WATERS AND OTHERS . . . . APPELLANTS;
COMPLAINANTS,

AND

PUBLIC TRANSPORT CORPORATION . . RESPONDENT.
RESPONDENTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1991.

Feb. 5, 6; *Dec.* 3.

Mason C.J., Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

Discrimination Legislation — Discrimination on ground of status — Disabled persons — Direct and indirect discrimination — Whether intention or motive to discriminate necessary — Discrimination constituted by imposition of requirement or condition — No contravention where requirement or condition reasonable — Reasonableness — Onus of proof — No contravention where act done necessary to comply with provision of other legislation — Whether necessary that other legislation directly impose obligation to do discriminatory act — Equal Opportunity Act 1984 (*Vict.*), *ss.* 17(1), (5), 29(2)(*b*), 39(*e*)(*ii*).

Section 29(1) of the *Equal Opportunity Act* 1984 (Vict.) made it unlawful "for a person who provides goods or services ... to discriminate against another person on the ground of status ... — (a) by refusing to supply the goods or perform the services; or (b) in the terms on which the person supplies the goods or performs the services". Sub-section (2) provided that the section did not apply to discrimination "on the ground of impairment in relation to the performance of a service where, in consequence of a person's impairment, the person requires the service to be performed in a special manner — (a) that cannot reasonably be provided by the person performing the service; or (b) that can on reasonable grounds only be provided by the person performing the service on more onerous terms than the terms on which the service could ... reasonably be provided to a person not having that impairment". Section 17(1) provided: "A person discriminates against another person ... if on the ground of the status ... of the other person the first-mentioned person treats the other person less favourably than the first-mentioned person treats or would treat a person of a different status ..." Sub-section (5) provided that "For the purposes of sub-section (1) a person discriminates against another person on the ground of the status ... of the other person if — (a) the first-mentioned person imposes on that other person a requirement or condition with which a substantially higher proportion of persons of a different status ... do or can comply; (b) the other person does not or cannot comply with the requirement or condition; and (c) the requirement or condition is not reasonable." Section 39 provided that the Act "does not render unlawful — ... (e) an act done by a person if it was necessary for the

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

person to do it in order to comply with a provision of — ... (ii) any other Act ..."

Held, by Mason C.J., Brennan, Deane, Dawson, Toohey and Gaudron JJ., that s. 29(2)(b) was directed to terms that were more onerous to the person who required the goods and services and not to the provider of the goods and services.

Per McHugh J. Section 17(1) dealt only with direct discrimination and sub-s. (5) dealt only with indirect discrimination.

Per Mason C.J., Deane and Gaudron JJ. Section 17(5) was not a complete and exhaustive statement of what constituted indirect discrimination for the purposes of s. 17.

Per Mason C.J., Deane and Gaudron JJ., McHugh J. contra, that s. 17(1) did not require an intention or motive to discriminate.

Reg. v. Birmingham City Council; Ex parte Equal Opportunities Commission, [1989] A.C. 1155, at p. 1194, and *Australian Iron & Steel Pty. Ltd. v. Banovic* (1989), 168 C.L.R. 165, at pp. 176-177, applied.

Per Mason C.J., Deane, Dawson, Toohey, Gaudron and McHugh JJ. A "requirement or condition" in relation to a service must be separate from that service.

Per Dawson, Toohey and McHugh JJ. The words "requirement or condition" should be construed broadly to cover any form of qualification or prerequisite, although the actual requirement or condition should be formulated precisely.

Per McHugh J. In the context of providing goods or services, a person should be regarded as imposing a requirement or condition when he intimates, expressly or inferentially, that some stipulation or set of circumstances must be obeyed or endured if those goods or services are to be acquired, used or enjoyed.

Held, further, by Brennan, Deane, Dawson, Toohey and McHugh JJ., Mason C.J. and Gaudron J. contra, that "reasonable" in s. 17(5)(c) referred to what was reasonable in all the circumstances of the case.

Per McHugh J. The onus of proving that a requirement or condition was not reasonable within s. 17(5)(c) lay on the complainant.

Vines v. Djordjevitch (1955), 91 C.L.R. 512, at pp. 519-520 and *Roddy v. Perry* [No. 2] (1957), 58 S.R. (N.S.W.) 41, at p. 47, applied.

Held, further, by Mason C.J., Brennan, Deane, Gaudron and McHugh JJ., that s. 39(e)(ii) referred only to what it was necessary to do in order to comply with a specific requirement directly imposed by the relevant provision as distinct from a requirement imposed by some person in the exercise of a power conferred by the provision.

Per Dawson and Toohey JJ. Section 39(e)(ii) protected acts other than those expressly authorized by the other Act. Its protection extended to those necessary to carry out specific directions given under statutory authority, but not where a discretion as to the manner of carrying out the direction offered a choice between discrimination and no discrimination.

Hampson v. Department of Education and Science, [1991] 1 A.C. 171, applied.

Decision of the Supreme Court of Victoria (J. D. Phillips J.), reversed.

APPEAL from the Supreme Court of Victoria.

Peter Waters and nine other disabled persons lodged complaints under s. 44 of the *Equal Opportunity Act* 1984 (Vict.) alleging that

the Public Transport Corporation had discriminated against them in contravention of the Act. The acts of discrimination complained of were the removal of conductors from some trams and the introduction by the Corporation of "scratch tickets" for use on public transport. The tickets were to be bought from retail outlets and were to be validated by the traveller making a scratch mark in designated places to indicate the journey being undertaken. Some of the complainants could not travel on trams which did not have conductors. The disabilities of all complainants made it impossible or at least exceedingly difficult to use scratch tickets.

The complaints were referred to the Equal Opportunity Board which upheld them and made orders requiring the Corporation to "discontinue the scratch-ticket system as the main ticket system for the complainants" and to "refrain from implementing the driver-only tram proposal".

The Corporation appealed to the Supreme Court pursuant to s. 49(4) of the Act. After the time for appeal under that section had expired the Corporation instituted proceedings for judicial review by originating motion under Ch. 1, O. 56 of the Supreme Court Rules seeking to raise issues extending beyond those raised in its appeal. Phillips J. allowed the appeal and set aside the orders of the Board and in lieu thereof ordered that the complaints be dismissed. The originating motion was dismissed. The complainants appealed to the High Court, by special leave, from the dismissal of the appeal. The Corporation applied for special leave to cross-appeal from the dismissal of the motion in the event that the appeal succeeded.

A. M. North Q.C. (with him *H. Borenstein*), for the appellants. The Act is in the nature of a human rights code and calls for a broad interpretation to advance its purposes (1). Section 31(1) of the *Transport Act* 1983 (Vict.) is not a provision of any other Act for the purposes of s. 39(e)(ii). The other provision must expressly require an act of discrimination. Section 31(1) does not expressly require the Minister or Director-General to give directions which are discriminatory in effect nor does s. 31(1) require the Corporation to comply with such directions (2). [He referred to Pearce and Geddes, *Statutory Interpretation in Australia* (3); *Reg. v. Cain* (4).] It was

(1) *Re Ontario Human Rights Commission v. Simpsons-Sears Ltd.* (1958), 23 D.L.R. (4d) 321, at p. 329; *Street v. Queensland Bar Association* (1989), 168 C.L.R. 461, at pp. 487, 508, 566, 581; *Re Saskatchewan Human Rights Commission v. Canadian Odeon Theatres Ltd.* (1985), 18 D.L.R. (4d) 93; *Waugh v. Kippen* (1986), 160 C.L.R. 156.

(2) *Hampson v. Department of Education and Science*, [1991] 1 A.C. 171.

(3) 3rd ed. (1988), p. 105.

(4) [1985] 1 A.C. 46.

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

open on the evidence and at law for the Board to find that the discriminatory acts were not necessary in order to comply with directions of the Minister or Director-General within s. 39(e)(ii). The characterization of the "requirement or condition" within s. 17(5)(a) was a question of fact for the Board, and the judge erred in interfering with it because there was evidence to support it. The judge's characterization was wrong in law in that it was too narrow. It failed to take account of the substance of the acts of the Corporation and the impact of its acts. [He referred to *Australian Iron & Steel Pty. Ltd. v. Banovic* (5); *Street v. Queensland Bar Association* (6); *Clarke v. Eley (I.M.I.) Kynoch Ltd.* (7); *Home Office v. Holmes* (8); *Styles v. Secretary of Department of Foreign Affairs and Trade* (9); and *Styles v. Secretary of Department of Foreign Affairs and Trade* (10).] "Reasonable" in s. 17(5)(c) is a reference to reasonableness in relation to the victim alone. This construction flows from the scheme of the Act which exempts the discriminator from liability in limited specific situations defined in other sections. These sections constitute an exclusive code for exemption for discriminators.

F. X. Costigan Q.C. (with him Mrs. *A. Richards*), for the respondent. The proper interpretation of s. 29(1)(b) requires that there be two separate sets of terms, one for one group of people, and one for the group of people discriminated against. The respondent does not contend that for the purposes of indirect discrimination under s. 17(5) it is necessary to identify any conscious and/or intentional element. There is nothing in the circumstances surrounding the complaints in relation to driver only trams which can be described as a "requirement or condition" to attract the operation of s. 17(5)(a). Moreover there was no imposition on any complainant of a requirement or condition. "Reasonable" in s. 17(5)(c) means reasonable in all the circumstances. The circumstances include economic, financial and public policy matters (11). The Act recognizes that in the case of indirect discrimination the burden of complying may be unreasonable (12). The corporation is entitled to

(5) (1989) 168 C.L.R. 165.
(6) (1989) 168 C.L.R. 461.
(7) [1983] I.C.R. 165.
(8) [1984] I.C.R. 678.
(9) (1988) 84 A.L.R. 408.
(10) (1989) 23 F.C.R. 251.
(11) *Styles v. Department of Foreign Affairs* (1988), 84 A.L.R., at pp. 426-431; (1989) 23 F.C.R., at pp. 263-264.
(12) *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at p. 552; *Home Office v. Holmes*, [1985] 1 W.L.R. 71; [1984] 3 All E.R. 549.

the benefit of s. 39(e)(ii). It received a direct order pursuant to s. 31 of the *Transport Act* which it was required to obey. That direction required it to implement a driver only tram system. It could not decline to comply. Its action was necessary to carry out this direction. [He referred to *Hampson v. Department of Education and Science* (13).] The orders of the Board were null and void because they were vague, uncertain and unintelligible. By reference to ss. 49(4) and 88 of the *Magistrates' Court Act* 1971, the respondent was entitled to avail itself of the judicial review proceedings in circumstances where by reason of the narrow interpretation placed upon the power of amendment in s. 91 of the *Magistrates' Court Act* it was precluded from adding a ground of appeal in an order to review.

Cur. adv. vult.

Dec. 3.

The following written judgments were delivered:—

MASON C.J. AND GAUDRON J. The appellants are nine individuals ("the complainants") who lodged complaints under s. 44 of the *Equal Opportunity Act* 1984 (Vict.) ("the Act") and twenty-nine community organizations representing the interests of disabled persons, which organizations made allegations of discrimination that came to the attention of the Equal Opportunity Board ("the Board") established by s. 8(1) of the Act. The respondent, the Public Transport Corporation ("the Corporation"), is responsible for the provision of public transport in the State of Victoria in accordance with and subject to the *Transport Act* 1983 (Vict.).

The complaints and the allegations of discrimination arose out of a direction by the Minister for Transport to introduce a number of changes to the public transport system. This appeal is concerned with two of those changes, namely, a new ticketing system for public transport and the removal of conductors from some trams. The new tickets, known as "scratch tickets", were to be purchased from retail shops and were to be validated by the traveller making a scratch mark in designated places to indicate the journey being undertaken.

Each of the nine complainants suffers from a disability making it exceedingly difficult, if not impossible, to use scratch tickets. Some of the complainants, by reason of their particular disabilities, cannot travel on trams which do not have conductors. And, of course,

(13) [1991] 1 A.C. 171.

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

Mason C.J. Gaudron J.

other persons in the same general position as the complainants are similarly affected. It was by reason of these matters that it was complained and alleged, amongst other matters, that the introduction of scratch tickets and the removal of conductors constituted discrimination against the complainants in particular and against impaired persons generally.

History of the proceedings

The complaints were referred to the Board under s. 45 of the Act. Initially the Board took the view that it had no jurisdiction, but it was held otherwise on appeal to the Supreme Court of Victoria. The allegations of discrimination were referred to the Board under s. 42 of the Act after investigation by the Commissioner for Equal Opportunity under s. 41.

The complaints and allegations of discrimination were heard together and, after a lengthy hearing, they were upheld to the extent that they were based on the introduction of scratch tickets and the removal of conductors. Thereupon, the Board made orders requiring the Corporation to "discontinue the scratch-ticket system as the main ticket system for the [c]omplainants" and to "refrain from implementing the driver-only tram proposal". It is common ground that those orders were made by way of determination of the complaints lodged under s. 44 of the Act.

The Corporation appealed from the decision and orders of the Board to the Supreme Court pursuant to s. 49(4) of the Act. That sub-section provides for an appeal only on a question of law. The appeal is to be in accordance with the provisions of Pt XI of the *Magistrates' Courts Act* 1971 (Vict.) with such adaptations as are necessary. The appeal must be instituted within twenty-eight days. Within that period the Corporation obtained an order nisi as provided in Pt XI of the *Magistrates' Courts Act*. Later, and after the time for appeal had expired, the Corporation instituted proceedings for judicial review by originating motion under Ch.I, O. 56 of the Supreme Court Rules of Victoria ("the Rules") seeking to raise issues extending beyond those raised in its appeal.

The appeal and the originating motion were heard by Phillips J. The appeal was allowed. The order nisi which had been previously granted was made absolute and it was ordered that the orders of the Board be set aside and, in lieu thereof, that the complaints be dismissed. This appeal is brought from that order, there being no provision at that time for an appeal to the Full Court of the Supreme Court. The originating motion was dismissed, his Honour suggesting, in effect, that it was incompetent. In the event that the

appeal should succeed, the Corporation seeks special leave to cross-appeal from the dismissal of that motion.

The provisions of the Act

Section 29(1) of the Act provides:

> "It is unlawful for a person who provides goods or services (whether or not for payment) to discriminate against another person on the ground of status or by reason of the private life of the other person —
>
> (*a*) by refusing to supply the goods or perform the services; or
>
> (*b*) in the terms on which the person supplies the goods or performs the services."

"Status" is defined in s. 4(1) of the Act to mean, in par. (d) of the definition and in relation to a person, the impairment of that person. "Impairment" is relevantly defined in that sub-section to mean, in pars (b) and (c) of the definition, total or partial loss of a part of the body and malfunction of a part of the body. It is common ground that each of the complainants is impaired in one or other of those ways. It is also common ground that the Corporation provides services.

It is provided by s. 29(2) and (3) that certain discrimination is outside the operation of that section. It is necessary only to refer to sub-s. (2) which provides:

> "This section does not apply to discrimination on the ground of impairment in relation to the performance of a service where, in consequence of a person's impairment, the person requires the service to be performed in a special manner —
>
> (*a*) that cannot reasonably be provided by the person performing the service; or
>
> (*b*) that can on reasonable grounds only be provided by the person performing the service on more onerous terms than the terms on which the service could ... reasonably be provided to a person not having that impairment."

The concept of "discrimination" is dealt with in s. 17 of the Act which relevantly provides:

> "(1) A person discriminates against another person ... if on the ground of the status or by reason of the private life of the other person the first-mentioned person treats the other person less favourably than the first-mentioned person treats or would treat a person of a different status or with a different private life.
>
> ...
>
> (5) For the purposes of sub-section (1) a person discriminates against another person on the ground of the status or by reason of the private life of the other person if —
>
> (*a*) the first-mentioned person imposes on that other person

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

Mason C.J. Gaudron J.

a requirement or condition with which a substantially higher proportion of persons of a different status or with a different private life do or can comply;
(*b*) the other person does not or cannot comply with the requirement or condition; and
(*c*) the requirement or condition is not reasonable."

The Act, in Pt V, contains a number of general exceptions. One exception is to be found in s. 39 which relevantly provides:

"This Act does not render unlawful —

...

(*e*) an act done by a person if it was necessary for the person to do it in order to comply with a provision of —
(i) an order of the Board;
(ii) any other Act; or
(iii) an instrument made or approved by or under any other Act."

If conduct which is the subject of a complaint under s. 44 of the Act constitutes discrimination which is proscribed by the Act and is not excepted from its operation, whether specifically, as e.g. by s. 29(2), or generally, as e.g. by s. 39(e), the Board may make orders in accordance with s. 46. That section relevantly provides, in sub-s. (2)(a), that:

"[The Board] may order the person with respect to whom the complaint was made ... to refrain from committing any further act of discrimination against the complainant."

The substantive issues in the appeal and in the application for special leave to cross-appeal

The proceedings have at all times been conducted on the basis that, to the extent that discrimination is involved, it is because, in terms of s. 17(5) of the Act, the scratch tickets and driver-only trams involve the imposition of a requirement or condition with which a substantially higher proportion of unimpaired persons can or do comply than do impaired persons. Compliance is not in issue. Nor is it now in issue that scratch tickets involve the imposition of a requirement or condition. Accordingly, the specific issues which arise under the Act are —

(1) Whether, as found by Phillips J., there is no requirement or condition involved in the removal of conductors from trams.

(2) Whether the requirement or condition involved in the introduction of scratch tickets and that, if any, involved in the removal of conductors are, in terms of s. 17(5)(c), reasonable. More precisely, the question is whether, as held by Phillips J., the Board was wrong in refusing to have regard to the financial considerations which were said to justify those changes.

(3) Whether, if the changes constitute discrimination within s. 29(1) of the Act, they nonetheless fall within the special exception in s. 29(2). This question lies at the heart of the Corporation's application for special leave to cross-appeal.

(4) Whether, as was held by Phillips J., the Corporation's conduct in relation to the introduction of scratch tickets and the removal of conductors falls within the general exception set out in s. 39(e)(ii) of the Act in that, a direction having been given by the Minister, that conduct was necessary for the Corporation to comply with s. 31(1) of the *Transport Act*.

(5) Whether, as was held by Phillips J., the orders made by the Board, by reason of their vagueness, went beyond the power conferred by s. 46(2)(a) of the Act.

The relationship between s. 17(1) *and s.* 17(5) *of the Act*

The subject-matter of s. 17(5) of the Act is usually referred to as "indirect discrimination" (14) or as "adverse effect discrimination" (15), signifying that some criterion has been used or some matter taken into account which, although it does not, in terms, differentiate for an irrelevant or impermissible reason, has the same or substantially the same effect as if different treatment had been accorded precisely for a reason of that kind.

The notion of "indirect discrimination" or "adverse effect discrimination" derives from the decision of the Supreme Court of the United States in *Griggs v. Duke Power Co.* (16), which gave rise to the term "disparate impact discrimination". In that case a general anti-discrimination provision, much like that in s. 17(1) of the Act, which was directed to the elimination of racial discrimination, was interpreted as prohibiting the use of a selection test which, although not overtly differentiating on the basis of race, had a disparate impact on persons from different racial backgrounds.

Within the Australian legal system, it is usual for anti-discrimination legislation to ban discriminatory practices in terms which deal separately with treatment which differentiates by reason of some irrelevant or impermissible consideration and with practices which, although not overtly differentiating on that basis, have the same or substantially the same effect. That is the case with s. 17(1)

(14) See, e.g., *Australian Iron & Steel Pty. Ltd. v. Banovic* (1989), 168 C.L.R. 165, at pp. 175, 182-183, 202.
(15) See, e.g., *Street v. Queensland Bar Association* (1989), 168 C.L.R. 461, at p. 508, per Brennan J.
(16) (1971) 401 U.S. 424.

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

Mason C.J. Gaudron J.

and s. 17(5) of the Act. (17). That form of proscription appears to have been based on that in the *Sex Discrimination Act* 1975 (U.K.).

Sub-section (1) of s. 17 describes what constitutes discrimination by a person against another person in any circumstances relevant for the purposes of a provision of the Act. A person discriminates in the described sense "if on the ground of the status or by reason of the private life of the other person the first-mentioned person treats the other person less favourably than the first-mentioned person treats or would treat a person of a different status or with a different private life". The sub-section is expressed in general terms apt to apply to both direct and indirect ("adverse effect") discrimination. Conduct which is "facially neutral" may nevertheless amount to, or result in, "less favourable" treatment. In the United States and Canada anti-discrimination statutes expressed in general terms that do not draw any distinction between direct and indirect discrimination have been consistently construed as applying to both forms of discrimination (18). This Court has taken the same approach in construing s. 92 of the Constitution (19).

The remaining sub-sections in s. 17 give more precise content to the general concept of discrimination described in sub-s. (1). Instead of making separate and independent provision for indirect discrimination, the legislature has chosen by sub-s. (5) to make it clear that sub-s. (1) applies to indirect discrimination of the kind described in sub-s. (5), just as sub-s. (4) makes it clear that sub-s. (1) applies to direct discrimination of the kind to which it refers. Sub-sections (4) and (5) commence with the words "[f]or the purposes of sub-section (1)", as does sub-s. (2). Accordingly, sub-s. (5) is epexegetical to, or explanatory of, sub-s. (1), spelling out the reach, though not necessarily the whole of the reach, of that provision in its application to indirect discrimination (20).

It is implicit in what we have just said that we do not accept the proposition that s. 17(5) is a complete and exhaustive statement of

(17) See also *Sex Discrimination Act* 1984 (Cth), ss. 5, 6, 7; *Anti-Discrimination Act* 1977 (N.S.W.), ss. 7, 24, 39, 49A, 49P, 49ZG; *Equal Opportunity Act* 1984 (S.A.), s. 29; *Equal Opportunity Act* 1984 (W.A.), ss. 8, 9, 10, 36, 53.

(18) *Griggs* ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation" — see (1971), 401 U.S. 424, at p. 431); *Albemarle Paper Co. v. Moody* (1975), 422 U.S. 405; *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536.

(19) *Cole v. Whitfield* (1988), 165 C.L.R. 360, at pp. 399, 407-408; *Castlemaine Tooheys Ltd. v. South Australia* (1990), 169 C.L.R. 436, at pp. 466-467, 478, 480.

(20) See the discussion of the relationship between s. 166 and s. 167 of the *Income Tax Assessment Act* 1936 (Cth) in *George v. Federal Commissioner of Taxation* (1952), 86 C.L.R. 183, at pp. 203-204.

what constitutes indirect discrimination for the purposes of s. 17. Indirect discrimination as described in s. 17(1) may occur otherwise than by means of the imposition of a "requirement or condition" within the meaning of s. 17(5). And the language of the section appears to be inconsistent with the notion that s. 17(5) is a complete and exhaustive prescription for the purposes of s. 17(1). The object of s. 17(5) was to ensure that s. 17(1) extended so far, not to confine its operation.

Section 17(1)*: does it require an intention or motive to discriminate?*

There is some force in the suggestion that the expressions "on the ground of the status" and "by reason of the private life" in s. 17(1) look to an intention or motive on the part of the alleged discriminator that is related to the status or private life of the other person (21). However, the principle that requires that the particular provisions of the Act must be read in the light of the statutory objects is of particular significance in the case of legislation which protects or enforces human rights. In construing such legislation the courts have a special responsibility to take account of and give effect to the statutory purpose (22). In the present case, the statutory objects, which are stated in the long title to the Act, include, among other things, "to render unlawful certain Kinds of Discrimination, to promote Equality of Opportunity between persons of different status". It would, in our view, significantly impede or hinder the attainment of the objects of the Act if s. 17(1) were to be interpreted as requiring an intention or motive on the part of the alleged discriminator that is related to the status or private life of the person less favourably treated. It is enough that the material difference in treatment is based on the status or private life of that person, notwithstanding an absence of intention or motive on the part of the alleged discriminator relating to either of those considerations. A material difference in treatment that is so based sufficiently satisfies the notions of "on the ground of" and "by reason of". A similar view was adopted by the House of Lords in *Reg. v. Birmingham City Council; Ex parte Equal Opportunities Commission* (23) in relation to s. 1(1)(a) of the *Sex Discrimination Act* (U.K.) which proscribed less favourable treatment on the ground of sex. Lord Goff of Chieveley (with whom the other

(21) See *Department of Health v. Arumugam*, [1988] V.R. 319, at p. 327, per Fullagar J.
(22) *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R., at p. 547; see also *Street* (1989), 168 C.L.R., at pp. 487, 566.
(23) [1989] A.C. 1155.

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

Mason C.J. Gaudron J.

members of the House agreed) said (24): "The intention or motive of the defendant to discriminate ... is not a necessary condition of liability." His Lordship noted (24) that, if intention or motive were relevant "it would be a good defence for an employer to show that he discriminated against women not because he intended to do so but (for example) because of customer preference, or to save money, or even to avoid controversy. In the present case, whatever may have been the intention or motive of the council, nevertheless it is *because of* their sex that the girls in question receive less favourable treatment than the boys" (emphasis added). (See also the discussion by Deane and Gaudron JJ. in *Banovic* (25).)

Requirement or condition in s. 17(5) *of the Act*

It was found by the Board that the removal of conductors involved the imposition of a requirement or condition that "the [c]omplainants ... use trams without the assistance of conductors". On appeal, it was held by Phillips J. that "for the Corporation simply to remove conductors from some of its trams does not involve, in any ordinary use of language, the 'imposition' of some 'requirement or condition' on either the travelling public generally or the [c]omplainants in particular".

In *Banovic*, this Court considered s. 24(3) of the *Anti-Discrimination Act* (N.S.W.) which deals with the same subject-matter as s. 17(5) of the Act in terms of a person "requir[ing] the other person to comply with a requirement or condition". It is clear from that case that compliance may be required even if the requirement or condition is not made explicit: it is sufficient if a requirement or condition is implicit in the conduct which is said to constitute discrimination. There is nothing in the Act to suggest that, in this regard, s. 17(5) involves anything different from the provision considered in *Banovic*.

It was submitted on behalf of the Corporation that, when applying s. 17(5) in the context dictated by s. 29 of the Act, namely, the provision of goods and services, it is necessary to ensure that the nature of those goods or services is not treated as constituting a requirement or condition. Then it was submitted that the requirement or condition identified by the Board, namely, the use of "trams without the assistance of conductors", is merely a description of the nature of the service provided by the Corporation.

It is necessary to note that the Board identified the requirement or condition involved in the removal of conductors in a context in

(24) [1989] A.C., at p. 1194.
(25) (1989) 168 C.L.R., at pp. 176-177.

which it was clear that it knew and appreciated that conductors were being removed from only some of the Corporation's trams. In that context, the formulation of the requirement or condition is somewhat elliptical but meaning that the complainants could fully avail themselves of tram transport only if they could use trams without the assistance of conductors. It may be that the routes on which the complainants were likely to travel had only conductorless trams, with the practical consequence that the complainants were, in effect, required to "use trams without the assistance of conductors".

In the context of s. 29, the notion of "requirement or condition" would seem to involve something over and above that which is necessarily inherent in the goods or services provided. Thus, for example, it would not make sense to say that a manicure involves a requirement or condition that those availing themselves of that service have one or both of their hands. But, subject to that, there is nothing in s. 29 or in s. 17(5) to suggest that either the goods or services or the requirement or condition, if any, involved in their provision should be identified in any particular way. Thus, and subject to that qualification, the identification of the service involved is no more than a determination of fact (26). It is clear that, without making any express finding to that effect, the Board proceeded on the basis that the service provided by the Corporation was that of public transport as affected by the changes directed by the Minister for Transport.

It was open to the Board to identify the service provided by the Corporation with more or less particularity. For example, in the context of the complaints with respect to the removal of conductors, the Board might have identified the service as the provision of transport by trams, some of which had conductors and some of which did not. However, it was for the Board to identify the service, and the complaints and the evidence permitted it to proceed on the basis that it did.

Once the service provided by the Corporation was identified (albeit, not expressly) by the Board as public transport as affected by the changes directed, it was open to it to find, as in effect it did, that the removal of conductors from some trams involved the imposition of a condition that the complainants could fully avail themselves of the tram service only if they could use trams without the assistance of conductors. And a condition of that nature falls within the

(26) See *Re Saskatchewan Human Rights Commission and Canadian Odeon Theatres Ltd.* (1985), 18 D.L.R. (4th) 93; *James v. Eastleigh Council*, [1990] 1 Q.B. 61.

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

Mason C.J. Gaudron J.

ordinary conception of "requirement or condition" and, thus, falls within s. 17(5)(a). Indeed, it is apparent that it is within the intended operation of s. 17(5)(a), for, when stated in this way, what is revealed is the less favourable treatment of those who need the assistance of conductors as against those who do not. Of course, that does not answer the question whether that is less favourable treatment on the ground of status. That must be determined by reference to s. 17(5)(b) and (c).

When the finding as to the requirement or condition involved in the removal of conductors is understood, as it must be, in the manner that has been indicated, no error of law is disclosed in the Board's interpretation or its application of s. 17(5)(a) of the Act.

The meaning of "reasonable" in s. 17(5)(c) of the Act

The question raised by s. 17(5)(c) in this case is whether a requirement or condition is reasonable, notwithstanding that it is one with which a substantially higher proportion of unimpaired persons can or do comply than do impaired persons.

The Board approached the question raised by s. 17(5)(c) on the basis that it should determine whether the requirement or condition was reasonable by reference to, and only by reference to, the circumstances of the complainants. Accordingly, it held that it was precluded from considering "financial or economic considerations which [might] have motivated the [Corporation]" and from placing those considerations "in the balance against the facts presented by the [complainants]". On appeal, Phillips J. held that "reasonable" in s. 17(5)(c) meant "reasonable in all the circumstances of the case and it involves considering not only the position of the [c]omplainants but also the position of the Corporation".

Paragraph (c) of s. 17(5) does not remove discriminatory conduct from the operation of the Act. To the extent that discriminatory conduct is taken outside the Act's operation, that is done by other provisions, including s. 29(2) and s. 39(e). Instead, the effect of s. 17(5)(c) is to limit the concept of "discrimination". It is limited by the notion of "reasonableness". Given that that notion determines whether conduct otherwise falling within s. 17(5) constitutes discrimination, it would be surprising if "reasonable" were used in some general and imprecise sense, leaving that question to be answered as a matter of impression. However, that may be put to one side, for the meaning of "reasonable" in s. 17(5) must be ascertained by reference to the notion of "discrimination" and by reference to the scope and purpose of the Act.

The purpose of the Act is to eliminate discrimination on the

the Act operates. The discrimination with which the Act is concerned is discrimination against, rather than discrimination between, persons with different characteristics. The notion of "discrimination against" involves differentiating by reason of an irrelevant or impermissible consideration. Anti-discrimination legislation operates on the basis that certain characteristics or conditions are declared to be irrelevant or impermissible. Thus, subject to the exceptions set out in the Act, the effect of s. 17(1) is to declare that status and personal life are not to be taken into consideration in those areas in which the Act operates. The notion of "discrimination between" involves differentiating on the basis of a genuine distinction, which, in the context of anti-discrimination legislation, must be a characteristic that has not been declared an irrelevant or impermissible consideration. It is this consideration which suggests that the function of s. 17(5)(c) is to identify those cases in which a requirement or condition serves to effect a genuine distinction or, more precisely, a distinction which is not rendered impermissible by the Act.

The function of s. 17(5)(c) which is suggested by the purpose of the Act is borne out by *Griggs* which, as earlier indicated, held that certain practices which have the same effect as direct discrimination are comprehended within the general concept of "discrimination". That case concerned discrimination in employment and, in that context, it was said (27) of a practice having the same effect as direct discrimination that, if it "cannot be shown to be related to job performance, the practice is prohibited". Later, in *Albemarle Paper Co.*, the Supreme Court of the United States held (28), by reference to its earlier decision in *McDonnell Douglas Corp. v. Green* (29), that, even if "tests are 'job related', it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship'". And, in *Banovic*, a case also concerned with discrimination in employment, Deane and Gaudron JJ. said (30) that "reasonableness" in s. 24(3)(b) of the *Anti-Discrimination Act* (N.S.W.) was directed to the considerations identified in *Albemarle Paper Co.* but, perhaps, also embraced matters pertaining to the stability and harmony of the workforce.

The two-stage approach which emerged from *Griggs* and *Albemarle Paper Co.* was reaffirmed by the Supreme Court of the

(27) (1971) 401 U.S., at p. 431.
(28) (1975) 422 U.S., at p. 425.
(29) (1973) 411 U.S. 792.
(30) (1989) 168 C.L.R., at p. 181.

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

Mason C.J. Gaudron J.

United States in *Wards Cove Packing Co. Inc. v. Atonio* (31). That approach is not very different from the approach that has emerged in this Court in relation to the notion of discrimination involved in ss. 92 and 117 of the Constitution. In the case of different treatment, that approach involves ascertaining whether there is a difference which might justify different treatment and, if so, whether the different treatment in issue is reasonably capable of being seen as appropriate and adapted to that difference (32).

One very powerful reason for confining the meaning of the word "reasonable" in the context of s. 17(5)(c) in this way is that an extension of the concept to embrace all the circumstances of the case would open the way to justification of indirect discriminatory practices on grounds which are not available in the case of direct discrimination. Just why the legislature should intend to draw such a distinction between direct and indirect discrimination does not appear. And there is nothing to indicate that the consequences of direct discrimination are more objectionable and harmful to society than the consequences of indirect discrimination. In this situation a narrow reading of s. 17(5)(c) is more apt to secure the attainment of the statutory objects than a reading which permits the adoption of a discriminatory practice merely because it is "reasonable" having regard to economic and financial considerations. If the legislature had intended to provide for an exemption on that ground, it would have found a home in "Part V — General Exceptions".

The reason for the introduction of par. (c) in s. 17(5) is that the sub-section provides in effect that the imposition of a requirement or condition of the kind described in par. (a) amounts to discrimination against a person on the ground of status or private life if pars (b) and (c) are satisfied. Unless provision were made by par. (c) for the concept of reasonableness, the fact that the differentiating treatment is based on a non-proscribed distinction, and reasonably so based, would not avail the alleged discriminator. No such provision is required in connexion with s. 17(1) where conduct based on a relevant or non-proscribed distinction is not discrimination "on the ground of" or "by reason of" the status or private life of the person concerned.

Having regard to the purpose of the Act, the general context of s. 17(5)(c), the way in which "indirect discrimination" has been dealt

(31) (1989) 57 L.W. 4583.

(32) See the discussion by Brennan J. in *Gerhardy v. Brown* (1985), 159 C.L.R. 70, at p. 127; and see, in relation to s. 92, *Cole v. Whitfield* (1988), 165 C.L.R., at p. 408; *Bath v. Alston Holdings Pty. Ltd.* (1988), 165 C.L.R. 411, at pp. 427-428; *Castlemaine Tooheys Ltd.* (1990), 169 C.L.R., at p. 478; in relation to s. 117, *Street* (1989), 168 C.L.R., at pp. 487-489, 508-509, 510-511, 523-524, 555, 570-571, 582-583.

with in the United States following *Griggs*, and the notion of discrimination as revealed in the context of ss. 92 and 117 of the Constitution, "reasonable" in that paragraph is, in our view, to be read as directing an inquiry whether the requirement or condition reflects a distinction other than one based on status or personal life and, if so, whether the requirement or condition is appropriate or adapted to that distinction.

However, this view — which, for convenience, may be called "the strict view of s. 17(5)(c)" — is not a view which commends itself to a majority of the Court. Thus, it is necessary that this case be determined on a different basis.

Once the strict view of s. 17(5)(c) is rejected, "reasonable" in that paragraph must mean reasonable in all the circumstances. If "reasonable" is not limited by the concept of "discrimination", there is nothing else in the Act to limit the considerations to be taken into account in reaching a decision on that issue. In particular, and for the reasons given by Dawson and Toohey JJ., those considerations are not limited by s. 29(2) of the Act.

The strict view of s. 17(5)(c) of the Act would lead to the conclusion that Phillips J. was in error in upholding the Corporation's ground of appeal that the Board "erred in law in ruling that ... [i]t should not have regard to any financial or economic considerations which may have motivated the [Corporation] ... when determining the question of reasonableness". That view has not gained acceptance and the alternative view requires acceptance of the conclusion of Phillips J. that the Board erred in the manner stated.

The operation of s. 29(2) *of the Act*

As earlier indicated, s. 29(2) takes discriminatory conduct in the provision of goods and services outside the operation of s. 29 where, "in consequence of a person's impairment, [that] person requires the service to be performed in a special manner — (*a*) that cannot reasonably be provided by the person performing the service; or (*b*) that can on reasonable grounds only be provided by the person performing the service on more onerous terms than the terms on which the service could ... reasonably be provided to a person not having that impairment".

The Board proceeded, without any express finding to that effect, on the basis that the complainants required public transport to be provided in a special manner, namely, without scratch tickets and, so far as it was provided in trams, in trams with conductors. On this basis, it is hard to understand why the Corporation did not rely on

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

Mason C.J. Gaudron J.

s. 29(2)(a). However, it has at all times confined itself to a claim that its conduct is protected by par. (b).

The Board interpreted s. 29(2)(b) as concerned with terms which are more onerous to the provider of the services. It was argued in this Court on behalf of the Corporation that, to the contrary, it is concerned with terms which are more onerous to the impaired person. Then it was put that, the Board having proceeded on a wrong basis, there was, in effect, a failure to determine the question raised by s. 29(2)(b) and, unless the appeal should otherwise be resolved in the Corporation's favour, that question should be remitted for the Board's decision.

It was not necessary for Phillips J. to consider the meaning of s. 29(2)(b). And his Honour took the view that, in any event, it might not be open to the Corporation to rely on it as it was not raised in the grounds set out in the order nisi obtained pursuant to s. 49(4) of the Act, but only in the originating motion taken out pursuant to Ch. I, O. 56 of the Rules. His Honour indicated that he inclined to the view that the effect of s. 49(4) was to exclude the operation of Ch. I, O. 56. That latter question may, for the moment, be put to one side.

Section 29(2) operates only if an impaired person requires a service to be performed in a special manner which "cannot reasonably be provided" (par. (a)) or "can on reasonable grounds only be provided ... on more onerous terms" (par. (b)). The separate paragraphs of s. 29(2) are directed to the separate areas covered by s. 29(1)(a) and (b). It is convenient to repeat those paragraphs of s. 29(1) which make it unlawful for a person who provides goods or services to discriminate on the ground of status or by reason of private life:

> "(*a*) by refusing to supply the goods or perform the services; or
> (*b*) in the terms on which the person supplies the goods or performs the services."

Given that, by s. 17(1), the concept of discrimination is one which involves "less favourable" treatment, it is clear that "the terms" referred to in s. 29(1)(b) are the terms which are given to the person who requires the goods or services. And, because it operates in the same area as s. 29(1)(b), it follows that s. 29(2)(b) is also directed to terms that are more onerous to the person who requires the goods or services, namely, the impaired person.

There is no reason to treat "the terms" by reference to which s. 29(2)(b) operates in any narrow or technical sense. However, the composite expression "more onerous terms" in the context of s. 29(2)(b) indicates that the paragraph is concerned with terms which are more onerous to the person who seeks the performance of

the service in a special manner and which are necessarily different from those on which the service would be provided to others, as, for example, where a higher price is charged. It is not concerned with a term, such as that referred to in s. 17(5) as a "requirement or condition", which does not involve any overt differentiation but has a discriminatory effect.

This case is concerned with terms which are the same for everyone, regardless of their status or the nature of their personal life. More particularly, the terms are the same for all users of public transport, whether impaired or not. There is thus no possible foundation for an argument that the introduction of scratch tickets or the removal of conductors from trams falls within s. 29(2)(b).

The requirement in s. 31(1) *of the Transport Act and the general exception in s.* 39*(e)(ii) of the Act*

Section 39 of the Act contains a variety of exemptions from unlawfulness under the Act. Three of its seven paragraphs ((a), (b) and (f)) exempt the "exclusion" of persons from organizations, activities or programmes in certain defined areas or circumstances (i.e., community service organizations and social or other clubs; sporting activities; and benign discrimination under special measures programmes). Another three paragraphs ((c), (d) and (da)) exempt particular kinds of "discrimination" (i.e., on the ground of status or impairment in relation to an annuity or insurance; on the ground of impairment where necessary for protection of public health). In contrast, par. (e) of s. 39 is not confined by reference to the objective character of the conduct concerned. It extends to any act at all done by a person if the act "was necessary for the person to do it in order to comply with a provision of — (i) an order of the Board; (ii) any other Act; or (iii) an instrument made or approved by or under any other Act". It is submitted by the Corporation that the acts of which complaint is made in the present case fall within the exemption contained in s. 39(e)(ii) for the reason that they were necessary for it to do in order to comply with s. 31 of the *Transport Act*. That submission was rejected by the Board but upheld by Phillips J. in the Supreme Court.

Section 31 of the *Transport Act* does not directly impose an obligation upon anyone to do any specific thing. Sub-section (1) of s. 31 provides that a corporation to which it applies — and the Corporation is such a corporation — "must exercise its powers and discharge its duties subject to the general direction and control of the Minister [for Transport] or the Director-General [of Transport], and to any specific directions given by the Minister or the Director-

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

Mason C.J. Gaudron J.

General". Clearly enough, the section impliedly confers upon the Minister and the Director-General statutory power to give a direction to the Corporation. It also requires obedience by the Corporation to any direction given in the valid exercise of that statutory power.

The question involved in this aspect of the case is whether the exemption in s. 39(e)(ii) of anything which it was necessary to do in order to comply with a "provision" of any other Act extends to anything which was necessary in order to comply with a direction given by the Minister in the exercise of the statutory power conferred by s. 31 of the *Transport Act*. The effect of the construction of s. 39(e)(ii) for which the Corporation contends ("the wide construction") in supporting an affirmative answer to that question would be that any of the myriad of persons possessing statutory power or authority to give a direction to another person in relation to a subject-matter would be empowered to exempt the conduct of that other person in relation to that subject-matter from unlawfulness under the Act in any case where the provision of the particular Act conferring the power or authority expressly or impliedly required — as it ordinarily would — that such a direction be obeyed by the persons to whom it was given. It is argued for the appellants that s. 39(e)(ii) should be more narrowly construed as referring only to something which is done in order to comply with a specific obligation directly imposed by an actual provision of another Act ("the narrow construction").

As a matter of language, the words of s. 39(e)(ii) are capable of bearing the meaning attributed to them by either construction. Anything that it is necessary to do in order to comply with an exercise of statutory power can, as a matter of language, be said to be necessary "in order to comply with" the legislative "provision" conferring (and expressly or impliedly requiring obedience to) the statutory power. On the other hand, and depending upon context, a reference to what is necessary to comply with "a provision of ... any other Act" can be construed as referring only to what it is necessary to do in order to comply with a specific requirement directly imposed by the relevant provision as distinct from a requirement imposed by some person in the exercise of some power conferred by the provision (cf., e.g., the construction given by the House of Lords in *Hampson v. Department of Education and Science* (33) to the words "any act of discrimination done ... in pursuance of any instrument"). If the relevant words fell to be construed in isolation, we would favour the wide construction of

(33) [1991] 1 A.C. 171.

them. When par. (e)(ii) is construed in its context in the Act, however, it appears to us that the narrow construction is the preferable one.

For one thing, the express provision of s. 39(e)(iii) exempting any act which it was necessary to do in order to comply with a provision of "an instrument made or approved by or under any other Act" militates against the wide construction of s. 39(e)(ii). If s. 39(e)(ii) extended to exempt any act which was necessary to comply with the direct or indirect requirements of a provision of any other Act, s. 39(e)(iii) would be largely surplusage since a statutory instrument made or approved under another Act will ordinarily command obedience by reason of an express or implied provision of that other Act. Moreover, the fact that s. 39(e)(iii) requires "*an instrument*" made or approved under another Act — that is to say, a formal and written exercise of statutory power or authority which can be readily identified and examined — serves to confirm that it is unlikely that the exemption of s. 39(e)(ii) was intended to extend to less formal and less readily identifiable or examinable exercises of statutory power, such as the oral directive upon which the Corporation relies in the present case.

More importantly, the wide construction seems to us to be inconsistent with the general scheme of the Act. It is one thing to provide that the Act should give way to an express direction contained in an actual provision of another Act or in a statutory instrument. It is a quite different thing to provide, in effect, that the Act shall give way to any subordinate direction, no matter how informal, to which a provision of any other Act requires obedience. In that regard, it would seem inevitable that, if the wide construction is given to the words "necessary ... in order to comply with a provision of ... any other Act" for the purposes of s. 39(e)(ii), a correspondingly wide construction should be given to the words "necessary ... in order to comply with a provision of ... an instrument" for the purposes of s. 39(e)(iii). In a context where, prerogative aside, the Crown ordinarily acts through employees or agents exercising statutory powers, the result would be that the express provision in s. 5 that the Act binds the Crown would become almost illusory and the effect of the Act would be to confer an unfair advantage upon some Crown commercial instrumentalities, such as the Corporation, vis à vis any private competitor lacking comparable immunity.

Indeed, if the Corporation's argument be correct, it is difficult to see why the Director-General, an officer not directly responsible to the Victorian Parliament, could not validly give a direction to the Corporation and to the Roads Corporation requiring each of them

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

Mason C.J. Gaudron J.

to exercise its powers and discharge its duties without paying any regard at all to any of the provisions of the Act. Moreover, the undermining of the general scheme of the Act would not be confined to the case where a statutory provision authorizes the giving of directions to those in the service of the Crown. It would extend to any case where an Act or statutory instrument required that one person act in accordance with the directions of another. If, for example, a provision of an Act or of a "statute" or regulation of a university made or approved under an Act (34) required subordinate officers of the university to act in accordance with the directions of the university's council or vice-chancellor, anything necessary to comply with those directions would be exempt from the operation of the Act. If a general provision of a Companies Act happened to provide that the employees of a corporation must act in accordance with the directions of the company's board of directors, the board of any company could effectively remove the affairs of the company from the reach of the Act.

As has been said, s. 31 of the *Transport Act* did not require the Corporation to do any specific thing. It did not directly impose any obligation upon the Corporation to remove conductors from trams or to introduce scratch tickets. If such an obligation was imposed upon the Corporation, it was imposed by the oral directive of the Minister given pursuant to s. 31. It follows from what has been said above that s. 39(e)(ii) of the Act does not exempt from unlawfulness under the Act whatever it was necessary for the Corporation to do in order to comply with that oral directive. That being so, the provisions of s. 39(e)(ii) are inapplicable and it is unnecessary to consider whether the acts of the Corporation of which complaint is made were in fact "necessary ... in order to comply with" the Minister's oral directive.

The orders made by the Board

It is argued on behalf of the Corporation that the orders made by the Board are so vague as to be beyond the power conferred by s. 46(2)(a) of the Act. The orders operated by reference to the very acts which were found to constitute discrimination, namely, the introduction of scratch tickets and the removal of conductors from trams. No error of law attended those findings. The orders that the Corporation "discontinue the scratch-ticket system as the main ticket system for the [complainants]" and "refrain from implementing the driver-only tram proposal" clearly constitute orders authorized by s. 46(2)(a), being orders that the Corporation

(34) See, e.g., *Melbourne University Act* 1958 (Vict.), s. 17.

"refrain from committing any further act of discrimination against the complainant[s]".

The Corporation's application for special leave to cross-appeal

The application for special leave to cross-appeal raises an important question whether the avenue of review provided by Ch. I, O. 56 of the Rules is excluded, either by s. 49(4) of the Act or by s. 88 of the *Magistrates' Courts Act*. It is not strictly necessary to decide this question as there is no possible foundation for the argument that the Corporation would otherwise wish to make by reference to s. 29(2)(b) of the Act. However, it is appropriate that we indicate our general agreement with what is said on this issue by McHugh J.

Conclusion

For the reasons earlier given the matter must be determined on the basis that "reasonable" in s. 17(5)(c) of the Act means reasonable in all the circumstances.

The appeal should be allowed. The application for special leave to cross-appeal should be dismissed. The orders of the Supreme Court dismissing the complaints should be set aside and, in lieu thereof, it should be ordered that the matter be remitted to the Board to determine, in accordance with s. 17(5)(c) of the Act, whether the requirements or conditions involved in the introduction of scratch tickets and removal of conductors from trams are reasonable.

BRENNAN J. This case arose out of changes that were made to the Melbourne metropolitan transport system in order to reduce the expenditure of public funds. Conductors were withdrawn from the modern tramcars and a system of scratch tickets was introduced. The scratch ticket system required passengers to buy a ticket before boarding a tram and to validate it for their journey (by scratching it) or pay a penalty fare. The consequences of these changes were disastrous for many disabled people who were unable to buy or use a scratch ticket or who needed assistance in boarding or alighting from a tram, in acquiring a ticket on the tram, in finding a seat and in identifying their desired route and destination. They were denied the assistance which conductors had been accustomed to afford. In the result, many disabled people were effectively denied the use of public transport by trams, thereby restricting further the movement of people already confined by constraints imposed by nature, age or misfortune. This litigation was launched by nine individuals and was supported by a number of organizations in the interest of

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

Brennan J.

disabled people in an endeavour to restore the services which had been available before the changes. The ventilation of the problem has produced a partial solution: the scratch ticket system has been changed and some assistance has been made available to disabled people on trams without conductors. That is of no significance to the consideration of the legal issues which now fall for determination. This Court must decide those issues by reference to the circumstances as they were before these ameliorating steps were taken.

Disabilities — physical, functional and mental — are almost infinitely various and they create needs which vary according to the nature and extent of the disability. Services may be required to satisfy those needs and, in many cases, the services are provided by public authorities. Indeed, a measure of the civilization of a society is the extent to which it provides for the needs of the disabled (and of other minorities) and protects them from adverse and unjust discrimination which offends their human dignity. The provision of needed services and the protection against adverse and unjust discrimination are distinct but related means of securing the welfare and dignity of the disabled. This litigation seems to me to be largely misdirected, for it invokes the *Equal Opportunity Act* 1984 (Vict.) ("the Act") and alleges unlawful discrimination when the true remedy which is sought is an enhancement of the services available to the disabled. Anti-discrimination legislation cannot carry a traffic it was not designed to bear. The beneficial operation of such legislation is prejudiced by invoking its assistance to achieve remedies which can be achieved only by straining the legislative language. The provision of services for the disabled, a function properly and necessarily reposed in the Executive Government as the branch of Government with fiscal power and responsibility, might not receive due attention if the measure of the entitlements of the disabled is determined by litigation under anti-discrimination legislation. Anti-discrimination legislation should be liberally construed but not as though it were the only, or even the principal, means by which the disadvantages of the disabled or of other minority groups are to be alleviated.

The material facts and the relevant provisions of the Act are set out in other judgments and I need not repeat them. Section 29(1) of the Act proscribes two categories of discriminatory conduct relating to the provision of services for disabled people (by which term I mean persons suffering from an impairment as defined in s. 4(1) of the Act): discrimination *by refusing* to perform services (par. (a)) and discrimination *in the terms* on which services are performed (par. (b)). The ultimate question is whether either of these two provisions

covers the conduct of the Public Transport Corporation ("the Corporation") in withdrawing conductors from modern trams and introducing the scratch ticket system. It will be necessary to keep the distinction between these two categories of unlawful discrimination in mind in order to construe and apply the Act to the present case. The issues which, in my view, fall for determination appear under the headings following.

(i) *What is the relevant service for the purposes of s. 29(1)(a)?*

Conductors on modern trams had been accustomed to provide disabled people with the services earlier mentioned, as the Equal Opportunity Board ("the Board") found. Whether or not conductors were bound by the terms of their employment to provide the particular services needed by disabled people, the services which facilitated the use of the tram service by many disabled people were performed by the Corporation through its servants, the conductors. The services performed by the Corporation were the special services provided by conductors for the disabled and the general tram service available to the travelling public. By withdrawing conductors from modern trams, the Corporation refused to perform the special services theretofore available to the disabled, with the regrettable consequence that many more disabled people were unable to avail themselves of the latter service. Although the Corporation refused to perform the special services for the disabled, the refusal was not discriminatory as that concept is defined by s. 17(1) of the Act. The special services were not refused "on the ground of ... status"; conductors were simply withdrawn from modern trams, presumably on the ground of economy, though the adverse impact of the withdrawal fell more severely on the disabled than on the general public. But the Corporation treated the disabled and the general public alike, for the special services which had been provided by conductors had never been available to those who were not disabled except, perhaps, for the courtesies extended to all passengers and those courtesies were uniformly withdrawn from modern trams irrespective of the status of their passengers.

As the case did not fall within s. 17(1), the appellants placed reliance upon s. 17(5). But s. 17(5) has no application to a refusal of the special services which conductors had been accustomed to provide. Those services were not refused by the imposition of a "requirement or condition" on disabled people. They were refused simply because the conductors who had been accustomed to provide them were no longer employed on modern trams. The real impact on the disabled of the withdrawal of the special services consisted in

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

Brennan J.

on the disabled of the withdrawal of the special services consisted in their inability to avail themselves of the tram service available to the general public. The Corporation, of course, provided the ordinary tram service for all members of the travelling public: the Corporation did not refuse "to ... perform the services" of providing the ordinary tram service, though many disabled were no longer able to use it. Therefore the Corporation's conduct did not amount to a discriminatory refusal of service as proscribed by s. 29(1)(a). Indeed, before Phillips J. it was agreed that s. 29(1)(a) had no direct relevance to the case. The appellants founded their argument on s. 29(1)(b) and s. 17(5).

However, before leaving this aspect of the case, reference should be made to s. 29(2)(a), which suggests that the category of discriminatory conduct proscribed by s. 29(1)(a) includes a refusal to perform a service "in a special manner" required by another person "in consequence of [that other] person's impairment". Although this provision suggests that there may be a discriminatory refusal of service by a refusal to perform it in a "special manner", in terms it distinguishes between a service and the manner in which it is performed. It cannot be construed as importing a duty to provide impaired persons with services not available to non-impaired persons. Construing s. 29(1)(a) and s. 29(1)(b) together, it seems to me that, where the availability of the service to impaired persons depends on the manner in which it is performed (as distinct from the performance of an additional service) and the service can reasonably be performed in a manner which would make the service practically available to impaired persons who require a special manner of performance, it is unlawful to refuse to perform the service in that manner. Obviously, there may be fine distinctions to be made between an additional service performed only for a class which needs it and the manner in which a particular service can reasonably be performed in order to make that service available to that class. Thus, it may be unlawful discrimination falling within s. 29(1)(a) for the Corporation to refuse to permit trams to stop near a school for the blind (a special manner of "performing" the general tram service) because that would amount to a refusal of the service to blind children attending the school, though s. 29(1)(a) does not make it unlawful to withdraw the further service of escorting blind children to the footpath. Whatever the true distinction between a service and a special manner of performing it may be, it cannot be said that the provision of staff to assist the disabled to use the general tram service is merely a special manner of "performing" the general tram service: the provision of such assistance is an additional or enhanced service.

We were informed that, in the argument before Phillips J., the parties agreed that the needs of disabled people for the services provided by conductors amounted to a requirement that the Corporation's services be performed in a special manner. The agreement evidently arose in relation to the operation of s. 29(2)(b), a provision which confers immunity in respect of conduct otherwise falling within s. 29(1)(b). The agreement does not appear to have affected his Honour's decision in any material way and, in the context of s. 29(1)(a), it erroneously confuses the manner in which a service can be performed and an additional or enhanced service.

(ii) *What is the relevant service for the purposes of s.* 29(1)*(b)?*

The performance of a service and "the terms on which" the service is performed are concepts which are kept distinct in s. 29(1)(b) and (2)(b) of the Act. As s. 29(1)(b) speaks of discriminating "in" the terms on which services are performed, discrimination must be found, if at all, in the terms on which the service is performed not in the performance of the service. Because of the correlation between the terms on which a service is performed and the performance of the service, the existence of discrimination can be ascertained only by reference to the terms on which an actual service is performed by the putative discriminator. The service relevant to an alleged act of discrimination is the service which the putative discriminator performs, not a service which the putative discriminator has been accustomed to perform, nor a service of a higher standard which the putative discriminator could perform but is not performing. For the purposes of s. 29(1)(b), a service consists in what is performed, not in what is not performed. If there be any unlawful discrimination by non-performance, it must fall within s. 29(1)(a).

In this case, at the material time the relevant service being performed by the Corporation was the provision of tram transport for the general public. It was a feature of that service that the modern class of trams had no conductor. The withdrawal of conductors from modern trams in the Corporation's fleet is a fact relevant to the ascertainment of the "services" performed by the Corporation but, to bring the case within s. 29(1)(b), the appellants must characterize the withdrawal of conductors' services and the introduction of the scratch ticket system as the imposition of a requirement or condition within s. 17(5) on the users of tram transport.

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

Brennan J.

(iii) *What requirement or condition was imposed?*

Although s. 17 defines discrimination for the purposes of the Act as a whole, it is erroneous to commence the analysis of a situation which is said to reveal a contravention of s. 29(1)(b) by inquiring whether the situation as a whole reveals direct (s. 17(1)) or indirect (s. 17(5)) discrimination. Such an approach tends to conflate the relevant services and the terms on which the services are performed. If that mistake be made, indirect discrimination — the category relied on here — will be found not only in a requirement or condition imposed by the putative discriminator but in any change in the services performed by that person which impacts differentially on persons "of a different status or with a different private life". The appellants' argument seems to me to make that mistake. When that mistake is made, it is necessary to strain the language of the statute to bring the facts within the terms of s. 17(5). Thus, in the present case it is necessary to describe the Corporation's withdrawal of conductors from modern trams as the imposition of a requirement or condition having an adversely differential impact on persons suffering an impairment. In reality, the differential capacity to enjoy the tram service flowed from the restricted capacity of persons suffering an impairment to enjoy the tram service as it was, not from the imposition on them of a requirement or condition as a term of their enjoyment of the tram service.

It is only after the terms on which a service is performed have been identified that it is possible to determine whether the person performing the service discriminates "in" those terms. It is argued by the appellants that the ascertainment of what the service is and what are the terms on which the service is performed are questions of fact and that s. 49(4) of the Act precludes an appeal on questions of fact from the decisions of the Board. But if the Board misdirects itself in law in ascertaining what is the relevant service and what are the relevant terms on which that service is performed, it may make an error of law and erroneously treat the withdrawal of a service as a requirement or condition imposed on the enjoyment of a service which is not withdrawn. In my opinion, the Board did so misdirect itself in this case.

What are the terms on which the Corporation's service, such as it was, was available? In my respectful view, it is erroneous to give the description of an imposed requirement or condition to a situation in which the use of modern trams was practically unavailable to passengers who could not use them without assistance from conductors. Nor can the withdrawal of conductors from modern

trams be described as the imposition of a requirement or condition that passengers travel on trams without a conductor. Such descriptions strain the language of the statute: the Corporation did not require persons to travel on trams with or without conductors, nor did the Corporation restrict the use by the disabled of such service as it provided except by the scratch ticket requirement. The straining of language arises because the supposed requirement or condition is not in truth a term on which the service was performed but was a feature of the service as it was performed by the Corporation.

The difficulty encountered by disabled people who wished to use the modern trams arose simply because the services available fell short of their needs. If such shortfalls in a service can be transformed into a requirement or condition imposed by the person performing the service, the Act becomes a charter of the minimum standards of service which a person performing the service must provide or at least maintain to cater for the needs of the disabled. That is not the purpose of the Act. If a shortfall in a service or the withdrawal of a service is characterized as a requirement or condition imposed by the person performing the service, the Board must assume responsibility for determining whether the shortfall or withdrawal is "reasonable" (35). If "reasonable" in s. 17(5)(c) be held to import consideration of the cost of enhancing the service to eliminate the shortfall or to restore the service withdrawn, the responsibility for deciding the level of service to be provided would effectively pass from the performer of the service to the Board though the Board has no fiscal responsibility for providing the service. Whether that situation would be conducive to the interests of impaired persons is a matter of speculation. In the present case, the Board ordered the Corporation to "refrain from implementing the driver-only tram proposal". The form of the order is open to objection as failing to restrain specific conduct which might have been found to amount to the refusal of a service or the imposition of a requirement or condition but, more significantly, it purports to order the Corporation to maintain a level of staffing for its trams as the means of maintaining the services needed by disabled people. I find no basis in the Act for an order compelling the performer of a service to retain or employ staff to maintain the level of service previously provided.

In my opinion, the only relevant requirement or condition imposed by the Corporation in this case was that a person using the service should have acquired and should validate a scratch ticket or

(35) s. 17(5)(c).

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

Brennan J.

pay a penalty fare. That requirement or condition was one with which a substantially higher proportion of unimpaired persons than of impaired persons could comply (36) and with which many impaired persons could not comply (37). The imposition of that requirement or condition thus amounted to discrimination unless the requirement or condition was reasonable (38), the question next to be considered.

(iv) *Was the scratch ticket requirement reasonable?*

The imposition of a requirement or condition which satisfies pars (a) and (b) of s. 17(5) prima facie amounts to discrimination, but it falls into that classification only if the requirement or condition is not reasonable (38). It is not possible to determine reasonableness in the abstract; it must be determined by reference to the activity or transaction in which the putative discriminator is engaged. Provided the purpose of the activity or transaction is not to discriminate on impermissible grounds, the reasonableness of a requirement or condition depends on whether it is reasonable to impose the requirement or condition in order to perform the activity or complete the transaction. There are two aspects to this criterion of reasonableness: first, whether the imposition of the condition is appropriate and adapted to the performance of the activity or the completion of the transaction; second, whether the activity could be performed or the transaction completed without imposing a requirement or condition that is discriminatory (that is, one to which pars (a) and (b) of s. 17(5) would apply) or that is as discriminatory as the requirement or condition imposed. These are questions of fact and degree. Effectiveness, efficiency and convenience in performing the activity or completing the transaction and the cost of not imposing the discriminatory requirement or condition or of substituting another requirement or condition are relevant factors in considering what is reasonable.

As to the first aspect, I would agree generally with what Mason C.J. and Gaudron J. have written in emphasizing that, in considering reasonableness, the connexion between the requirement or condition and the activity to be performed or the transaction to be completed is an important factor. The reasons which may justify discrimination on the respective grounds specified in the Act — sex, marital status, race, impairment, parenthood, childlessness, being a de facto spouse, religious or political belief or activity — vary

(36) s. 17(5)(a).
(37) s. 17(5)(b).
(38) s. 17(5)(c).

according to the category of discrimination and the activity or transaction to which an alleged instance of discrimination relates. But even where the imposition of the particular requirement or condition is appropriate and adapted to the performance of the relevant activity or the completion of the relevant transaction, it is necessary to consider whether performance or completion might reasonably have been achieved without imposing so discriminatory a requirement or condition. To determine the latter question, in my view, reference to the general circumstances of the case is required. It follows that "reasonable" in s. 17(5)(c) cannot be narrowly confined. It must be remembered that the imposition of a requirement or condition falling within s. 17(5)(a) is not by itself an instance of discrimination; it becomes an instance of discrimination only by reason of its consequences on others. The only way in which a balance can fairly be struck between a putative discriminator's legal freedom to impose a requirement or condition in the several activities or transactions to which the Act relates and the interests of persons in a protected category is to consider all the circumstances of the case. Contrary to the view adopted by the Board, it may be necessary to consider the position of the putative discriminator.

It is submitted that, as the Act contains express provisions which remove particular discriminatory conduct by the putative discriminator from the net of proscription, these provisions exhaust the cases in which the position of the putative discriminator falls for consideration. Section 29(2) is such a provision and it is inappropriate — so the argument runs — to consider whether a discriminatory requirement or condition is reasonable from the viewpoint of the putative discriminator when s. 29(2)(b) states the occasions when conduct otherwise prohibited by s. 29(1)(b) is not unlawful. The occasions when s. 29(2)(b) might apply are limited to occasions when an impaired person "requires the service to be performed in a special manner" and the putative discriminator has imposed a requirement or condition more onerous than a requirement or condition that might reasonably be imposed on a non-impaired person. Section 29(2)(b) applies only when the conduct prohibited by s. 29(1) arises from the special manner in which the person complaining of the discrimination requires the relevant service to be performed; it does not apply when the discriminatory conduct consists simply in the refusal of a service or in the imposition of a discriminatory requirement or condition unrelated to the manner in which the service is performed. True it is that there is a considerable area of overlap between s. 17(5) in its application to s. 29(1)(b) and s. 29(2)(b), but it would give the Act an unreasonable operation if

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

Brennan J.

the specific provision of s. 29(2)(b) were read as excluding from consideration under s. 17(5)(c) the reasonableness of imposing the impugned requirement or condition in order to perform the relevant activity or to complete the relevant transaction.

Here, there was no occasion for the Board to consider the reasonableness of withdrawing conductors on the modern trams but the Board did have to determine whether it was reasonable to impose the scratch ticket arrangements to collect the fares of passengers or whether some alternative arrangements could reasonably have been implemented which would have eliminated or diminished the adverse effect of the scratch ticket arrangements on intending passengers suffering from impairment. As the Board construed s. 17(5)(c) to exclude consideration of factors other than the impact of the changes made by the Corporation on the availability of transport to persons suffering impairment, its decision on the question of reasonableness had to be set aside. Section 29(2)(b) had no application. The appellants' complaint as to the scratch ticket requirement did not reveal a requirement that the tram service be performed in a special manner and there was no suggestion that any discrimination in the terms on which that service was performed consisted in the imposition on disabled people of terms more onerous than the terms on which the service could be reasonably provided to others.

It was therefore necessary for Phillips J. to send the matter back to the Board for reconsideration unless the oral direction given by the Minister to the Corporation to implement the Cabinet resolution to introduce scratch tickets excluded the implementation from the operation of s. 29 of the Act.

(v) *Was the Minister's direction binding on the Corporation?*

Section 31(1) of the *Transport Act* 1983 (Vict.) reads as follows:

> "Each Corporation must exercise its powers and discharge its duties subject to the general direction and control of the Minister or the Director-General, and to any specific directions given by the Minister or the Director-General."

A controlling executive power of the kind conferred by s. 31(1) is not a power to direct a Government agency not to comply with its obligations under the general law. Section 31(1) does not authorize the Minister to give a direction to the Corporation to act in contravention of the *Equal Opportunity Act*. If the direction given by the Minister purported to require the Corporation to contravene the Act, the direction was pro tanto in excess of the Minister's power and therefore invalid. However, the direction given by the Minister would not require a contravention of the Act by the

Corporation if what is done in accordance with the direction is exempt from the prohibitions contained in the Act. Section 39 of the Act exempts certain categories of discriminatory conduct from proscription. Relevantly, s. 39 reads:

> "This Act does not render unlawful —
>
> ...
>
> (*e*) an act done by a person if it was necessary for the person to do it in order to comply with a provision of —
>
> (i) an order of the Board
>
> (ii) any other Act; or
>
> (iii) an instrument made or approved by or under any other Act."

An exemption created by s. 39(e) applies when the "provision" with which the putative discriminator is bound to comply is to be found in an order, an Act or an instrument. Unless the "provision" itself makes it necessary to do the relevant discriminatory act, s. 39(e) does not take the act outside the operation of the *Equal Opportunity Act*. Section 39(e)(ii) should not be construed as relating to a provision in an Act which does not itself require the doing of a discriminatory act but which requires obedience to a direction which is given under an authority conferred by that Act. If sub-par. (ii) so far extended, sub-par. (iii) would be otiose.

Sub-paragraph (iii), however, does not embrace all directions given under a statutory power. The term "instrument" generally imports a document of a formal legal kind; the term is so used in the definition of "Subordinate instrument" in s. 3 of the *Interpretation of Legislation Act* 1984 (Vict.). A verbal direction is not an instrument. Of course, it would make s. 39(e) adventitious in its operation if sub-par. (iii) applied when a Minister exercises a power in writing but not if he exercises a power by verbal direction. The instruments of which sub-par. (iii) speaks are, I think, written instruments which the "other Act" prescribes as the means by which a power conferred by the other Act is exercised. The scope of the exemptions created by s. 39(e)(ii) and (iii) of the Act is thus limited to discriminatory acts done in compliance with a statutory duty imposed by another Act or by an exercise of a statutory power which the other Act requires to be exercised by written instrument and which is so exercised.

No doubt directions given by the Minister under s. 31(1) of the *Transport Act* might be in writing, but the *Transport Act* does not require that directions shall be given by written instrument. Accordingly, s. 39(e) does not exempt from the prohibitions in the Act acts done to comply with directions given under s. 31(1) of the *Transport Act*. The corollary is that s. 31(1) does not authorize the

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

Brennan J.

giving of a direction which requires a Corporation to act in contravention of the *Equal Opportunity Act*. It follows that, although the direction to withdraw conductors involved no contravention of the Act, the direction to introduce the scratch ticket system would have done so — and would therefore have been unauthorized by the *Transport Act* — unless that system was "reasonable". The question whether that system was reasonable has not been determined by the Board according to law.

The matter must therefore go back to the Board to determine whether the requirement or condition that a passenger acquire and validate a scratch ticket or pay a penalty fare was a reasonable requirement or condition to impose on passengers travelling on the Corporation's trams including the modern trams without conductors.

It is unnecessary to consider in detail the form of the orders made by the Board with respect to scratch tickets except to say that there was no valid objection to an order in a form which required the Corporation to "discontinue the scratch-ticket system as the main ticket system".

The appeal should be allowed, the orders of Phillips J. set aside and in lieu thereof the matter should be remitted to the Equal Opportunity Board with a direction to determine whether the scratch ticket system was reasonable and, if so, to dismiss the complaints and allegations but, if the scratch ticket system was not reasonable, to order that the Corporation refrain from implementing the scratch ticket system as the main ticket system for Melbourne trams.

The Corporation's application for special leave to cross-appeal should be refused. Section 29(2)(b) has no application and the question of the jurisdiction of the Supreme Court under Ch. I, O. 56 of the Supreme Court Rules (Vict.) to review a decision by the Board should not now be decided.

DEANE J. Subject to one qualification, I agree with the judgment of Mason C.J. and Gaudron J. The qualification is that I do not share their Honours' views about the preferred meaning of the word "reasonable" in s. 17(5)(c) of the Act. In what follows, I deal with that aspect of the case.

An element of the Equal Opportunity Board's conclusion that the imposition of the requirements or conditions relating to scratch tickets and the absence of conductors constituted discrimination for the purposes of s. 17(5) was a finding that the requirements or conditions were "not reasonable" (s. 17(5)(c)). In making that finding, the Board acted on the basis that the question of

reasonableness for the purposes of s. 17(5)(c) was to be determined without regard to any financial or economic considerations which may have influenced the Public Transport Corporation in imposing the requirements or conditions. In the Board's view, all that was relevant for the purpose of determining whether a requirement or condition was not reasonable for the purposes of s. 17(5)(c) was its impact upon a complainant "in the context as presented by the evidence". It followed that the Board considered that it was not open to it "to place ... in the balance against the facts presented" by the complainants "any financial or economic considerations" which may have motivated the Corporation.

In the Supreme Court, Phillips J. was of the view that the question posed by s. 17(5)(c), namely, whether "the requirement or condition is not reasonable", was not to be answered by reference solely to the position of the person subjected to the discrimination. On his Honour's approach, the word "reasonable" in par. (c) should be read as meaning "reasonable in all the circumstances of the case" with the result that relevant circumstances affecting the alleged discriminator, including any financial cost of avoiding or removing a requirement or condition, are factors to be taken into account in determining whether the requirement or condition is "not reasonable". His Honour's approach in that regard corresponded with the views expressed by the members of the Federal Court in *Styles v. Secretary, Department of Foreign Affairs and Trade* (39).

The arguments supporting the Board's conclusion that circumstances affecting the alleged discriminator are not relevant for the purposes of s. 17(5)(c) are not without force. To give "reasonable" the wide meaning of "reasonable in all the circumstances of the case" effectively introduces an element of wide discretionary judgment into the identification of the "adverse effect discrimination" with which s. 17(5) is concerned. Moreover, the position of the alleged discriminator, including any financial cost of avoiding or removing discrimination, may also arise in the class of case which falls within s. 29(2) (i.e. where a person, by reason of impairment, requires a service to be performed in a special manner) and it is possible that the general policy of the Act would be better served if consideration of the position of the alleged discriminator was confined to that class of case. On balance, however, I agree with the reasons given by Dawson and Toohey JJ. for concluding that the context provided by s. 29(2) of the Act does not justify confining the ambit of the word "reasonable" in s. 17(5)(c) so as to

(39) (1989) 23 F.C.R. 251, at p. 263.

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

Deane J.

render irrelevant any financial or other considerations affecting an alleged discriminator.

The fact that I do not share their Honours' views about the preferred meaning of the word "reasonable" in s. 17(5)(c) does not lead to any disagreement with the orders which Mason C.J. and Gaudron J. propose since, as their Honours point out, those orders are framed to reflect the conclusion reached by a majority of the Court, including myself, that the word should be understood as meaning "reasonable in all the circumstances of the case".

DAWSON AND TOOHEY JJ. In 1989 the Victorian Government decided to make changes to the public transport system in Melbourne. The changes included the introduction of scratch tickets and the removal of conductors from trams. A scratch ticket is one which a passenger is required to scratch in order to remove portions of the surface so as to reveal the date and time of travel. The scratch tickets were to be purchased before travel at shops such as milk bars or newsagencies, rather than on the trams, thus enabling the elimination of conductors on some trams. The changes were known as the "MetTicket concept" to which the Victorian Cabinet gave approval on 24 July 1989. The Cabinet record of that day records the approval as follows:

> "Agreed:
> That approval be given to the MetTicket concept which is characterised by:
> a. passenger responsibility to have a valid ticket at all times when travelling;
> b. sale of the full range of public transport tickets through commercial retail networks/outlets;
> c. introduction of Ticket Vending Machines on unstaffed/partially staffed stations and key off-station sites;
> d. introduction of scratch-tickets for daily or part-day trips purchased in bulk in advance from retail outlets;
> e. a new revenue protection system based on an upgraded passenger information/ticket examination service and on-the-spot fine for fare evaders; and
> f. a marketing emphasis to be given to increased periodical (weekly/monthly/annual) ticket usage.
> Noted:
> That the concept involves
> a. validation of scratch tickets by the passenger on day/time of travel;
> b. modification of modern trams to driver-only operation;
> c. retention of conductors on W Class (old green and yellow) trams;
> d. provision of additional tram services, subject to the Treasurer's approval and implementation of the staffing changes involved by 30 June 1993."

Following the decision by Cabinet, it appears that the Minister for Transport orally directed the respondent, the Public Transport Corporation, through the Director-General of Transport, to implement the resolution of Cabinet.

On 18 December 1989, nine persons, who are appellants in this appeal, lodged individual complaints with the Equal Opportunity Board pursuant to s. 44 of the *Equal Opportunity Act* 1984 (Vict.) ("the Act"). Certain community organizations representing the disabled also alleged discrimination and are appellants, but it is unnecessary to refer to them separately. The individual appellants suffer from a range of disabilities, including cerebral palsy and visual impairment. They alleged, amongst other things, that the decision to introduce scratch tickets and to remove conductors from some trams discriminated against them on the ground of their status. "Status" in relation to a person is defined in s. 4(1) of the Act as including the impairment of that person and "impairment" is defined by the same sub-section as including total or partial loss of a bodily function and the malfunction of a part of the body. "Malfunction of a part of the body" is defined by the same sub-section to include a mental or psychological disease or disorder and a condition or malfunction as a result of which a person learns more slowly than persons who do not have that condition or malfunction.

Section 29 of the Act provides that:

> "(1) It is unlawful for a person who provides goods or services (whether or not for payment) to discriminate against another person on the ground of status or by reason of the private life of the other person —
>
> (*a*) by refusing to supply the goods or perform the services; or
>
> (*b*) in the terms on which the person supplies the goods or performs the services.
>
> (2) This section does not apply to discrimination on the ground of impairment in relation to the performance of a service where, in consequence of a person's impairment, the person requires the service to be performed in a special manner —
>
> (*a*) that cannot reasonably be provided by the person performing the service; or
>
> (*b*) that can on reasonable grounds only be provided by the person performing the service on more onerous terms than the terms on which the service could be reasonably be provided to a person not having that impairment."

No point was taken before us that at the time the appellants lodged their complaints there may have been no more than a decision to implement the scratch ticket system. Nor was it contested that each of the appellants suffered from a form of

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

Dawson J. Toohey J.

impairment within the meaning of the Act. It was also common ground that the respondent provides services.

On 28 March 1990 the Board made findings that the respondent had unlawfully discriminated against the appellants in the terms on which it provided the scratch ticket system and in the terms on which it decided to provide a driver-only tram service. The Board did not then make any orders, giving the parties an opportunity to consider its reasons. On 30 April 1990 the Director-General of Transport gave written directions to the respondent, purporting to give them pursuant to s. 31 of the *Transport Act* 1983 (Vict.). These directions required the respondent to "ensure that its actions are in accordance with the requirements of appropriate legislation, and in particular taking into account the findings of the Equal Opportunity Board". Specifically the respondent was directed, amongst other things, "[t]o introduce a ticketing arrangement that removes the discriminatory impact on disabled persons of scratch tickets" and "[n]ot to extend beyond the current level the operation of driver-only/LRV [light rail vehicle] services" until further direction. The respondent was also directed to develop, in consultation with other persons and bodies, proposals for consideration by the Minister for Transport and the Director-General of Transport providing that "driver-only tram/LRV drivers' duties in respect of the disabled are to include all those duties previously required by [the respondent] to be performed by tram/LRV conductors, thereby directly addressing the [Equal Opportunity Board's] findings".

On 9 May 1990 the Board ordered the respondent within ninety days to "discontinue the scratch-ticket system as the main ticket system" for the appellants "using the public transport system" and ordered the respondent to "refrain from implementing the driver-only tram proposal". The respondent obtained an order nisi to review the decision of the Board pursuant to s. 49(4) of the Act, which allows an "appeal to the Supreme Court against [an order of the Board under Pt VI of the Act] on a question of law only as if the order were an order of a Magistrates' Court". Upon the return of the order nisi, Phillips J. made the order absolute dismissing the appellants' complaints. He held that the Board erred in a number of respects, but ultimately held that the respondent was bound to succeed upon the basis that its acts were necessary to comply with a provision of another Act, namely, the *Transport Act*. The relevant provision of the *Transport Act* was s. 31(1) which provides:

> "Each Corporation must exercise its powers and discharge its duties subject to the general direction and control of the

> Minister or the Director-General, and to any specific directions given by the Minister or the Director-General."

The respondent is a Corporation within the meaning of that sub-section.

Section 39(e)(ii) of the *Equal Opportunity Act* provides that the Act does not render unlawful:

> "an act done by a person if it was necessary for the person to do it in order to comply with a provision of —
>
> ...
>
> (ii) any other Act."

Phillips J. held that the respondent was required under s. 31(1) of the *Transport Act* to carry out the first direction given by the Minister for Transport through the Director-General of Transport to implement the resolution of Cabinet and that the Board was bound, on the evidence, to find that the acts complained of were necessary for that purpose.

The impairment suffered by the appellants falls into four categories, namely, visual impairment, physical disability, intellectual handicap and psychiatric disability, and the individual complaints lodged by each of the appellants with the Board were similar in form. For example, one appellant, who suffers from an inability to read or write, complained that he could not validate a scratch ticket and that he needed tram conductors to tell him when to get off a tram and which street to take to reach his destination. Another appellant, who suffers from cerebral palsy and is confined to a wheelchair, complained that he has difficulty controlling his movements and would be unable to use a scratch ticket. The type of discrimination of which each of the appellants complained was that of being treated less favourably than the rest of the community. Under s. 17 of the Act, that may amount to discrimination. Section 17 relevantly provides:

> "(1) A person discriminates against another person in any circumstances relevant for the purposes of a provision of this Act if on the ground of the status or by reason of the private life of the other person the first-mentioned person treats the other person less favourably than the first-mentioned person treats or would treat a person of a different status or with a different private life.
>
> ...
>
> (5) For the purposes of sub-section (1) a person discriminates against another person on the ground of the status or by reason of the private life of the other person if —
>
> (*a*) the first-mentioned person imposes on that other person a requirement or condition with which a substantially higher proportion of persons of a different status or with a different private life do or can comply;

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

Dawson J. Toohey J.

(*b*) the other person does not or cannot comply with the requirement or condition; and
(*c*) the requirement or condition is not reasonable."

Before turning to the question of discrimination, it is convenient to deal with the application of s. 39(e)(ii) of the Act because the respondent sought to uphold the decision of Phillips J. If that decision is correct upon that point, the appellants must fail in their appeal.

The appellants submitted that s. 39(e)(ii), being an exempting provision, should be strictly construed so as to apply only to acts done in order to comply with another Act which specifies acts which are discriminatory. In other words, they submitted that the "other Act" of which s. 39(e)(ii) speaks must contain a provision expressly authorizing discriminatory conduct. They gave as an example industrial safety legislation which fixes at different levels the maximum weight which males and females may be permitted to lift. By contrast, they said, s. 31(1) of the *Transport Act* does not refer to discriminatory conduct which it permits or compels; it is merely a general provision which is intended to ensure that each Corporation operates under the direction and control of the Minister for Transport or the Director-General of Transport.

In support of their submissions the appellants referred to the decision of the House of Lords in *Hampson v. Department of Education and Science* (40). In that case the Education (Teachers) Regulations (U.K.) required school teachers to be qualified teachers. The appellant, a Hong Kong Chinese woman, applied for the necessary qualification. The qualification had to be obtained from the Secretary of State and in the particular case the Regulations required the appellant, to be eligible for the qualification, to have completed a course approved by the Secretary of State as comparable to one or other of a number of United Kingdom courses. The course completed by the appellant in Hong Kong was not approved by the Secretary of State as comparable and he refused to provide the appellant with the qualification which she sought. The appellant alleged discrimination on racial grounds. One of the defences raised by the Department was under s. 41(1)(b) of the *Race Relations Act* 1976 (U.K.) which provided that the relevant parts of that Act did not render unlawful any act of discrimination done, amongst other things, in pursuance of any instrument made under any enactment by a Minister of the Crown. The relevant regulations were such an instrument.

The House of Lords rejected a wide construction of s. 41(1)(b)

(40) [1991] 1 A.C. 171.

which would have embraced any act of a person who derived his authority from an instrument as an act done in pursuance of the instrument. In rejecting the wide construction, Lord Lowry, with whom the other members of the House agreed, pointed to the fact that the *Race Relations Act* bound the Crown with the result that, upon the wide construction, a large number of bodies would achieve virtual immunity from its provisions. Accordingly, he adopted a narrower construction of s. 41(1)(b) and held that the Secretary of State did not act in pursuance of the Regulations and so did not attract the protection of s. 41(1)(b). In rejecting the wide construction he said (41):

> "In my view it disregards, and has to disregard, the fact that, in order to decide the application one way or the other, the Secretary of State had first to set up and apply a non-statutory criterion the setting up and application of which involved the exercise of his administrative discretion and led to the discriminatory act complained of."

In other words, the approval or non-approval as comparable of the course completed by the appellant in Hong Kong was something which was done in the exercise of a discretion and not in a manner required by the instrument and was, therefore, not done in pursuance of the instrument. Hence, the act was not immune from the legislation prohibiting discrimination.

But even if it were right to accept this distinction between an act done in pursuance of an instrument and a discretion exercised under the instrument — a distinction which is not without its difficulties — *Hampson v. Department of Education and Science* does not support a construction as narrow as that for which the appellants contend. And we do not think that such a narrow construction can be justified upon the wording of s. 39(e)(ii). The words "in order to comply with a provision of ... any other Act" bespeak something wider than express authorization of the conduct said to be discriminatory. In the case now before us s. 39(e)(ii) protects those acts of discrimination which it was *necessary* to do in order to carry out those directions and so comply with s. 31(1) of the *Transport Act*.

It would not be possible to apply the approach in *Hampson v. Department of Education and Science* here because s. 31(1) of the *Transport Act* does not confer any discretion upon the respondent to disregard specific directions given by the Minister or Director-General. If it were necessary for the respondent to commit acts of discrimination in order to carry out the specific directions of the Minister for Transport or the Director-General of Transport then,

(41) [1991] 1 A.C., at p. 186.

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

Dawson J. Toohey J.

by virtue of s. 39(e)(ii), those acts would not be unlawful, but if there were a discretion as to the manner in which the specific directions might be carried out which offered a choice between discrimination and no discrimination, the adoption of discriminatory means would be afforded no protection by s. 39(e)(ii).

The Board reached the conclusion that the acts of discrimination which it found to exist were not necessary in order to enable the respondent to comply with the direction given by the Minister through the Director-General. In its decision it said:

> "The evidence in relation to the oral direction made after 24th July, 1989 in no way satisfies the Board that it was necessary for the Respondent, in implementing the scratch-ticket and driver-only tram concepts that they should discriminate against the Complainants. ... Indeed, over the hearing of this case, it would seem that there were many ways in which the problems associated with the concepts could have been dealt with to cater for the needs of the disabled."

Phillips J. reached the opposite conclusion and held that, in the absence of evidence, the Board erred as a matter of law in finding as it did.

The view expressed by Phillips J. that there was no evidence to support the Board's conclusion cannot, we think, be sustained. And even if there were no evidence in any technical sense, that would not of itself necessarily convert any error on the part of the Board into an error of law. Under s. 51 of the Act the Board is required to "act fairly and according to the substantial merits of the case and, except insofar as it otherwise determines, is not bound by the rules of evidence or by practices and procedures applicable to courts of record". The Board was, therefore, free to reach its conclusions upon matters of fact as it saw fit so long as it acted within the constraints of s. 51. Whether it was necessary for the respondent to discriminate against the appellants in implementing the Cabinet resolution was a question of fact and there was no appeal from the Board's determination of that question. However, there was in fact ample evidence, as Phillips J. recognized, that the basic MetTicket system might have been modified in a number of ways to avoid disadvantaging the appellants. Phillips J. took the view that the relevant direction required the introduction of the basic system literally and without modification but that is, we think, to read too much into the terms of the Cabinet resolution. Clearly it provided only an outline of the MetTicket system, leaving the details of the system to be worked out by the respondent. There was evidence that those details, which were relevant to the introduction of the scratch tickets and to the removal of conductors from trams and not

just to the day-to-day operation of the MetTicket system, could have been resolved in such a way as to accommodate the appellants' disabilities. Moreover, it is proper to read the obligation imposed upon the respondent by s. 31 of the *Transport Act* as envisaging that degree of flexibility on the part of the respondent because, under s. 14(2)(v) of the same Act, the respondent is required, in the exercise of its functions, to have regard to the achievement of a number of objectives, including the object of identifying "the transport needs of disadvantaged groups, particularly people with disabilities" and of implementing "appropriate services within the level of funds specifically provided for this purpose by Government".

The Board concluded that the respondent discriminated against the appellants within the meaning of s. 17(5) in that it required the appellants, as requirements or conditions of using the public transport system, to validate scratch tickets and to use the tram system without the assistance of conductors. In doing so it held that these were requirements or conditions with which persons not suffering the impairments suffered by the appellants can comply and with which the appellants cannot comply and further that these requirements or conditions were not reasonable. Since the respondent provided services and the terms upon which it performed those services were the requirements or conditions which the Board found to be discriminatory, the Board held under s. 29(1) of the Act that the imposition of those terms was unlawful. The Board did not find that the services which, as a consequence of their impairment, the appellants required the respondent to perform in a special manner could not reasonably be provided by the respondent (42) or could on reasonable grounds only be provided by the respondent on more onerous terms than the terms on which the service could reasonably be provided to persons not suffering an impairment of the kind suffered by the appellants (43).

The respondent accepted that indirect discrimination under s. 17(5) of the Act might be unintentional, but it submitted that it was necessary to establish the application of s. 29 before resort might be had to s. 17(5). It submitted that for s. 29 to have any application the appellants had to establish that it provided services to the appellants upon terms which were different from the terms on which it provided its services to other members of the public. It argued that, since the requirements or conditions that scratch tickets be used and that trams be used without the assistance of a

(42) s. 29(2)(a).
(43) s. 29(2)(b).

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

Dawson J. Toohey J.

conductor applied equally to the appellants and to other members of the public, s. 29 had no application.

However, what amounts to discrimination for the purposes of s. 29 is to be derived in the first instance from s. 17. Section 17 does not make unlawful any discriminatory act but merely defines what will amount to discrimination. Section 29 makes unlawful (in the circumstances set out in that section) acts amounting to discrimination within the meaning of s. 17. Section 29 must, therefore, be applied in conjunction with s. 17.

A distinction is often drawn between two forms of discrimination, namely "direct" or "disparate treatment" discrimination and "indirect" or "adverse impact" discrimination. Broadly speaking, direct discrimination occurs where one person is treated in a different manner (in a less favourable sense) from the manner in which another is or would be treated in comparable circumstances on the ground of some unacceptable consideration (such as sex or race). On the other hand, indirect discrimination occurs where one person appears to be treated just as another is or would be treated but the impact of such "equal" treatment is that the former is in fact treated less favourably than the latter. The concept of indirect discrimination was first developed in the United States in relation to practices which had a disproportionate impact upon black workers as opposed to white workers (44). Both direct and indirect discrimination therefore entail one person being treated less favourably than another person. The major difference is that in the case of direct discrimination the treatment is on its face less favourable, whereas in the case of indirect discrimination the treatment is on its face neutral but the impact of the treatment on one person when compared with another is less favourable.

In *Australian Iron & Steel Pty. Ltd. v. Banovic* (45), Dawson J. expressed the view that ss. 24(1) and 24(3) of the *Anti-Discrimination Act* 1977 (N.S.W.), which are to some extent comparable with ss. 17(1) and 17(5) of the Act in this case, dealt with direct discrimination and indirect discrimination respectively in a mutually exclusive way. This was because if s. 24(1) (the equivalent of s. 17(1)) embraced indirect as well as direct discrimination, then s. 24(3) (the equivalent of s. 17(5)) would be superfluous. Thus Brennan J. in *Australian Iron & Steel Pty. Ltd. v. Banovic* (46) held that treatment which was facially neutral would not fall within s. 24(1) (the equivalent of s. 17(1)). Subject to the effect (if any) of the opening words of s. 17(5), which are referred to

(44) *Griggs v. Duke Power Co.* (1971), 401 U.S. 424.
(45) (1989) 168 C.L.R. 165, at p. 184.
(46) ibid., at p. 171.

below, this reasoning leads equally to the conclusion that discrimination within s. 17(5) cannot be discrimination within s. 17(1). Conversely, it is clear that discrimination within s. 17(1) cannot be discrimination within s. 17(5) because otherwise the anomalous situation would result whereby a requirement or condition which would not constitute discrimination under s. 17(5) unless it was unreasonable could constitute discrimination under s. 17(1) even if it was reasonable. In this case s. 17(5) is prefaced by the words "For the purposes of sub-section (1)". The precise effect of those words is far from clear, but there are strong reasons for nevertheless concluding that s. 17(1) and s. 17(5) deal separately with direct and indirect discrimination and do so in a manner which is mutually exclusive. However, no point based upon those words was taken and the discrimination alleged by the appellants was discrimination within s. 17(5).

For there to be discrimination within the meaning of s. 17(5), there must be a requirement or condition imposed upon the complainant with which the complainant does not or cannot comply but with which a substantially higher proportion of persons of a different status do or can comply. In *Australian Iron & Steel Pty. Ltd. v. Banovic* (47), Dawson J. observed that, upon principle and having regard to the objects of the Act, the words "requirement or condition" in the comparable provision in the *Anti-Discrimination Act* should be construed broadly so as to cover any form of qualification or prerequisite, although the actual requirement or condition in each instance should be formulated with some precision. In that case, the use of the "last on, first off" principle in putting off redundant employees was held to impose a requirement or condition that an employee should have commenced employment before a certain date in order to retain his or her employment.

We do not think that there can be any doubt that the introduction of the scratch ticket imposed a requirement or condition that it be used in order to travel on trams and indeed the contrary was not contended by the respondent before this Court. Nor do we think that it unduly strains the language of s. 17(5) to say that the withdrawal of conductors from trams imposed a requirement or condition that passengers travel on trams without the assistance of a conductor. The Board so found and we think it was open to it to make those findings.

The respondent, however, contended that the service provided by it was driver-only trams and that there was, therefore, no relevant

(47) (1989) 168 C.L.R., at p. 185.

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

Dawson J. Toohey J.

requirement or condition imposed with respect to the use of that service. It is true that for something to be a requirement or condition in relation to a matter it must be separate from that matter. However, whether such a requirement or condition is in fact separate from the matter to which it relates will clearly depend upon how the matter is described and how the requirement or condition is characterized. Given that the legislation should receive a generous construction, we do not think that the respondent can evade the implications of s. 17(5) by defining the service which it provides so as to incorporate as part of that service what would otherwise be a requirement or condition of the provision of that service. At all events the respondent ought not be allowed to do so where the service previously provided by it was continued, but with alterations which might be characterized as the imposition of different requirements. In any event the description of the service provided by the respondent and the characterization of the requirements or conditions on which the service is provided by the respondent are questions of fact to be determined by the Board and it was clearly open to the Board to define the service provided by the respondent as public transport and to characterize the removal of conductors from some trams as imposing on users of those trams a requirement or condition that they use them without the assistance of conductors.

The Board found that the requirements or conditions which it identified could not be complied with by the appellants but could be complied with by those who did not suffer the appellants' impairments, that is, they could be complied with by a substantially higher proportion of persons of a different status. The Board was entitled to so find.

The Board further found that the requirements or conditions which it identified were not reasonable. In so doing it disregarded the financial or economic considerations which may have motivated the respondent in imposing those requirements or conditions, taking the view that those considerations were involved instead in determining whether the test laid down by s. 29(2) was met and that to have regard to the same considerations in the context of s. 17(5) would be to render s. 29(2) superfluous.

In our view the Board was in error in failing to have regard to the financial or economic circumstances of the respondent when considering reasonableness for the purpose of s. 17(5). The fact that it was also required to consider the financial situation of the respondent when dealing with s. 29(2) provided no justification for its taking the course which it did. Apart from anything else, reasonableness is raised by each of those provisions in relation to a

different matter. Under s. 17(5)(c) the Board was required to consider whether the requirements or conditions which it found to exist were reasonable. Under s. 29(2) it was required to consider reasonableness in relation to the special manner in which the appellants required the respondent to perform the service provided by it. The two things are not necessarily the same. Even if this were not the case the test of reasonableness under s. 29(2) would not be rendered superfluous by construing reasonableness under s. 17(5)(c) as embracing factors also relevant for the purposes of s. 29(2). This is because discrimination under s. 17(1), which is unlawful by virtue of s. 29(1), may nevertheless be rendered not unlawful under s. 29(2) and the establishment of discrimination under s. 17(1), unlike that under s. 17(5), does not require proof of reasonableness. Further, while the discrimination which is rendered not unlawful by s. 29(2) is limited to discrimination on the ground of impairment, s. 17(5) (and s. 17(1)) is relevant not just to discrimination on the ground of impairment but also to discrimination on other grounds such as sex or race.

Reasonableness for the purposes of both s. 17(5)(c) and s. 29(2) is a question of fact for the Board to determine but it can only do so by weighing all the relevant factors. What is relevant will differ from case to case, but clearly in the present case the ability of the respondent to meet the cost, both in financial terms and in terms of efficiency, of accommodating the needs of impaired persons who use trams was relevant in relation to the reasonableness of the requirements or conditions which it imposed and in relation to the reasonableness of the special manner in which the appellants required the respondent to perform its service. Another relevant factor would be the availability of alternative methods which would achieve the objectives of the Cabinet resolution but in a less discriminatory way. Other factors which might be relevant are the maintenance of good industrial relations, the observance of health and safety requirements, the existence of competitors and the like. As was observed by Bowen C.J. and Gummow J. in *Secretary, Department of Foreign Affairs and Trade v. Styles* (48), in the context of s. 5(2)(b) of the *Sex Discrimination Act* 1984 (Cth), which is comparable to s. 17(5):

> "[T]he test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience. ... The criterion is an objective one, which requires the court to weigh the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the

(48) (1989) 23 F.C.R. 251, at p. 263.

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

Dawson J. Toohey J.

requirement or condition on the other. All the circumstances of the case must be taken into account."

Clearly, in our view, the financial situation of the respondent was a circumstance to be taken into account when considering reasonableness both under s. 17(5) and under s. 29(2). Although the question of reasonableness is a question of fact rather than law, the failure of the Board to take into account a consideration which s. 17(5) requires to be taken into account constitutes an error of law.

In addition to the appeal instituted pursuant to s. 29(4) of the Act, the respondent sought, by way of originating motion, judicial review of the Board's decision under O. 56 of Ch. I of the Rules of the Supreme Court (Vict.). It is apparent that the respondent took this course in an attempt to raise grounds which it had been refused leave to raise by amendment of the grounds of appeal in the appeal under s. 49(4). The appellants by summons sought judgment on the originating motion or a stay upon the basis that the proceeding was frivolous or vexatious or an abuse of process. Section 49(4) of the Act prescribes a time limit of twenty-eight days to appeal to the Supreme Court on a question of law and it was said that the respondent was precluded from circumventing that time limit by recourse to the procedure under O. 56, which allows a more generous time limit of sixty days.

Phillips J. found it unnecessary to deal with the additional grounds which the respondent sought to raise and dismissed both the originating motion and the summons. The respondent sought to raise one of the additional grounds before us, although it conceded that it would require special leave to appeal from the decision of Phillips J. in order to do so.

The one ground which the respondent sought to raise concerned the proper construction of s. 29(2)(b) of the Act. The Board in its decision took the view that the "more onerous" terms of which that paragraph speaks are terms which are more onerous to the provider of the service. Clearly that is incorrect. Section 29(2) provides that s. 29 does not apply to discrimination where the special manner in which the impaired person requires a service to be performed cannot reasonably be provided by the person providing the service or where the person providing the service can only provide it on terms which are more onerous *to the impaired person* than to a person without the impairment. That is to say, s. 29(2) applies where a person with an impairment requires the provider of services to perform them in a special manner. In such a case, if the provider of the services cannot reasonably perform the service in that special manner or if he can on reasonable grounds only do so on terms more onerous to the impaired person than the terms on which he

could reasonably provide the service to an unimpaired person, he may lawfully refuse to provide the service or, it would seem, he may provide the service on those more onerous terms.

Furthermore, it is irrelevant, for the purposes of s. 29(2)(b), that the terms on which the service is performed are the same for all people because s. 29(2)(b) is involved, at least in some cases, with a hypothetical situation, i.e. it asks whether the service *can* reasonably be provided in a special manner only on more onerous terms to the complainant. If the service can only reasonably be provided in this special manner on more onerous terms to the complainant then there is no unlawful discrimination. But this is not to say that s. 29(2)(b) is only directed at such hypothetical cases because, as stated above, s. 29(2)(b) may also render otherwise unlawful discrimination lawful where the service is *actually* performed in the special manner on terms which are more onerous to the complainant. It may also be observed that s. 29(2)(b) is not confined to cases of direct discrimination but is equally applicable to indirect discrimination. The terms referred to in s. 29(2)(b) may therefore be more onerous, not only if they are or would be less favourable to the complainant on their face (i.e. if they result in direct discrimination), but also if they are or would be less favourable in their impact, albeit that they are neutral on their face (i.e. if they result in indirect discrimination).

However, the point raised by the appellants' summons concerning the propriety of proceeding by way of originating motion was not pursued before us and in the circumstances it would be inappropriate to grant special leave to appeal against Phillips J.'s decision dismissing the originating motion. We would therefore refuse special leave to appeal against that decision.

The only remaining matter is the respondent's submission that the orders made by the Board were null and void by reason of their being vague, uncertain and unintelligible. Under s. 46(2)(a) of the Act, the Board was entitled to order the respondent "to refrain from committing any further act of discrimination" against the appellants. No doubt it was incumbent upon the Board sufficiently to identify the nature of the discrimination which it ordered the respondent to refrain from committing. But in our view it did so by reference to the "scratch-ticket system" and the "driver-only tram proposal", for those were the aspects of the MetTicket system which imported the requirements or conditions which the Board found to constitute discrimination. In any event the orders of the Board reserved general liberty to the parties to apply and they could not therefore be said to involve any uncertainty of an incurable kind. We would reject the submission.

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

Dawson J. Toohey J.

The appeal should be allowed and the orders of Phillips J. set aside. Since the Board made an error of law in considering reasonableness under s. 17(5) without reference to the financial or economic situation of the respondent, the order which Phillips J. should have made was an order remitting the matter to the Board for rehearing on that point so far as the introduction of the scratch ticket system and the removal of conductors resulted in the imposition of a requirement or condition. That is the order which should now be made.

McHUGH J. The order under appeal, which was made by the Supreme Court of Victoria, set aside orders of the Equal Opportunity Board of Victoria ("the Board") requiring the Public Transport Corporation ("the Corporation") to discontinue "the scratch-ticket system as the main ticket system for the Complainants using the public transport system" and to refrain from implementing a "driver-only tram" proposal.

The appeal is brought by nine impaired individuals ("the complainants") and by twenty-nine organizations representing various groups of impaired people ("the organizations"), all of whom had lodged complaints with the Board alleging acts of discrimination by the Corporation which is the respondent to the appeal. The appellants contend that the Supreme Court erred in holding that the acts of the Corporation in introducing the scratch-ticket system and implementing the driver-only tram proposal were not unlawful acts of discrimination within the meaning of the *Equal Opportunity Act* 1984 (Vict.) ("the Act"). The Supreme Court found that the acts were not unlawful because they were done to comply with a direction given by the Minister for Transport pursuant to the provision of s. 31 of the *Transport Act* 1983 (Vict.). The appellants also contend that, contrary to the findings of the Supreme Court, the Board did not err in law in holding that the removal of conductors from trams constituted the imposition of a requirement or condition on the complainants within the meaning of s. 17(5)(a) of the Act, in holding that economic and financial considerations were not relevant in determining whether the imposition of a requirement or condition was reasonable for the purposes of s. 17(5)(c) of the Act, and in making orders in the form which it did.

The factual background

The appeal arises out of a decision made by the Corporation towards the end of 1989 to introduce certain changes to the public transport system. The Corporation is responsible for operating the

Victorian public transport system. In the latter half of 1989, the Corporation announced various changes to the operation of the public transport system which were to be brought into full effect on 1 January 1990. The most notable changes to be introduced were the removal of conductors from trams, the introduction of a ticketing system of "scratch" tickets and the reduction in the number of station assistants employed at railway stations. The "scratch" ticket system required the passenger to validate tickets, pre-purchased at retail outlets, by making a scratch mark in the relevant place on the day of travel to show the journey undertaken. The proposed changes had been approved by Cabinet in July 1989. Subsequently, directions were given by the Minister and the Director-General of Transport to the Corporation to implement the scheme.

In December 1989, the complainants each lodged complaints of discrimination with the Commissioner for Equal Opportunity, under s. 44 of the Act. Pursuant to s. 45 of the Act, the complaints were referred to the Board. Each of the complainants suffers from significant disability, in some cases physical and in others intellectual, in consequence of which he or she is either confined to a wheelchair, is unable to see properly, has difficulty controlling hand movements or is unable to read and write. Each complainant alleged that his or her use of the public transport system would be seriously disadvantaged if the proposed changes went ahead.

The complaints of the organizations made various allegations of discrimination by the Corporation against those who suffered from visual impairment or psychiatric, intellectual or physical disability. Those allegations were referred to the Board pursuant to s. 42 of the Act. The organizations concentrated on the same three aspects of the changes as had the nine complainants: the removal of tram conductors, the use of "scratch" tickets and the removal of assistants from railway stations.

The Board held that the appellants had succeeded in establishing their claims of unlawful discrimination in relation to the removal of tram conductors and the introduction of "scratch" tickets. The Board concluded that these two matters constituted discrimination under s. 17(5) of the Act which was unlawful by virtue of s. 29(1)(b). The Board held, however, that no case of discrimination had been made out in relation to the removal of station staff. The matter was re-listed to allow the Corporation to make submissions on the scope and operation of s. 39(e) of the Act which provides that an act is not unlawful under the Act if the doing of it was necessary in order to comply with a provision of an instrument made or approved by or under any other Act. The Board

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

McHugh J.

subsequently held that, notwithstanding that the acts of the Corporation were done as the result of a direction given by the Minister under s. 31 of the *Transport Act*, s. 39(e) did not prevent those acts being unlawful acts of discrimination.

Equal Opportunity Act 1984 *(Vict.)*

The Act, which is the successor to the *Equal Opportunity Act* 1977 (Vict.) and the *Equal Opportunity (Discrimination Against Disabled Persons) Act* 1982 (Vict.), renders unlawful certain kinds of discrimination against impaired persons. Section 17(1) of the Act deals with what can be described as "direct discrimination". Section 17(5) deals with what has been variously called "indirect discrimination", "disparate impact discrimination" and "adverse effect discrimination". Section 17(1) and (5) read as follows:

> "(1) A person discriminates against another person in any circumstances relevant for the purposes of a provision of this Act if on the ground of the status or by reason of the private life of the other person the first-mentioned person treats the other person less favourably than the first-mentioned person treats or would treat a person of a different status or with a different private life.
>
> ...
>
> (5) For the purposes of sub-section (1) a person discriminates against another person on the ground of the status or by reason of the private life of the other person if —
>
> (a) the first-mentioned person imposes on that other person a requirement or condition with which a substantially higher proportion of persons of a different status or with a different private life do or can comply;
>
> (b) the other person does not or cannot comply with the requirement or condition; and
>
> (c) the requirement or condition is not reasonable."

In *Australian Iron & Steel Pty. Ltd. v. Banovic* (49), Brennan J. and Dawson J. expressed the view, correctly in my opinion, that s. 24(1) and (3) of the *Anti-Discrimination Act* 1977 (N.S.W.), which are broadly comparable with s. 17(1) and (5) of the Victorian Act, were mutually exclusive provisions. Their Honours took the view that s. 24(1) dealt with direct discrimination and s. 24(3) with indirect discrimination. Consequently, what fell within one sub-section was outside the other sub-section. Likewise, in my opinion, s. 17(1) and (5) are mutually exclusive provisions.

The words "on the ground of the status or by reason of the private life of the other person" in s. 17(1) require that the act of the alleged discriminator be *actuated* by the status or private life of the

(49) (1989) 168 C.L.R. 165, at pp. 170-171, 184.

person alleged to be discriminated against. I am unable to accept the statement of Lord Goff of Chieveley in *Reg. v. Birmingham City Council; Ex parte Equal Opportunities Commission* (50), and the statements of Deane and Gaudron JJ. (51) in *Banovic* concerning intention or motive to discriminate if they are intended to suggest that it is not a necessary condition of liability that the conduct of the alleged discriminator ("the discriminator") be actuated by status or private life in a provision such as s. 17(1). With great respect to Deane and Gaudron JJ., I think that the examples given by them in *Banovic* as to intention or motive not being a necessary condition of liability are cases which are caught by the concept of indirect discrimination which fall within s. 17(5). The words "on the ground of" and "by reason of" require a causal connexion between the act of the discriminator which treats a person less favourably and the status or private life of the person the subject of that act ("the victim"). The status or private life of the victim must be at least one of the factors which moved the discriminator to act as he or she did. Of course, in determining whether a person has been treated differently "on the ground of" status or private life, the Board is not bound by the verbal formula which the discriminator has used. If the reason for the use of the formula was that it enabled a person to be treated differently on the ground of status or private life, then "the ground of" the act of the discriminator was the status or private life of the victim (52). But if the discriminator would have acted in the way in which he or she did, irrespective of the factor of status or private life, then the discriminator has not acted "on the ground of the status or by reason of the private life" of the victim. Likewise, if the discriminator genuinely acts on a non-discriminatory ground, then he or she does not act on the ground of status or private life even though the effect of the act may impact differently on those with a different status or private life. Thus, in *Director-General of Education v. Breen* (53), the Court of Appeal of New South Wales held that the Director-General had not acted "on the ground of sex" in selecting principals for non-secondary schools from a primary school promotions list rather than an infants school promotions list even though the use of the former list favoured male teachers. Only 1.5 per cent of teachers on the infants list were male but on the primary schools list 39 per cent of the teachers were male. Absent an intention to use the primary list to disadvantage

(50) [1989] A.C. 1155, at pp. 1193-1194.
(51) (1989) 168 C.L.R., at pp. 176-177.
(52) See *Umina Beach Bowling Club v. Ryan*, [1984] 2 N.S.W.L.R. 61, at p. 66, per Mahoney J.A.
(53) [1982] 2 I.R. 93.

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

McHugh J.

females, discrimination in a case such as *Breen* can be established only by relying on a provision similar to s. 17(5). At the relevant time, however, the *Anti-Discrimination Act* had no such equivalent.

The effect of the introductory words of s. 17(5), however, is that an act which falls within that sub-section is deemed for the purpose of s. 17(1) to constitute treating "the other person less favourably than the first-mentioned person treats or would treat a person of a different status or with a different private life". If the alleged discriminator has in fact treated the other person "less favourably", in the circumstances specified in s. 17(1), then discrimination is made out and s. 17(5) is irrelevant. Section 17(5), therefore, operates only in situations where s. 17(1) is inapplicable. The hypothesis upon which s. 17(5) is built is that the alleged discriminator has not in fact treated the other person "less favourably". Yet discrimination can arise just as readily from an act which treats as equals those who are different as it can from an act which treats differently persons whose circumstances are not materially different. Thus, both direct and indirect discrimination involve the notion of one person being treated "less favourably" than another.

How then can a case of indirect discrimination come within s. 17(5) and yet not come within s. 17(1)? The answer is that in s. 17(5) "discrimination" is defined in an artificial sense and is dealing with situations where a requirement or condition is imposed equally but has an adverse or more adverse effect on persons of a particular status or with a different private life. A person may be guilty of discrimination under s. 17(5) although he or she was not actuated in any way by status or private life. That is, s. 17(5) deals with the case of indirect discrimination. It is a special provision of the Act dealing with indirect discrimination. Moreover, the making of a finding of indirect discrimination under s. 17(5) is subject to the satisfaction of certain conditions. In accordance with accepted principles of statutory construction, it is not possible to make use of a general provision such as s. 17(1) to make findings of indirect discrimination in disregard of those conditions (54). Accordingly, in my opinion, s. 17(1) deals only with direct discrimination and s. 17(5) deals only with indirect discrimination. As will later appear, this conclusion has important consequences for the meaning of the term "reasonable" in s. 17(5)(c).

Both s. 17(1) and s. 17(5) refer to discrimination "on the ground of the status" of the person who is being discriminated against. The word "status" is defined in s. 4(1) of the Act to include impairment. "Impairment" in turn is widely defined so as to include the total or

(54) cf. *Saraswati v. The Queen* (1991), 172 C.L.R. 1, at pp. 23-24.

partial loss of a bodily function or of a part of the body, of the malfunction, malformation or disfigurement of a part of the body or the presence in the body of organisms causing disease. It is further defined to include an impairment which existed in the past but has now ceased to exist and an impairment which is imputed to a person.

In common with other anti-discrimination statutes, e.g., the *Sex Discrimination Act* 1975 (U.K.), the *Sex Discrimination Act* 1984 (Cth), the *Anti-Discrimination Act* (N.S.W.), the *Equal Opportunity Act* 1984 (S.A.) and the *Equal Opportunity Act* 1984 (W.A.), the Victorian Act in s. 17 describes what constitutes "discrimination". But s. 17 itself makes nothing unlawful. That is the task of later sections of the Act which make it unlawful for any person to discriminate in the circumstances specified in those sections. In this appeal, the relevant section is s. 29 which makes discrimination on the ground of impairment in the provision of or the terms on which goods or services are provided unlawful. The relevant parts of s. 29 are as follows:

> "(1) It is unlawful for a person who provides goods or services (whether or not for payment) to discriminate against another person on the ground of status or by reason of the private life of the other person —
>
> (*a*) by refusing to supply the goods or perform the services; or
>
> (*b*) in the terms on which the person supplies the goods or performs the services.
>
> (2) This section does not apply to discrimination on the ground of impairment in relation to the performance of a service where, in consequence of a person's impairment, the person requires the service to be performed in a special manner —
>
> (*a*) that cannot reasonably be provided by the person performing the service; or
>
> (*b*) that can on reasonable grounds only be provided by the person performing the service on more onerous terms than the terms on which the service could ... reasonably be provided to a person not having that impairment."

Section 29, however, has to be read with s. 39. The relevant parts of s. 39 are as follows:

> "This Act does not render unlawful —
>
> ...
>
> (*e*) an act done by a person if it was necessary for the person to do it in order to comply with a provision of —
>
> (i) an order of the Board;
>
> (ii) any other Act; or
>
> (iii) an instrument made or approved by or under any other Act."

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

McHugh J.

The conclusions of the Victorian Supreme Court

The Supreme Court (Phillips J.) allowed an appeal from the decision of the Board and set aside its orders. His Honour held that, while the introduction of "scratch" tickets imposed a relevant "requirement or condition" on the complainants, the removal of conductors from trams by the Corporation did not do so. The learned judge said that, by removing conductors, the Corporation was not imposing a requirement or condition on the travelling public generally nor on the complainants. His Honour also concluded that the Board erred in its consideration of what was "reasonable" within the meaning of s. 17(5)(c). He held that the Board was incorrect in holding that economic and financial considerations were not relevant matters to be considered under par. (c). Furthermore, Phillips J. held that s. 39 of the Act operated to exempt the relevant conduct of the Corporation from the provisions of the Act. Phillips J. was also of the opinion that the orders made by the Board were null and void for uncertainty.

The services and terms on which they are performed

The Corporation concedes that it is a provider of goods and services within the meaning of s. 29(1). The term "services" is defined in s. 4(1) to include services connected with transportation. The Board made no express finding as to what services were provided by the Corporation. The Board appears, however, to have acted on the basis that the services provided were that of "the public transport system". Phillips J. said that the identification of the "services" which were provided was essentially a question of fact for the Board. I cannot accept, however, that the Board's identification of the relevant services in this case was open to it as a matter of law. It is true that the identification of the relevant services is a question of fact. But the hypothesis upon which s. 29 operates is that there exists a person who provides goods or services and that that person has discriminated against the complainant in one of the ways set out in s. 29(1)(a) and (b). Accordingly, the goods or services which must be identified are those goods or services which are relevant to the complainant or any person or persons whom the complainant represents. Before there can be a finding of discrimination by a person in relation to the provision of goods or services, therefore, the relevant goods or services must be identified with sufficient precision to relate them to the facts of the case and the issues which arise for determination. If a person is alleged to have refused to perform services, e.g., the services in question must be identified in sufficiently concrete terms to enable the Board to

determine whether or not there has been a refusal to perform those services. What is a sufficiently precise identification of the service in one case may be too general in another. If the discrimination alleged was the refusal to allow impaired persons to travel on trams to St Kilda, it would be meaningless to identify the service provided as "the public transport system". If, however, the discrimination alleged was the refusal to allow impaired persons to travel on trams generally, "transportation of members of the public by trams" might identify the service with sufficient precision to enable the relevant issues to be resolved. On the other hand, if it was alleged that the physically impaired were discriminated against because they were not given sufficient time to become seated on trams, the relevant description of the service might not be sufficiently precise unless a description of the trams was incorporated into a description of the services. Likewise, if a person is alleged to have imposed on another person a "requirement or condition" in respect of using services, the services provided must be identified with sufficient precision to enable the Board to relate the requirement or condition to those services and to determine the issues raised by s. 17(5) of the Act. As will appear, the line between what is a "requirement or condition" of using services and the services themselves is often a fine one calling for an exact description of the services provided.

The generality of the Board's identification of the services provided in the present case went far beyond what was relevant to the facts and issues of the case and, moreover, assumed that there was only one service involved. The Board's identification of the services was wide enough to cover every means of transporting the public by road, sea, air and rail. Yet the relevant services were concerned only with railways and tramways and the nature of each service was different from the other. Consequently, the Board erred in law in assuming that the relevant services were "the public transport system". As will become apparent, this error has made it impossible to say whether or not the Board also erred in law in holding that the removal of the conductors from trams constituted the imposition of a "requirement or condition".

Section 29(1)

The appellants contend that the Corporation provides its services on the terms that the complainants use trams without conductors and buy "scratch" tickets before using the trams and that is a breach of s. 29(1) of the Act. The Corporation contends that s. 29(1) is inapplicable. It says that the discrimination must lie directly in the terms on which the goods or services are being

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

McHugh J.

provided; in other words, that the discrimination to which s. 29(1) refers can exist only where there are two situations, or sets of terms, to be compared. It was contended, therefore, that the introduction of "scratch" tickets, affecting all travellers alike, could not constitute discrimination under s. 29(1). However, the construction which the Corporation seeks to place on s. 29(1) is misconceived. As Phillips J. correctly stated:

> "All that s. 29(1)(b) requires is that there be some 'discrimination' in the terms on which the goods or services are provided; but what is 'discrimination' is described in s. 17. Section 17(1) describes the sort of direct discrimination mentioned by [the Corporation], where there are two sets of terms and one of which involves less favourable treatment by reference to a relevant criterion ... The other, indirect discrimination, involves no such difference in the terms on which the goods or services are being provided; it is enough that, although the terms be equal, they have unequal impact according to a relevant criterion."

In the present case, the terms on which the Corporation provided the relevant services was that users of those services must buy scratch tickets and "use trams without the assistance of conductors". Whether or not the terms on which the Corporation performs its services amount to discrimination depends on the application of s. 17(5) to the facts of the case.

Requirement or condition — s. 17(5)(a)

Section 17(5)(a) stipulates that a person who discriminates against another person must have imposed on that other person a "requirement or condition". For the purpose of determining the presence of "discrimination" within the meaning of s. 17(5), the requirement or condition that is allegedly imposed on a person must be identified with some precision (55).

The reported cases also require that the phrase "requirement or condition" in s. 17(5) be given a broad interpretation to enable the objectives of the Act to be fulfilled. The words "requirement or condition" are found not only in the Act but also, for example, in United Kingdom and New South Wales anti-discrimination statutes. In those jurisdictions, courts have given the words a wide interpretation (56). In *Banovic*, Dawson J., speaking of the equivalent New South Wales provision, said (55):

> "Upon principle and having regard to the objects of the Act, it is clear that the words 'requirement or condition' should be

(55) See *Banovic* (1989), 168 C.L.R., at p. 185, per Dawson J.
(56) See, particularly, *Clarke v. Eley (I.M.I.) Kynoch Ltd.*, [1983] I.C.R. 165.

> construed broadly so as to cover any form of qualification or prerequisite demanded by an employer of his employees."

See also my judgment in that case (57). In conformity with these pronouncements, s. 17(5) should be given a liberal interpretation in order to implement the objectives of the legislation. In the context of providing goods or services, a person should be regarded as imposing a requirement or condition when that person intimates, expressly or inferentially, that some stipulation or set of circumstances must be obeyed or endured if those goods or services are to be acquired, used or enjoyed.

The Corporation accepted that the introduction of "scratch" tickets involved the "imposition" of a "requirement or condition". As Phillips J. pointed out, for the Corporation to stipulate that a passenger purchase a ticket at a retail outlet before commencing his or her journey and then, at the commencement of the journey, validate the ticket in a certain way is to require something of a passenger. Such a stipulation is readily comprehended as one of the terms imposed upon passengers in the performance of the service. His Honour held, however, that the Corporation's act in removing conductors from trams was not the imposition of a "requirement or condition" within the meaning of s. 17(5)(a). He said that for the Corporation to remove conductors from some of its trams did not involve, in any ordinary use of language, the "imposition" of some "requirement or condition" on the travelling public or the complainants in particular.

However, a person could use the services provided by the Corporation's trams only if that person was prepared, inter alia, to endure using the trams without the assistance of conductors. That being so, it is no misuse of ordinary language to hold that the Corporation imposed a requirement or condition on persons using its trams if the services provided are characterized as the provision of trams. No doubt, as counsel for the Corporation stressed, it is important to distinguish between the services provided and the requirement or condition imposed. If, e.g., the Board found that the relevant services provided were conductorless trams, then it is difficult to see how the use of trams without a conductor was a requirement or condition of providing the service. Whether the services provided were trams or trams without conductors was a question of fact for the Board. Unfortunately, the Board defined the services provided at too high a level of generality to determine whether it was open as a matter of law to find that the use of trams without a conductor was a requirement or condition of the services

(57) (1989) 168 C.L.R., at pp. 195-197.

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

provided. Nevertheless, in my opinion, Phillips J. erred in holding that as a matter of law the provision of trams without conductors was not imposing a requirement or condition on persons using those trams. Whether or not it was a requirement or condition is a question of fact for the Board after it defines the relevant services with greater precision.

McHugh J.

Reasonableness of the requirement or condition — s. 17(5)(c)

By reason of the provisions of par. (c), a person discriminates under s. 17(5) only if the requirement or condition imposed is "not reasonable". The Act gives no guidance as to the criteria to be applied in determining reasonableness.

The Board held that the financial and economic factors which grounded the Government's decision to make the changes to the public transport system were not relevant under par. (c), primarily for the reason that to hold otherwise would be to render s. 29(2) of the same Act superfluous. Phillips J. held that the Board had erred in law so holding. His Honour said that under par. (c) it was proper to consider the Corporation's economic and financial justifications in determining whether the requirements or conditions imposed by it were reasonable. In rejecting the appellants' contention that the reference to reasonableness is a reference to the point of view of those discriminated against, his Honour declared that:

> "On its face, par. (c) is not limited; it provides simply that there may be discrimination if the requirement or condition in question 'is not reasonable'. Surely that means reasonable in all the circumstances of the case and it involves considering not only the position of the Complainants but also the position of the Corporation."

This is a convenient place to deal with the contention that, contrary to the approach of Phillips J., the function of s. 17(5)(c) is to identify those cases in which a requirement or condition "serves to effect a distinction" which is not rendered impermissible by the Act. Consequently, the word "reasonable" in s. 17(5)(c) is said to be concerned only with whether the requirement or condition which has been imposed reflects a distinction other than one based on status or personal life and, if so, whether that requirement or condition is appropriate or adapted to that distinction.

In our joint judgment in *Castlemaine Tooheys Ltd. v. South Australia* (58), Gaudron J. and I sought to explain the general considerations which, *statute aside*, result in particular treatment being identified as discriminatory. We said:

(58) (1990) 169 C.L.R. 436, at pp. 478-479.

> "A law is discriminatory if it operates by reference to a distinction which some overriding law decrees to be irrelevant or by reference to a distinction which is in fact irrelevant to the object to be attained; a law is discriminatory if, although it operates by reference to a relevant distinction, the different treatment thereby assigned is not appropriate and adapted to the difference or differences which support that distinction. A law is also discriminatory if, although there is a relevant difference, it proceeds as though there is no such difference, or, in other words, if it treats equally things that are unequal — unless, perhaps, there is no practical basis for differentiation.
>
> ...
>
> To justify a distinction as relevant to an objective it is necessary to show that the distinction made is a real distinction. That involves the identification of a difference or differences explaining the distinction. It also involves showing a connexion between the distinction and the objective such that the object is reasonably capable of being seen as likely to be achieved — other than to an extent that is trifling or insignificant — by different treatment based on that distinction."

The contention that the function of s. 17(5)(c) is to identify those cases in which a requirement or condition "serves to effect a distinction" which is not rendered impermissible by the Act seems to depend on the proposition that the purpose of the Act is to deal with "discrimination" in the sense that that word would be understood in a context outside the Act. But in my opinion the Act seeks to eliminate "discrimination" only in situations which fall within the definitions of that term contained in the Act and, at least in the case of s. 17(5), the definition is highly artificial.

As I earlier pointed out, s. 17(1) and (5) deal with mutually exclusive subject matters — s. 17(1) with direct discrimination and s. 17(5) with indirect discrimination. What constitutes discrimination is to be found by applying the criteria specified in s. 17. Cases of indirect discrimination are to be determined by applying the criteria in s. 17(5) uninfluenced by the language of s. 17(1) or any general concept of discrimination. Whether "the requirement or condition is not reasonable" (s. 17(5)(c)) does not depend on the notion that the purpose of the term "reasonable" is to limit some general concept of discrimination which exists independently of s. 17(5). The reasonableness of the "requirement or condition" is itself part of the definition of discrimination in situations falling within s. 17(5). That sub-section deals with situations where a person has not directly treated the complainant less favourably than that person treats or would treat another person. In those situations, the act of a person will be held to be discrimination if the conditions specified in pars (a), (b) and (c) of

H. C. OF A. 1991. WATERS v. PUBLIC TRANSPORT CORPORATION. McHugh J.

s. 17(5) are satisfied. Section 17(5) is a deeming provision, and what falls within it is discrimination for the purposes of the Act even though it is not discrimination within the meaning of s. 17(1) or discrimination in the sense that that term would be understood in a context outside this Act. That being so, arguments based on any concept of discrimination existing outside the statutory definition contained in s. 17(5) are not legitimate aids to the construction of the term "reasonable" in s. 17(5)(c). What has been said in cases like *Castlemaine Tooheys*, therefore, has no application to s. 17 of the Act. Likewise, arguments based on *Griggs v. Duke Power Co.* (59) and similar authorities in the United States of America are not legitimate aids in interpreting s. 17(5) because those authorities do not deal with the term "discriminate" as it is defined in s. 17(5) or for that matter in s. 17(1).

In a legal instrument, subject to a contrary intention, the term "reasonable" is taken to mean reasonable in all the circumstances of the case (60). Nothing in the context of s. 17(5)(c) indicates that the term should not be given its ordinary meaning. The reasonableness of the imposition of the requirement or condition in that paragraph, therefore, must be examined by reference to the relevant circumstances, including in the case of a requirement or condition imposed by a government or statutory body any relevant policy objectives. In par. (c) the circumstances can include economic, financial and policy factors.

The Board held that a tribunal or court cannot examine economic and financial considerations in considering s. 17(5) because such an examination would make the provisions of s. 29(2) otiose. Section 17(5)(c) and s. 29(2), however, do not serve identical functions. Section 29(2) is confined to situations where the provider of the services is being asked by the complainants to provide them "in a special manner". Because it is so confined, s. 29(2) does not duplicate what falls for consideration under s. 17(5)(c). Further, s. 29(2) applies only in relation to discrimination on the ground of impairment; s. 17(5)(c) applies in a far wider range of situations. In considering the Corporation's argument that it acted reasonably for the purpose of s. 17(5)(c), therefore, the Board was not duplicating any inquiry which could arise under s. 29(2), even though it may have had to examine the same or similar evidence under both provisions.

In my opinion, therefore, Phillips J. was correct in holding that

(59) (1971) 401 U.S. 424.
(60) cf. *In re a Solicitor*, [1945] K.B. 368, at p. 371.

the Board had erred in law in determining the meaning of the term "reasonable" in s. 17(5)(c).

It follows that the Board must reconsider its findings in relation to the two requirements or conditions which it found existed in this case. In reconsidering whether the imposition of the requirements or conditions was reasonable, the Board must examine all the circumstances of the case. This inquiry will necessarily include a consideration of evidence viewed from the point of view of the appellants and of the Corporation. I should note that it was common ground between the parties that the onus was on the Corporation to produce evidence to show that the relevant requirements or conditions were reasonable. However, I cannot accept that the concession of the Corporation was correctly made. A finding that the requirement or condition imposed was not reasonable is an essential element in proving a breach of s. 17(5). A complainant has the onus of proving the element contained in par. (c) (61).

Exemption from the provisions of the Equal Opportunity Act 1984 *(Vict.)*

If, after reconsidering the evidence, the Board is satisfied that the acts of the Corporation constitute a breach of ss. 17 and 29(1) of the Act, the Board will have to determine whether the prima facie unlawfulness of the acts of the Corporation is neutralized by the provisions of s. 39(e)(ii) of the Act. The Board has already held that s. 39(e)(ii) did not prevent the acts of the Corporation from being unlawful acts of discrimination. But in the Supreme Court, Phillips J. reversed that finding. It, therefore, becomes necessary to examine the correctness of his Honour's finding.

Section 39(e)(ii) provides that the Act does not render unlawful an act done by a person if it was necessary for the person to do it in order to comply with a provision of any other Act. The *Transport Act* impliedly gives power to the Minister responsible for public transport in Victoria to give directions to the Corporation. Section 31(1) of the *Transport Act* provides:

> "Each Corporation must exercise its powers and discharge its duties subject to the general direction and control of the Minister or the Director-General, and to any specific directions given by the Minister or the Director-General."

The specific direction on which the Corporation relies in this appeal is the initial direction given to the Corporation, orally, following the

(61) See *Vines v. Djordjevitch* (1955), 91 C.L.R. 512, at pp. 519-520; *Roddy v. Perry* [No. 2] (1957), 58 S.R. (N.S.W.) 41, at p. 47.

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

McHugh J.

Cabinet meeting in July 1989. It was a direction given by the Minister, through the Director-General, for the implementation of the Cabinet decision to change various aspects of the public transport system. It was not contended by the appellants that the giving of an oral direction is outside the ambit of s. 31(1) of the *Transport Act*. The direction given was as follows: "the Minister directed the [Corporation] through the Director-General of Transport, Mr. J. King, to implement the Cabinet resolution approving the scratch ticket system and the driver-only trams."

The validity of the direction was not challenged by the appellants until the hearing in this Court on 5 February 1991. Consequently, the Minister was not a party to or intervener in the proceedings. Although it would have been desirable to have made the Minister a party to the proceedings, it was not strictly necessary. The Minister is not bound by the present proceedings. Furthermore, counsel for the Corporation did not suggest that the validity of the direction could not be examined in this appeal provided that the examination of that issue did not require the calling of evidence. To that important question I now turn.

While the Minister is not himself a person providing goods and services and does not fall within the ambit of s. 29(1), he is deemed to have committed an unlawful discriminatory act in directing the Corporation if the Corporation is guilty of a contravention of s. 29 of the Act. This conclusion is the result of s. 5 which provides that the Act is intended to bind the Crown and s. 35 which provides that, where one person counsels, requests, demands or procures another person to act and that person does act in contravention of the Act, both persons shall be jointly and severally liable under the Act in respect of the contravention. If the discriminatory act of the Corporation is unlawful, it is jointly and severally the unlawful act of the Minister.

The question then is whether s. 31(1) of the *Transport Act*, properly construed, and read in conjunction with the *Equal Opportunity Act*, authorizes the Minister to give a direction which overrides the protective provisions of the latter Act. It is clear enough that, for the purpose of s. 39(e)(ii), a direction of the Minister, made under s. 31(1), is not itself "an act done by a person" which "was necessary for the person to do ... in order to comply with a provision of" any other Act. In *Clinch v. Commissioner of Police* (62), the Commissioner of Police claimed that, in refusing to employ the complainant, he was acting in compliance with a requirement of "any other Act" and hence was exempted from

(62) [1984] E.O.C. 92-115.

complying with the *Anti-Discrimination Act* (N.S.W.) because of the provision of s. 54(1) of that Act which is the equivalent of s. 39(e)(ii) of the Victorian Act. The Equal Opportunity Tribunal of New South Wales held that, in order to fall within the exception in s. 54, the Commissioner had to demonstrate that his conduct occurred pursuant to an actual requirement of an Act and that it was necessary for him to pursue such a course of conduct. The Tribunal held that the requirement of the "other Act" must be mandatory and specific. The terms of s. 39(e)(ii) are different from s. 54(1) of the New South Wales legislation in that s. 39(e)(ii) refers to "an act done by a person if it was necessary for the person to do it in order to comply with a *provision* of ... any other Act" (emphasis added). Nevertheless, the reference to necessity appears in both Acts, and the principle of *Clinch* — which I think was correctly decided — means that a Minister when exercising a discretion conferred on him or her by "an Act" is not within the protective cloak of s. 39(e)(ii).

Nevertheless, if the direction in the present case was lawfully made under s. 31(1) of the *Transport Act*, neither the Corporation nor the Minister was guilty of any unlawful act of discrimination. Phillips J. held, correctly in my opinion, that s. 31(1) of the *Transport Act* is not merely an empowering provision, but a provision which obliges the Corporation to comply with specific directions given to it by the Minister. Moreover, I agree with his Honour that what the Corporation did was necessarily done in order to comply with the direction. Consequently, if the direction was valid, the Corporation's acts were not unlawful.

The power of the Minister to give directions under s. 31(1) is subject to the operation of the general law. By the general law, I mean the body of common law and equitable rules which are supplemented or amended by statutes and regulations and other instruments having the force of law. Section 31(1), therefore, would not authorize a direction that the Corporation commit a crime or tort or breach a contract or by-law. Nor would it authorize a direction that the Corporation commit a breach of a statute such as the Act. These propositions, though not directly expressed in the *Transport Act*, are self-evident. They are self-evident because, under a government of laws and not of men and women, it is axiomatic that, in the absence of express words or necessary intendment, Parliament does not intend the recipient of the power to authorize a Minister, statutory body or government official to break the general law of the land. The argument for the Corporation did not contest the truth of these propositions. But it contended that regard had to be given to s. 39(e)(ii) in determining whether the Minister could

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

McHugh J.

lawfully give a direction to the Corporation to do that which, because of the Act, the Corporation could not otherwise do of its own initiative. In other words, the Corporation contended that, since s. 39(e)(ii) took an act outside the operation of the Act if it was necessarily done in order to comply with a provision of another Act, nothing in the Act made the direction of the Minister unlawful. This argument is not without force. But in the end the question is whether, in enacting s. 31(1), Parliament intended that the Minister could give directions which had the effect of converting an otherwise unlawful act of the Corporation into a lawful act. Now, as I have said, it is axiomatic that, in conferring a power such as s. 31, Parliament does not intend to authorize the giving of directions to perform acts which are unlawful. It is but a short step to infer that, in the absence of a plain intention, Parliament, in conferring such a power, also does not intend the recipient of the power to authorize acts which, but for the direction, would be unlawful. And in the absence of a contrary legislative indication, it is an inference which should be drawn. Consequently, in my opinion, Parliament cannot be taken to have authorized the Minister to give directions to the Corporation to perform acts which but for the directions would be a breach of the Act. The present case is altogether different from one where the Minister has a statutory duty to give the direction.

The direction of the Minister, therefore, was not authorized by the *Transport Act*. No act done pursuant to it is exempted by s. 39(e)(ii). Consequently, Phillips J. was in error in holding that the Board had erred in law in not upholding the Corporation's claim for exemption from the operation of the Act pursuant to s. 39(e)(ii) of the Act.

Order 56 of the Supreme Court Rules (Vict.)

While in order to decide the present appeal it is not necessary to determine the availability to the Corporation of an appeal mechanism pursuant to the Victorian Supreme Court Rules, in my view the Corporation was not entitled to appeal from the decision of the Board on a point of law out of time by resort to originating motion under Ch. I, O. 56. The relevant facts are as follows: the Supreme Court granted an order nisi to the Corporation pursuant to s. 49(4) of the Act. That sub-section provided for a right of appeal within twenty-eight days of the Board's decision. After twenty-eight days had expired, the Corporation sought to challenge the Board's decision on the ground, inter alia, that it had misconstrued s. 29(2) of the Act and that it had erred in law in concluding that s. 29(2)(b)

was not available to the Corporation to render lawful the acts complained of. The Corporation then took out an originating motion pursuant to O. 56 of the Supreme Court Rules, which allows for judicial review within sixty days of a decision. As the Corporation had succeeded on other grounds, Phillips J. declined to determine whether s. 29(2)(b) was available to the Corporation. He dismissed the originating motion taken out by the Corporation without ruling upon its merits.

Before this Court, counsel for the Corporation argued that, while the Act does provide a right of appeal, there is an alternative appeal mechanism available under the Supreme Court Rules and that it was not out of time in seeking to raise the s. 29(2) defence. At the relevant time, s. 49(4) of the Act read as follows:

> "Any party to proceedings before the Board may, within 28 days after the day on which the Board makes an order under this Part and after having first served notice of that party's intention to do so on every other party to the proceedings and on the Registrar of the Board, appeal to the Supreme Court against that order on a question of law only as if the order were an order of a Magistrates' Court and the provisions of Part XI of the *Magistrates' Courts Act* 1971 shall, with such adaptations as are necessary, apply accordingly."

Section 88 of the *Magistrates' Courts Act* provided for appeal by way of order nisi within one month of the order complained of, but it did so without prejudice to such other right or remedy as may exist. The Corporation described O. 56 as another "right or remedy" within the meaning of s. 88. Consequently, the Corporation claimed that it was entitled to avail itself of O. 56 judicial review proceedings. It may be true that O. 56 is another "right or remedy" within the meaning of s. 88. But s. 49(4) does not convert an appeal under that sub-section into an order of a Magistrates Court so that the appeal is under Pt XI of the *Magistrates' Courts Act*. The appeal is one under s. 49(4) and must be lodged within twenty-eight days. The provisions of Pt XI of the *Magistrates' Courts Act* apply to that appeal "with such adaptations as are necessary". The effect of the "as if" clause in s. 49(4) was to apply the procedural machinery of Pt XI of the *Magistrates' Courts Act* 1971 (now repealed) to an appeal under s. 49(4) of the Act with such modifications as were necessary. The policy of s. 49(4) as discerned from its terms is that an order of the Board can be challenged only on a question of law by an appeal to the Supreme Court lodged "within 28 days after the day on which the Board makes an order under this Part and after having first served notice of that party's intention to do so on every other party". Any provision of Pt XI of the *Magistrates' Courts Act* which is inconsistent with the

H. C. OF A. 1991.

WATERS v. PUBLIC TRANSPORT CORPORATION.

McHugh J.

legislative intention revealed by that policy must necessarily be modified in its application to an order made by the Board. That means, inter alia, that those parts of s. 88 which give a right to appeal within one month of the making of an order and provide that an appeal is not without prejudice to any other "right or remedy" are not applicable to an order under the Act.

The Supreme Court, therefore, had no jurisdiction to hear the proceedings based on O. 56.

Validity of the Board's Orders

Before Phillips J., the Corporation argued that certain orders of the Board were null and void for vagueness and uncertainty. Since the orders of the Board must be set aside and the matter reconsidered in accordance with the reasons of the Court, any ruling on the orders which the Board made serves no useful purpose.

Order

The appeal is allowed.

Appeal allowed.

Application for special leave to cross-appeal refused.

Set aside the order of the Supreme Court of Victoria allowing the appeal to that Court and dismissing the complaints. In lieu thereof, order that the matter be remitted to the Equal Opportunity Board to determine in accordance with s. 17(5)*(c) of the Equal Opportunity Act* 1984 *(Vict.) whether the requirements or conditions involved in the introduction of scratch tickets and removal of conductors from trams are reasonable and to determine the complaints accordingly.*

Solicitors for the appellants, *Slater & Gordon.*

Solicitor for the respondent, *R. C. Beazley*, Victorian Government Solicitor.

R.A.S.