted and led him to grant the mandatory injunction requiring the Commission and its members, before adopting a standard or code for the lead industry, to consider further whether there are any other appropriate provisions which in their opinion should be made from the point of view of occupational health and safety.

90. In my view the Commission did act under a mistake of law on the assumption by it that it was precluded from performing part of its function by the SD Act; also, it did fail to consider for itself fully the practices that are desirable in the interests of health and safety. I therefore am of the opinion that his Honour correctly made declarations and orders in this case.

91. Commonsense is surely an important element in the Commission's role and the role of the HREOC. Each body is charged with specific statutory functions and each should consult the other where functions may intercept. Indeed they have done this in the present case, but the matter should not get out of hand as I think it has in this case.

92. Statutory bodies, employers and employees alike are at the threshold of adjusting to legislation such as the SD Act; and it is not surprising that problems arise of the kind with which this case is concerned. It is to be hoped that co-operation and good sense will prevail to ensure that the objects and terms of the two Acts of the Parliament which are involved in this case are furthered and observed.

93. In conclusion, I do not see any question arising in this case of inconsistency between the SD Act and the NOHSC Act. The two Acts may reasonably and properly be reconciled and there is a strong presumption that the Parliament did not intend to contradict itself; but intended that both Acts should operate, as indeed they can and should. Counsel appearing as amicus curiae made a sound point when he observed that it is not only the SD Act that is relevant in the field of sex discrimination, but the legislation of States and Territories touching the same matter (though not always in the same terms) is also relevant and should be within the understanding of the Commission.

94. I would therefore dismiss the appeal. The HREOC has failed in the appeal, but Mt <<Isa>> has failed in its challenge to the findings of his Honour the subject of the notice of contention. In all the circumstances the appropriate order for costs is that the HREOC should pay two-thirds of the costs of Mt <<Isa>> of the appeal. The costs of the second to twentieth respondents should be paid by the HREOC as submitting respondents.
JUDGE3
LEE J I have had the advantage of reading in draft the reasons of Lockhart J and, in general, subject to the following comments, agree with the conclusions expressed therein.

2. Although conduct engaged in by the National Occupational Health and Safety Commission ("the Commission") for the purpose of making a decision under the National Occupational Health and Safety Commission Act 1985 (Cth) ("NOHSC Act") was the conduct sought to be reviewed in the proceedings before Davies J, the appellant in this appeal was the Human Rights and Equal Opportunity Commission ("HREOC") which, upon its own application, had been joined as a respondent in the proceedings before the learned primary Judge on the ground that it had an interest in upholding the course of conduct being followed by the Commission. The Commission took no part in the appeal and submitted to any order the Court may make.

3. I agree with the learned primary Judge and with Lockhart J that the Commission had a statutory duty to declare national standards and codes of practice for the promotion of the health and safety of employees in the workplace and that the contents of para.14(1)(d) of the "Proposed National Inorganic Lead Control Standard" ("the proposed Standard") and para.12.1(d) of the proposed "National Code of Practice for the Control and Safe Use of Inorganic Lead at Work" ("the proposed Code") revealed that the Commission was following a course which could lead to an improper delegation of part of the performance of the Commission's statutory function.

4. I agree with Lockhart J that had para.12.1(d) of the proposed Code stood alone it may have been unobjectionable but the appeal was argued by both sides, at least tacitly, on the basis that it and para.14(1)(d) of the proposed Standard stood or fell together.

5. With Lockhart J I see no inconsistency between the Sex Discrimination Act 1984 (Cth) ("the SDA Act") and the NOHSC Act and no question of implied repeal arises. (See Suatu Holdings Pty. Ltd. v. Australian Postal Corporation (1989) 86 ALR 532.)

6. In disposing of this appeal it is unnecessary to express any opinion on the construction or manner of operation of ss.5, 6, 7 and 14 of the SDA Act but in deference to the submissions of counsel the following remarks may be made, which, as with the comments made by the learned primary Judge, are no more than general observations.

7. Sections 5, 6 and 7 deal with the occurrence of discrimination on the ground of sex (s.5), marital status (s.6) and pregnancy (s.7) and, but for para.7(1)(b), apply the same provisions to each of the described acts of discrimination. Under sub-ss. 5(1), 6(1) and 7(1) a person ("the discriminator") discriminates against another if, by reason of the sex, marital status or pregnancy of another or of a characteristic that appertains generally thereto or is generally imputed thereto, the discriminator treats

that other person less favourably than, in circumstances that are the same or not materially different, the discriminator treats or would treat a person of the opposite sex, of different marital status or a person who is not pregnant. Pursuant to para.7(1)(b) discrimination on the ground of pregnancy is not subject to the provisions of the SDA Act unless the less favourable treatment is not reasonable in the circumstances.

8. Under sub-ss.5(2), 6(2) and 7(2) of the SDA Act a discriminator discriminates against another on the ground of sex, marital status or pregnancy if the discriminator requires a person to comply with a requirement or condition:

(a) with which a substantially higher proportion of persons of the opposite sex, of different marital status or who are not pregnant comply or are able to comply;
(b) which is not reasonable having regard to the circumstances of the case; and
(c) with which a person does not or is not able to comply.

9. It may be noted that the imposition of the defined requirement or condition will not amount to discrimination if it is reasonable having regarding to the circumstances of the case or if the particular person to whom it is applied, complies or is able to comply with it.

10. It was submitted by counsel that sub-ss.5(1), 6(1) and 7(1) apply to incidents of direct discrimination and sub-ss.5(2), 6(2) and 7(2) to circumstances of indirect discrimination. (See Australian Iron and Steel Pty. Ltd. v. Banovic (1989) 168 CLR 165 per Deane, Gaudron JJ at p 175; Waters v. Public Transport Corporation (1991) 173 CLR 349 per Mason CJ, Gaudron J at pp 357-358, McHugh J at pp 400-401.) That is, sub-ss.5(1), 6(1) and 7(1) apply to the less favourable treatment of a person which results directly from consideration of the sex, marital status or pregnancy of that person, whilst sub-ss.5(2), 6(2) and 7(2) operate by reason of a statutorily implied connection between such a consideration and the imposition of a requirement or condition that is disproportionate and unreasonable in the circumstances, being circumstances which include the sex, marital status or pregnancy of a person. There is no requirement under sub-ss.5(2), 6(2) or 7(2) that the aggrieved person show that he or she has been treated "less favourably", but it is a notion underlying each of those sub-sections. (See Waters per McHugh J at p 402.)

11. The apparent purpose of sub-ss.5(2), 6(2) and 7(2) is to define as discriminatory, conduct that otherwise does not amount to discrimination under sub-ss.5(1), 6(1) and 7(1) of the SDA Act. If that construction were not applied, sub-ss.5(2), 6(2) and 7(2) would add nothing to sub-ss.5(1), 6(1) and 7(1). (See Australian Iron and Steel Pty. Ltd. v. Banovic per Dawson J at p 184.) In Waters Mason CJ and Gaudron J (pp 358-359) reached a different conclusion in respect of statutory terms dealing with the same issue of discrimination but expressed in words differing significantly from those used in the equivalent provisions of the SDA Act. (cf. McHugh J at p 402.)

12. Section 14 of the SDA Act provides as follows:

"14.(1) It is unlawful for an employer to discriminate against a person on the ground of the person's sex, marital status or pregnancy:
(a) in the arrangements made for the purpose of determining who should be offered

employment;
(b) in determining who should be offered employment; or(c)in the terms or conditions on which employment is offered.

(2) It is unlawful for an employer to discriminate against an employee on the ground of the employee's sex, marital status or pregnancy:
(a) in the terms or conditions of employment that the employer affords the employee;
(b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment;
(c) by dismissing the employee; or
(d) by subjecting the employee to any other detriment.

(3) Nothing in paragraph (1)(a) or (b) renders it unlawful for a person to discriminate against another person, on the ground of the other person's sex, in connection with employment to perform domestic duties on the premises on which the first- mentioned person resides."

13. The meaning of the word "discriminates" as used in ss.5, 6 and 7 of the SDA Act will not be supplied by the simple application of the ordinary meaning of the verb "to discriminate". The context in which the word appears involves a concept of detriment arising out of one person being treated less favourably than another. (See Boehringer Ingelheim Pty. Ltd. v. Reddrop (1984) 2 NSWLR 13 per Mahoney J at p 20.)

14. The meaning of "to discriminate" provided by the Shorter Oxford English Dictionary, 3rd Edition includes, inter alia, to distinguish, differentiate, perceive a difference or make an adverse distinction and the meaning of the verb "to favour" is to approve, to oblige, to treat with partiality, or to regard with favour. The ordinary meaning of to treat less favourably as used in sub-ss.5(1), 6(1) and 7(1) would be to treat a person less obligingly, with less partiality, or in a less well-disposed manner or less even-handedly than another person of the opposite sex or of different marital status or who is not pregnant would be treated in the same circumstances or in circumstances not materially different.

15. In the present case the circumstances that would be the same, or not materially different, would be the exposure of a worker to the ingestion of lead at the employer's workplace coupled with the employer's obligation not to breach a duty of care owed to persons who may be injured by reason of that exposure.

16. Before it could be said that discrimination had occurred under sub-ss.5(1) of the SDA 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.

17. It is not directly obvious that an employer offering conditional employment in "lead-risk jobs" to child-bearing or breastfeeding persons would

necessarily discriminate against a person on the ground of sex and engage in unlawful conduct under s.14 of the SDA Act.

18. The proposed Standard and proposed Code recognize that a foetus or a breastfeeding child is exposed to significant harm if the blood lead level of the pregnant or breastfeeding person responsible for that foetus or child exceeds the specified minimum level. Perhaps it is yet to be proven that such a level of lead in the blood of an adult person also represents a risk to the health of the adult but it is unquestioned that a foetus or breastfeeding child nourished by a person with blood at that lead level is at risk of suffering marked and permanent injury.

19. It may be argued that an employer to whom the proposed Standard and proposed Code apply and who owes a duty of care to a person who may become pregnant, to a person breastfeeding a child, and to an unborn child or breastfeeding child would not be acting less favourably - in the sense of acting in an ill-disposed or less obliging manner or with less partiality - towards a person to whom, or through whom, that duty of care is owed if the employer sought to observe that duty by protecting an employee, or applicant for employment, from the harm that may occur if that person were employed in a workplace which exposed that person to a blood lead level in excess of the specified minimum.

20. Provided the employer took into account all relevant matters in respect of the employee or applicant and the circumstances of the employment in addition to the employer's duty to take all reasonable steps to protect the health of that person in the workplace and of others who may be injured by that exposure, it would be arguable that in so acting an employer would not be treating that person less favourably than a person of the opposite sex and arguable that no question of discrimination on the ground of sex, or a characteristic appertaining or imputed thereto, would arise. (See Webb v. Emo Air Cargo (UK) Ltd. (1992) 2 All ER 43.)

21. The task of the relevant tribunal would be to determine whether the true and unmasked basis of the employer's conduct was grounded on the sex of the aggrieved person. (See Australian Iron and Steel Pty. Ltd. v. Banovic per Deane, Gaudron JJ at p 177.) That is, the sex, or a characteristic of that sex, must have had a causally operative effect upon the treatment of the aggrieved person resulting in the treatment being less favourable than that which would have been displayed to a person of the opposite sex in the circumstances. (See Director-General of Education v. Breen (1984) EOC 92-015 per Street CJ at 75,429.)

22. The second question that would arise under s.14 of the SDA Act is whether discrimination had occurred as defined by sub-ss.5(2), 6(2) or 7(2) of the SDA Act. It would be arguable that an offer of employment upon the condition or requirement that the applicant for employment not work in a "lead-risk job" if in the course of the employment the person has a blood lead level in excess of the specified minimum and is breastfeeding a child or may become pregnant, would not be unreasonable having regard to all the circumstances of the case and would not involve discrimination under those sub-sections.

23. It may be acknowledged that the failure of an employer to prevent a person employed in the inorganic lead industry being exposed to a blood lead level higher than the specified minimum level, will result in the employer being unable to offer a safe place of work to, at least, child-bearing and

breastfeeding persons but it does not follow, without more, that such a failure to provide a place of work safe for all employees, including those child-bearing and breastfeeding, necessarily involves discrimination on the ground of sex or on the ground of a characteristic appertaining generally to that sex. Whether it would be a practice that may constitute discrimination as defined in sub-s.3(1) of the Human Rights and Equal Opportunity Commission Act 1986, thereby attracting one of the functions of the HREOC, is a different question.

24. I would dismiss the appeal with the costs of the appeal to be paid by HREOC including the costs of the submitting respondents. Argument on <<Mount>> <<Isa>>'s notice of contention was a necessary part of the conduct of the appeal and it is not appropriate to make any separate order in respect of that notice by reducing the costs of the appeal awarded to <<Mount Isa>>.