

MISUNDERSTANDING ANTI-DISCRIMINATION LAW: THE NEW SOUTH WALES COURT OF APPEAL IN REDDROP

I Introduction

Five Australian legislatures have so far passed laws which make discrimination on the basis of marital status unlawful: the Commonwealth, New South Wales, Victoria, South Australia and Western Australia.¹ The statutory provisions in the various jurisdictions are all of a similar kind, both in respect of the definitions of discrimination with which they deal, and in respect of the contexts in which the defined discriminations are proscribed; rather similar administrative, procedural and remedial measures are also provided in all of these statutes. Their similarity can be attributed to the influences of the earlier statutes upon those coming later, and to the strong influence of similar United Kingdom statutes which in turn owe much to the influence, particularly with respect to basic definitional concepts of discrimination, of United States legislation. The provisions defining and proscribing discrimination on the basis of marital status do not stand alone in any jurisdiction: variously dealt with are also discrimination on ground of race, sex (including pregnancy and sexual harassment), physical and intellectual impairment, sexuality (including homosexuality), religious and political opinion, and family status.

Even in those jurisdictions where anti-discrimination laws are relatively old (for example, the federal and New South Wales provisions were passed in 1975 and 1977 respectively, and previous South Australian and Victorian legislation dated from 1966 and 1977 respectively) there has been relatively little litigation although the amount is steadily growing. What litigation has occurred has been confined mostly to the specialist tribunals which are established under each of the respective statutes. Discrimination matters are gradually becoming more frequent before the superior courts, on appeal from these tribunals. There are signs that these courts are having considerable difficulty in understanding the principles which are embodied in this legislation. This is perhaps because it has a rather novel character from the point of view of the traditional Anglo-Australian legal culture which has always tended to avoid express legislative attention to basic rights issues such as equality of treatment.

One recent indication of such difficulty is found in the decision of the New South Wales Court of Appeal in *Boehringer Ingelheim Pty Ltd v Reddrop*,² a case concerning discrimination on the ground of marital

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1 The respective statutory provisions are Sex Discrimination Act, 1984 (Cth) [hereafter SD(Cth)] s 6, Anti-Discrimination Act, 1977 (NSW) [hereafter AD(NSW)] s 39, Equal Opportunity Act, 1984 (Vic) [hereafter EO(Vic)] ss 4(1) & 17, Equal Opportunity Act, 1984 (SA) [hereafter EO(SA)] s 29(5), Equal Opportunity Act, 1984 (WA) [hereafter EO(WA)] s 9. Further abbreviations used in the article are: ADB(NSW) – Anti-Discrimination Board (NSW); EOT(NSW) – Equal Opportunity Tribunal (NSW); EAT(UK) – Employment Appeal Tribunal (UK).

2 [1984] 2 NSWLR 13 [hereafter *Reddrop*], an appeal from *Reddrop v Boehringer Ingelheim* (EOT(NSW) No 16 of 1981, 29 October 1982, unreported).

status. Because of the already-mentioned similarity of provisions in all of the Australian statutes and the highly underdeveloped nature of discrimination-law jurisprudence in all jurisdictions, this decision has an importance which goes far beyond New South Wales alone. The view taken in this article is that the Court displayed, with great respect, fundamental errors in its understanding of anti-discrimination legislation and that it is important for the development of anti-discrimination jurisprudence under all Australian statutes for such errors to be corrected. The principles incorporated in such legislation are not *sui generis* and have not been discovered by the Australian legislatures independently of developments or goals in other parts of the world. In this discussion, reliance will be placed on widely-accepted concepts of anti-discrimination law and policy, concepts which, while receiving differently-worded expression in different countries, provide an appropriate guide to the reading of the Australian provisions. Although the *Reddrop* decision concerned marital status discrimination, the central difficulties which faced the Court were difficulties which related to concepts and principles which touch all forms of discrimination, irrespective of the criterion. A broad introduction to these principles will be provided before the detailed discussion of *Reddrop*.

II Some Basic Principles of Discrimination Statutes

Three basic elements relating to the various Australian statutes should be referred to here: statutory structure, types of discriminatory criteria, and modes of applying discriminatory criteria. These elements are by no means the only important ones for understanding discrimination law, and have been singled out for the purposes of the present discussion.

A Statutory Structure

All the Australian anti-discrimination statutes are structured so as to provide definitions of discriminatory criteria (concepts such as "race", "sex", "marital status", and so on); to specify the modes of application of these defined criteria which the legislative proscriptions address; to specify the social and economic contexts in which particular applications of these criteria are made unlawful; to specify defences and exemptions from the operation of the statutes proscriptions; and to establish institutional and remedial arrangements. Critical to understand immediately is that the definition and mode provisions (in the legislative practice these two aspects are intertwined within the same sections) do not, except in a few cases,³ make any behaviour unlawful. It is only in particular specified contexts, such as employment, education, accommodation, provision of goods and services, and clubs, that behaviour so defined is actually proscribed. There is then no *general* prohibition on discriminatory behaviour in our community, although most of the important contexts are indeed covered. This usually explicit structure of anti-discrimination laws is very important to their interpretation: there is a logical and analytical separation which strictly should prevent one from deciding what is discrimination by looking primarily at the context, and from deciding whether the context is one in which discrimination is prohibited by looking at the nature of the

3 Principally Racial Discrimination Act, 1975 (Cth) [hereafter RD(Cth)] ss 9-15.

discrimination.⁴ This analytical separation is not one which can always be absolutely maintained, but as a ground-rule for the Australian statutes is fundamental.⁵ Finally, it is important to stress that no full understanding of the scope of the statutory proscriptions is possible without attention to the exemptions and exceptions which are often also structurally separate in their legislative form.

B Definitions of Discriminatory Criteria

The statutory definitions of discriminatory criteria involve two primary elements. First, there is the provision of definitions of *some* grounds of discrimination such as "race", "marital status", "physical impairment", and so on. Such definitions are sometimes of a relatively mechanical kind: for example, the "race" definition in all of the statutes is there merely to indicate that that term wherever it is used is essentially a form of shorthand which includes other expressions such as "colour", "ethnic origin", "nationality", and so on.⁶ This is not to say that what is included within this form of shorthand is not significant; on the contrary, the absence of the inclusion of "nationality" in the coverage of federal race discrimination legislation is possibly of great significance.⁷ However, these definitions, even where they are of a less mechanical kind, for example the definitions of "physical impairment",⁸ essentially provide only the barest reference point for the specification of "protected" groups. Second, in other provisions the statutes provide expansions of the grounds which might go to constitute discrimination. These expansions add to the primary categories of "race", "sex", and so on, as such, "characteristics" which generally are either appurtenant to, or imputed to, persons defined by the primary categories. The speaking of English with a foreign accent is probably a characteristic which appertains to persons of different races or ethnic origins; certain ways of behaving are attributed or imputed to people of particular national groups (even if, as a matter of fact, these attributions are no more true of them than of other national groups or of people in general). The legislative purpose of adding these expansions is clearly to avoid closely related criteria or stereotyped assumptions⁹ from performing as surrogates for the central, unacceptable criteria.

C Modes of Applying Discriminatory Criteria

Any of the statutorily specified criteria, including their expansions, can be applied or can operate in a decision-making or resource-allocating process in a number of different, sometimes overlapping, ways. They may be present (a) intentionally or unintentionally, (b) overtly or covertly, and (c) directly or indirectly. It seems that, under Australian law, so long as discriminatory criteria are present, no matter in which of

4 Without intending to address this structural characteristic in any detail, it is worth observing that it is referred to in *Reddrop* in the judgment of Mahoney JA where he summarises the submissions for the respondent company (at 18-19).

5 The same structure applies in respect of the United Kingdom legislation: see *Chiu v British Aerospace* [1982] IRLR 56, at 58 (EAT(UK)).

6 See RD(Cth) ss 9-16; AD(NSW) s 4; EO(Vic) s 4; EO(SA) s 5; EO(WA) s 4.

7 See, eg, *Yildiz v Minister for Immigration* (1982) 46 ALR 112.

8 AD(NSW) s 4; EO(Vic) s 4; EO(SA) s 5; federal and Western Australian law does not address physical impairment discrimination.

9 Characteristics which are "generally imputed" to a group might also be called 'generalised assumptions': *Horsey v Dyfed County Council* [1982] ICR 755, at 760 (EAT(UK)), or "stereotyped assumptions".

these ways, they are capable of constituting unlawful discrimination. In the case of (a) the Anti-Discrimination Board (NSW) has so held, without contradiction. That is, even if a person acts discriminatorily without intending to, that may constitute an unlawful act.¹⁰ This is also the case with regard to (b) according to views in the New South Wales Supreme Court.¹¹ That is, even if the discriminatory basis of a person's behaviour is not overt, that will not avoid unlawfulness, although one would normally expect greater problems of proof than when the basis is overt.

In respect of (c), the same is also true,¹² the statutes rather precisely defining the circumstances under which this will be so.¹³ These concepts of direct and indirect discrimination require, however, somewhat more detailed attention since they involve fundamentally different modes of legal analysis. Direct discrimination, which also goes by the name "disparate treatment", refers to the express or necessarily direct application of a discriminatory criterion. It is perhaps best understood by contrast with indirect discrimination, also called "disparate impact", which involved the immediate application of a criterion which, on its face, is completely neutral (in terms of statutorily defined discriminatory criteria), but which, because of the way in which that neutral criterion operates in practice, has a discriminatory effect.¹⁴ So, disparate treatment would be exemplified by refusing a person a job because he or she is black; disparate impact would arise by refusing a person a job because he or she did not have an educational or other qualification, which as a matter of fact, was one disparately distributed between blacks and whites. Whether in the latter case there is unlawful discrimination is influenced by a number of other important factors, as will become clear in the following discussion of *Reddrop*.

Some of the critical analytical problems associated with a disparate treatment or direct discrimination form of analysis should be briefly mentioned. There is a need to compare the treatment of one person (the claimant) with some other real or hypothetical person because, if there is

10 *Harrison v Watson* (ADB(NSW) No 3 of 1978, 19 June 1979, unreported); see also *Metwally v University of Wollongong* (EOT(NSW) Nos 4 & 6 of 1982, 23 November 1983, unreported) at p 37 (overruled, but only for constitutional reasons, in *University of Wollongong v Metwally* (1984) 56 ALR 1); *Reddrop v Boehringer Ingelheim* (EDT(NSW), No 16 of 1981, 29 October 1982, unreported) (overruled on other points by *Reddrop*). The same view applies in the United Kingdom: see eg, *Peake v Automotive Products Ltd.* [1977] 1 QB 780 (EAT(UK)); *Ministry of Defence v Jeremiah* [1980] 1 QB 87 (Ct App (UK)); *Grieg v Community Industry* [1979] ICR 356, at 360-1 (EAT(UK)); *Seide v Gillette Industries* [1980] IRLR 427 (EAT(UK)).

11 *Umina Beach Bowling Club Ltd v Ryan* [1984] NSWLR 61, at 66 (per Mahoney JA). See also *Mooney v Flannery* (ADB(NSW) No 2 of 1979, 3 December 1979, unreported); *Harrison v Watson* (ADB(NSW) No 3 of 1978, 19 June 1979, unreported).

12 It is questionable only with respect to RD(Cth), because not express, but it is not excluded by the statutory language.

13 See, eg, EO(Vic) s 17(1),(2) & (4) which addresses "direct discrimination" and s 17(5) which addresses "indirect discrimination". Note, however that EO(Vic) itself uses the expression "indirect discrimination" as a marginal note for the provision (s 35) with deals with aiding and abetting, thereby departing from the more general usage.

14 For one of the classic references to this division in United States jurisprudence, see *International Brotherhood of Teamsters v United States* 431 US 324, at 335 n 15 (S Ct 1977), but the references there to the need to find a discriminatory motive do not apply in Australia (see n 10 above).

no difference in the treatment, there is no discrimination. This comparison of treatment necessarily implies a need also to compare the persons themselves in respect of *relevant* or *material* factors, on the principle that it is only differences in the treatment of those *materially* alike which amounts to discrimination; if the difference of treatment occurs only in respect of persons who, in close relation to the context and to the nature of the treatment, are different, then there will be no disparate treatment. Also critical to the analysis is the requirement that this difference of treatment of materially alike persons was based on a specified discriminatory criterion (as discussed in 11.B above). This, put another way, is simply to say that decision-making or behaviour may under the law involve differences of treatment for all sorts of reasons, no matter how capricious or objectionable, provided that none of these reasons is one of the discriminatory criteria specified in any relevant anti-discrimination statute. The establishment of the *basis* of challenged behaviour is probably the most difficult aspect of disparate treatment theory, but not, as will be seen, of disparate impact theory. Of particular importance is the issue of what should be the test of the discriminatory basis. As is later discussed, it is here suggested that a "but for" test is the most appropriate, that is, to ask whether, but for a discriminatory element, the decision would have been made. If the answer is no, then the basis should be regarded as discriminatory. There is also the issue of whether a mixture of different bases for a decision, some lawful, other not, avoids a finding of discriminatory treatment. By applying the "but for" test, and also independently, it is suggested that as a matter of law and principle, provided a discriminatory factor played more than a trivial role even among other factors that should establish the discriminatory basis. There is a further question relating to the use of mixed factors, a question which was important in the *Reddrop* case. Does the operation of an unlawful criterion in conjunction with a lawful criterion, such that only some of the members of a protected group would be disadvantaged, constitute discrimination? The views that the "but for" test should be the standard test and that a mixture of criteria does not avoid finding a discriminatory basis, answer this question affirmatively. In addition, the well-developed theory of "race-plus" and "sex-plus" discrimination brings one to the same conclusion, as discussed below.

Disparate treatment or indirect discrimination has different characteristics. In particular, the identification of the discriminatory basis of behaviour is not in issue. The basis of the challenged actions is admitted, claimed or accepted to have been a *neutral* one, that is, one not among the specified discriminatory criteria of the statutes. What is critical here is whether that neutral criterion has a disparate distribution in the community (or reasonably selected subsections of it), and is a criterion which the claimant cannot satisfy. If that is the case, such a neutral criterion is, according to the classic disparate impact theory in many jurisdictions¹⁵ and under the Australian statutory provisions,

15 See, for examples from the United Kingdom, *Mandla v Lee* [1983] 2 AC 548; from the European Economic Community, *152/73 Sotgiu v Deutsche Bundespost* [1974] 1 ECR 153; *96/80 Jenkins v Kingsgate Ltd* [1981] 1 ECR 911; *Commission of the European Communities v United Kingdom* [1981] 1 ECR 1045; from the United States, *Griggs v Duke Power* 401 US 424 (S Ct 1971); disparate impact also applies in international law: see B. Sundberg-Weitman, *Discrimination on Grounds of Nationality*, 108 (1977).

discriminatory. This characterisation as discriminatory can be avoided by showing that the use of the neutral criterion was justifiable according to external standards, a possibility not available in respect of disparate treatment. An important issue which follows from that is to decide what the standard of justification will be.¹⁶

Despite the apparently clear separation, there are some points of similarity and convergence between the disparate treatment and disparate impact forms of analysis, but these will not be discussed here. Very important though is to note that if an act is challenged as having been based on a discriminatory criterion, the analysis from the point of view of the Australian anti-discrimination statutes is not concluded by showing that a neutral criterion was present. A shift to a disparate impact analysis may be called for. Also, it is important to observe that decision-making processes usually have a number of separable stages in which justifiable, and therefore lawful, neutral criteria may be present. If, however, these are applied through procedures which are based directly on a specified discriminatory factor, the analysis must shift back to a disparate treatment mode. This aspect will also receive further discussion below.

III Reddrop: The Facts and Issues

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

There are three matters which all members of the Court addressed and an additional element appearing in the judgement of Mahoney JA which will be considered in this discussion. The three common aspects were:

(a) The meaning of discrimination on ground of marital status in the New South Wales statute;¹⁷

(b) The meaning of "a characteristic appertaining generally to" persons of a particular marital status;¹⁸

(c) Whether there was evidence available to support the view that the company would have treated an unmarried person in a similar cohabitational situation as the complainant (that is, cohabiting with a rival's employee) in the same way that it treated the complainant.¹⁹ Mahoney JA also considered:

(d) Which "characteristics" are, in effect, excluded from an

16 The standards in the United Kingdom, the European Economic Community, and the United States are all relatively stringent: see the authorities cited in the preceding note.

17 AD(NSW) s 39(1)(a); discussed in IV.A below.

18 AD(NSW) s 39(1)(b); discussed in IV.B below.

19 Discussed in IV.C below.

employer's consideration by the inclusion of the expansive elements of appurtenant and imputed characteristics in the definition of marital status discrimination.²⁰

In addition, close attention will be given to what the Court virtually ignored but which is perhaps the most significant aspect:

(e) Whether the facts of the case suggest that disparate impact (or "indirect") discrimination may have been committed.²¹

IV Defining Marital Status Discrimination

A Establishing the Discriminatory Basis

All the members of the Court in *Reddrop* took the view that the meaning of discrimination on the ground of "marital status"²² did not extend "to embrace the identity or situation of the spouse".²³ Mahoney and Priestley JJA relied on the statute's definition (an *exclusive* one, said Priestley JA) of "marital status"²⁴ as the "status...of being...[inter alia] married", taking the view that this definition did not include, for example, the status of being married to an employee of the competitor of one's own employer or, as Mahoney JA put it, "the characteristics or proclivities of the particular spouse".²⁵

In his application of the s 4 (1) definition of "marital status" to the s 39 (1) (a) definition of marital status discrimination, Priestley JA said that the latter provision addresses discrimination against a married person "simply because he is married and for no other reason". This, and his Honour's emphasis on the exclusiveness of the s 4 (1) definition, has two possible implications for the interpretation of this and the other Australian acts: first, that it would not be unlawful discrimination if a person were to rely on a proscribed criterion (such as race, sex, and so on) if some other criterion were also to play a role, that is, where there were mixed criteria, and second (flowing from the first), that it would not be unlawful to discriminate against sub-groups of those persons who in general receive the protection of these statutes.²⁶ The reasoning of Moffitt P and Mahoney JA supports the second of these implications of Priestley JA. Somewhat inconsistently, however, Mahoney P himself expressly rejected the first implication, saying, "I do not think [the] view...should be accepted [that]...there would be discrimination within the sub-section only where the ground for different treatment of the

20 AD(NSW) s 39(1)(b) and (c); discussed in IV.D below.

21 Discussed in V below.

22 AD(NSW) s 39(1)(a):

A person discriminates against another person on the ground of his marital status if, on the ground of —

(a) his marital status...he treats him less favourably than in the same circumstances, or in circumstances which are not materially different, he treats or would treat a person of a different marital status.

23 Moffitt P, *Reddrop* 14; the other Justices express similar conclusions: Mahoney JA *ibid* 21; Priestley JA *ibid* 24-25.

24 AD(NSW) s 4(1).

25 *Reddrop* 21.

26 The Australian anti-discrimination statutes are not couched in terms of groups who are protected, but rather in terms of criteria of decision-making which are in particular contexts proscribed. However, the effect is, with regard to any particular application of a criterion, to offer protection to the particular group described by that application of the criterion.

complainant was, and was only, his marital status".²⁷ In other words his Honour regarded discrimination which results from an application of mixed criteria as falling within the proscriptions of the Act. Other arguments and authorities, discussion of which follows, support the same interpretation, suggesting that the first implication is to be rejected.

First, one can argue that while there is a definition of marital status in s 4 (1), and while it may be exclusive, as Priestley JA emphasised, this does not of itself exclude behaviour based on mixed criteria from the coverage of the Act. The existence of a definition seems not decisive when the structure of the Act is seen as a whole. As was mentioned in the introductory discussion, some of the criteria proscribed in this and the other Australian acts receive definitions, and some do not. In, for example, the case of "sex" it seems obvious that no definition was necessary because the legislatures took the view that the term was sufficiently clear by itself; in the case of "race" the definition, as mentioned, allows one word to act as a shorthand for related concepts in the substantive provisions;²⁸ in the case of "marital status" the purpose of the definition seems to be expansion or clarification, in particular because there are included, in addition to the expected meanings of being single, married, widowed or divorced,²⁹ the less expected meanings of being in a de facto relationship and of being married but separated. The point to be made is that whether or not there are definitions of this type does not go to answer the question of whether there is unlawful discrimination when behaviour is based on a mixture of lawful and unlawful criteria. If the presence or not of such definitions were relevant, one would have to come to the rather surprising conclusion that different proscribed criteria would be subject to different principles in this respect; it would be puzzling to understand why the legislatures might have followed such a course, particularly as the statutory structures in all jurisdictions are remarkably symmetrical as between different criteria apart from the irregular presence or absence of such definitions of criteria. In general, then, I suggest that such definitions of criteria as are provided in the legislation are there to provide necessary clarifications and/or expansions of specified criteria and not to shrink the scope of the cases which would otherwise be covered by an "ordinary meaning" interpretation of those criteria.

Second, one needs to distinguish between the statutes' definitions of discriminatory *criteria* on the one hand, and the definitions of *discrimination* on the other. It is only in the latter that the statutes make reference to the *basis* of the proscribed behaviour where they provide, as in s 39 (1) (a) for example, "[a] person discriminates...on the ground of his marital status if, *on the ground of*...his marital status...[he does certain things]".^{29a} Seen in the light of this part of s 39 (1) (a)'s definition of discrimination, it is not the definition of "marital status"

27 *Reddrop* 20 (the quotation involves a transposition of sentences with no change of sense). With respect, his Honour's apparent support for the second implication is hard to reconcile with his having rejected the first since, as will become clear in the discussion, the second type of discrimination is a sub-species of the first.

28 See text accompanying nn 6-7 above.

29 Priestley JA himself indirectly acknowledged the somewhat expansive character of the definition by his reference to the "ordinary meaning" of these four statuses: *Reddrop* 27.

29a Emphasis added.

(even if exclusive) which tells one whether or not a mixture of criteria may constitute unlawful discrimination but rather the interpretation one gives to the emphasised words in the quoted definition of discrimination, for it is those words which require a connection between a person's behaviour and the (sometimes defined) proscribed criterion. The issue then is whether the words "on the ground of" should be read as "on the ground alone of". It goes without saying that these words do not include the possibility of finding unlawful discrimination when only some other ground is present, but it is not at all obvious that the presence of an additional lawful ground avoids, or should avoid, unlawfulness. In *Breen*³⁰ Street CJ required that a proscribed ground have a "proximate bearing" and a "causally operative effect" on the challenged behaviour in order to constitute unlawful discrimination, but he did not exclude the possibility of a mixture of criteria.

Third, there are strong reasons for regarding behaviour based on a mixture of lawful and unlawful criteria as unlawful. It has already been suggested that the "but for" test is the appropriate way of showing whether or not a discriminatory criterion was the basis of a decision. This has been used as the basis of analysis in other jurisdictions³¹ and should be adopted in Australia.³² The "but for" test is perfectly compatible with the presence of mixed criteria. Indeed, by use of this test one is able to determine whether, despite the presence of other criteria, an unlawful criterion was also "causally operative". All the Australian statutes, apart from that of New South Wales, expressly provide that the presence of mixed factors will not avoid unlawful discrimination.³³ In New South Wales, the United Kingdom and the United States, where the statutes do not deal with this expressly, the same conclusion has been reached in the courts.³⁴ In this light, what the Equal Opportunity Tribunal decided did not, contrary to what Priestley JA suggests,³⁵ involve an "extended meaning" of marital status, but rather an application to the definition of discrimination of this widely-accepted interpretative method applied in respect of the question of whether or not there was a discriminatory basis to the challenged behaviour.

There was, as mentioned, a second implication arising from the reasoning of all the members of Court in the interpretation of s 39 (1) (a): that it would not be unlawful to discriminate against sub-groups of those persons who in general receive protection of the Act. This implication can be illustrated by an example. Assume that an employer

30 *Director-General of Education v Breen* [1982] 2 IR 93, at 95 (Ct App (NSW)).

31 See, eg, *Moberley v Commonwealth Hall (University of London)* [1977] IRLR 176; *McDonald v Santa Fe Rail Transp.* 427 US 273, at 282 n 10 (S Ct 1979); *Kneeland v Bloom Township High School* 518 F Supp 890, at 894 (1981); *EEOC v Sage Realty* 507 F Supp 599 (1981).

32 The test was not applied in *Australian Telecommunications Commission v Hart* (1982) 43 ALR 165; this led, it is suggested to a wrong analysis in that case. Cf *Schmidt v Austicks Bookshops Ltd* [1977] IRLR 360; *EEOC v Sage Realty* 507 F Supp 599 (1981).

33 See SD(Cth) s 8; (Cth) s 18 RD EO(Vic) s 4(7); EO(SA) s 6(2); EO(WA) s 5.

34 *O'Callaghan v Loder* [1983] 3NSWLR 89 (EOT(NSW)); *Owen & Briggs v James* [1982] ICR 618, at 623 and 626 (Ct App (UK)); *Griffin v George Buck Consulting Actuaries* 551 F Supp 1385, at 1389 n 7 (1982); *Hatton v Ford Motor Co* 508 F Supp 620, at 624 (1981) and authorities therein cited.

35 *Reddrop* 24.

refuses to employ women over the age of 25. That rule does not involve a rejection of all women, but of only a part of the female population. Other things being equal, however, all men are eligible for employment and therefore there is a less favourable treatment of women as a group, and as between a man and a woman both aged 26 or more, the woman will be treated less favourably than the man. Clearly, sex has a "proximate bearing" on the decision although age is also a determining element. The discrimination which is present in such a case can be described as "sex-plus" discrimination.³⁶ If the Australian statutes do not have the effect of making such discrimination unlawful this must be regarded as a major flaw in either policy or drafting. One can see "-plus" discrimination as a special case of the presence of mixed factors. In the general case, for example where an employer will not employ women and will also not employ anyone without overseas experience, preventing some men as well as all women from being successful in their applications, the second, lawful, factor is applied to all groups. In the special case of "-plus" discrimination, the second, lawful, factor is applied only to the group defined by the unlawful factor. Ignoring for the moment the evidentiary objections in *Reddrop* (which will be addressed below) the "-plus" discrimination analysis can be applied to the facts of that case: the company applied a second, lawful, factor, that of cohabitation with an employee of a business rival, to (and only to) married persons. There is no reason to treat such a case differently from the example given at the beginning of this paragraph. Although the effect of "-plus" discrimination is to discriminate against only a sub-group of protected persons, this provides no argument for a different outcome under the statute. As a matter of interpretation and policy, I would suggest that this and the other acts be regarded as covering "-plus" discrimination as well as discrimination which affects the whole of a protected group.³⁷

If, contrary to the views just expressed, the effect of judgement in *Reddrop* is that the court has in fact rejected the coverage of discrimination against sub-groups of protected groups, that is, a rejection of "-plus" discrimination, is this rejection partial or general? For the reasons just discussed and pointing to the examples given, I would suggest that any rejection of "-plus" discrimination which is to be found in *Reddrop* should be given a very limited scope. The decision can be limited very strictly to its facts to exclude only a "-plus" criterion which did not describe or apply in a direct way to the complainant itself. So, on this view the "-plus" criterion in *Reddrop* was too remote because it described the complainant's spouse rather than the complainant herself. Similarly, it would constitute unlawful discrimination if an employer

36 This expression is taken from United States jurisprudence. It was first used in *Phillips v Martin Marietta Corp* 400 US 542 (S Ct 1971); for a recent discussion of this concept in United States law, see Chamallas, "Exploring the 'Entire Spectrum' of Disparate Treatment under Title VII: Rules Governing Predominantly Female Jobs," [1984] U Illinois L Rev 1. In general one can describe all such cases, no matter what proscribed criterion is involved, as "-plus" discrimination and the expression is so used in the rest of this article.

37 *Hurley v Mustoe* [1981] ICR 490, at 493 (EAT(UK)); *Skyrail Oceanic Ltd v Coleman* [1981] ICR 864 (Ct App (UK)); *McLean v Paris Travel Service Ltd* [1976] IRLR 202 (EAT(UK)); cf *Bick v Royal West of England Residential School for the Deaf* [1976] IRLR 326 (EAT(UK)).

rejected for employment "a person who is married and who is less than 30 years old" but it would not be unlawful to apply a rule excluding "a person who is married and whose spouse is less than 30 years old". Such a distinction is over-refined perhaps, but it does offer both an explanation of the *Reddrop* decision (that the Court was concerned not to visit the statutory consequences on a criterion which appeared rather remote from the plaintiff) and is a means of avoiding the unsatisfactory consequences which have been suggested for a wholesale rejection of the concept of "-plus" discrimination. Another obvious reading which limits the decision, but which leads to unsatisfactory inconsistency, is simply to apply it only to marital status and not to other proscribed criteria.

B The Discriminatory Basis and Appurtenant Characteristics

New South Wales law provides, like most of the other Australian anti-discrimination statutes, that behaviour which is based on a "characteristic that appertains generally to persons of" a particular marital status is part of what is marital status discrimination.³⁸ None of the members of the Court in *Reddrop* found any support for the complainant in this provision. The complainant had claimed that it was a characteristic of a married person that he or she had a spouse and that the respondent company had made its decision on the basis of this characteristic. Priestley JA took the view that "having a spouse" was the same as being "married" and that s 39 (1)(b) read as the complainant asked would add nothing to what s 39 (1) (a) already said in referring to "marital status" as such.³⁹ Moffit P took the view that it was "unacceptable" to regard having a husband as a "characteristic" of a married woman but he did not make clear why this was an unacceptable view.⁴⁰ Mahoney JA said, however, contrary to both of these views, that it "is indeed a characteristic of a married person...such a person 'has a spouse' "⁴¹ but concluded that the company had not made its decision on the ground that the complainant had a spouse (that is, not on the ground of a characteristic with which s 39 (1) (b) deals) but rather on the ground of the *spouse's* characteristics.

This reasoning of Mahoney JA concerning the ground of the company's decision can be subjected to the same analysis made above with respect to "-plus" discrimination, in particular by reference to the "but for" test of the basis of behaviour: *but for* the characteristic of having a husband the complainant would not have had a spouse whose own characteristics could have been objected to. In response to this it might be argued that the company decided on the ground of "the complainant's characteristic of being married to a person who works for the company's rival" and that such a characteristic of the complainant is not one which appertains *generally* to person's of the complainant's marital status. Another analysis, however, is demanded by the application of the "but for" test: two factors were present, first that the complainant had a spouse (a *general* characteristic appertaining to married persons⁴²),

38 AD(NSW) s 39(1)(b).

39 *Reddrop* 29.

40 *Ibid* 14.

41 *Ibid* 21.

42 Or, as Priestley JA would have it, definitional of "marital status" and not simply a "characteristic".

and second that this spouse worked for the company's rival (a non-general, and, indeed, lawful factor) Priestley JA addressed this claim briefly but rejected it saying that is "conceded before the Tribunal...that there was no evidence that [the company] discriminated against [the complainant] *simply* because she was a married woman".⁴³ Under a "-plus" discrimination analysis it is indeed essential that the challenged behaviour *not* be based *simply* on a proscribed criterion, but rather that, in combination with another factor, a proscribed criterion be "causally operative". Under an application of the "but for" test, to which Priestley JA does not refer, such a causal operativeness is able to be demonstrated: but for the fact that the complainant had a spouse the company would not have rejected her for employment. It does not matter, therefore whether the having of a spouse is definitional of being married, that is coming within s 39 (1) (a) (the view of Moffitt P and Priestley JA), or a characteristic appertaining to married persons generally, that is within s 39 (1) (b) (the view of Mahoney JA), for this conclusion to follow.

A further, less important point can be made regarding s 39 (1) (b). Even if having a spouse is not to be seen as a characteristic appertaining to a married person because it is definitional of that status (with respect, a perfectly reasonable view), one might regard the condition of cohabitation (a seemingly key element in the company's thinking) as itself such a characteristic,⁴⁴ to which the same "but for" analysis would be applicable. Another possible characteristic under s 39 (1) (b) to which "but for" and "-plus" analyses might also apply is "the sharing of confidences with a person with whom one cohabits". The claim that this is a characteristic which appertains *generally* to married persons is one which offers no easy proof although there may be a general imputation to this effect; as such it is better treated in the next paragraph.

C The Discriminatory Basis, Imputations, Evidence, Proof

Again like other Australian statutes, the New South Wales Anti-Discrimination Act provides that a "characteristic that is generally imputed to" a person of a particular marital status, if forming the basis of less favourable treatment, allows behaviour to be characterised as discriminatory. Such a characteristic is one "which married persons are generally believed to have whether or not they in fact have it".⁴⁵ The argument for the complainant in *Reddrop*, that the company had made its decision on the basis of the generally imputed characteristic that married persons disclose the confidences of others to one another, was,

43 *Reddrop* 28 (emphasis added)

44 Cohabitation is clearly not definitional of the status of being married, although to an extent it can be seen, by analogy with the argument of Moffitt P and Priestley JA, as definitional of status (f) of "marital status" as defined in AD(NSW) s 4(1): "in cohabitation, otherwise than in marriage, with a person of the opposite sex".

45 *Reddrop* 24 (*per* Priestley JA). Moffitt P implicitly took the same view of the provision (at 15). Mahoney JA was, with respect, unclear on this point, for he said (at 22), as if to dispose of the argument under this provision, "I doubt whether the proneness to disclose confidences which should not be disclosed *is...* a characteristic of a married person" (emphasis added). By the word "is," he appears to have focussed on the actual existence or not of the characteristic although he had earlier (at 18) referred to the possible legislative motivation for s 39(1)(b) and (c) as the prevention of discrimination based on stereotyped characterisations (of their nature not always accurate) of persons of a particular sex or marital status.

however, rejected. The Court found that there was no evidence to support the argument.⁴⁶

In coming to this conclusion the view was taken that the Tribunal had too easily rejected the evidence of officers of the company that, by reason of the need for confidentiality, they would have refused to employ anyone who was living in a similar cohabitation as the complainant, whether married or not.⁴⁷ The finding of the Tribunal, on the evidence it heard and for which it was criticised by the Court, was essentially that the Company had directly relied on the complainant's marital status or a characteristic appurtenant to or imputed to that status, and that it had not applied a general standard of this kind.

There was evidence that, in the employment interview with the complainant, the respondent asked her what employment her husband had. Even if, as Priestley JA seems to conclude, this question arose under such circumstances of the interview as not to make the asking of the question discriminatory,⁴⁸ the fact of this question coupled with (a) the non-appointment of the complainant despite her better qualifications, (b) the expressed concerns (in evidence) of the company about the confidentiality riskiness associated with the complainant, and (c) the lack of any regular process for examining the confidentiality riskiness of employment applicants in general, together suggest that the claim of disparate treatment was not entirely unjustifiable. The claim or assumption that the company had rather applied a general non-discriminatory rule was a form of rebuttal to what could reasonably be regarded as a *prima facie* case of discrimination under the disparate treatment provisions of the Act.⁴⁹ As such one might expect that the company should be required to prove or at least adduce some evidence of the facts alleged in this rebuttal.

The Court did not, however, seem to require any firm proof that the company had applied a neutral rule rather than a directly discriminatory one, but rather assumed it. Significantly, it did not place great emphasis on the issue of whether the company in any regular way investigated *all* its job applicants with respect to this matter. The Tribunal said in its decision that the company made *no* efforts of this kind but Priestley JA showed, relying on the transcripts, that this was not entirely accurate.⁵⁰ What Priestley JA drew out from the evidence reveals, nevertheless, that the company did not have any rigorous standard practice or procedure for examining applicants with regard to their "cohabitational confidentiality riskiness" and that what the evidence shows at most is that, if it came by chance to the notice of the company that an

46 "[T]here was no evidence that, in declining the [complainant's] application, [the company] did so by reason of a 'stereotype assumption' that the [complainant], as a married woman, would be prone to disclose the confidence of her employer"; *Reddrop* 14 (*per* Moffitt P); see also Priestley JA at 29; Mahoney JA did not expressly comment on the state of the evidence although he did declare his view of the facts in saying "[b]ut I do not think that was 'the ground' of the company's decision" (at 21) but did not indicate the evidentiary basis for this view.

47 Moffitt P *ibid*, at 14-16; Priestley JA *ibid*, at 29-30.

48 Within the terms of the AD(NSW) s 40(1)(a): questions at an interview would be part of arrangements made "for the purpose of determining who should be offered employment."

49 AD(NSW) s 39(1).

50 *Reddrop* 30.

unmarried person was in a confidentiality-risky cohabitation, it *may* have reacted similarly to its reaction to the complainant.⁵¹

It seems clear that the burden of proof in discrimination cases always remains on the complainant under Australian law.⁵² In England, although the formal burden of proof is also on the complainant,⁵³ if the complainant shows less favourable treatment in circumstances consistent with its having been based on a proscribed criterion, this shifts the formal burden to the respondent⁵⁴ or at least “raises a case which calls for an answer”,⁵⁵ that is, the respondent must provide an explanation.⁵⁶ This is now also the rule in the United States.⁵⁷ It is suggested that, even accepting the principle that there is no formal shifting of the burden of proof, if a person has based behaviour on an *overt* reference to a discriminatory criterion (the behaviour of the respondent company was consistent with such a conclusion), and then seeks to claim that this reference was in fact part of a general, non-discriminatory policy (as the company claimed in evidence⁵⁸), some minimum evidentiary standard should be required to be met to establish this. Here the English practice in exactly this type of situation is strongly to be recommended.⁵⁹

Against these comments it might be asserted that the complainant had not even made out a *prima facie* case of disparate treatment, that all of the factors listed at the beginning of this sub-section do not suffice to establish even this basis. If this was so, as the Court seemed to conclude, then all discussion of an evidentiary burden on the respondent

51 There are two analytical aspects to this matter. The one, discussed in this paragraph, goes to the point that arguably there was no neutral requirement at all, and that the company's claims to this effect were false. The second, discussed in V.B below, goes to the point that, even if there was a neutral rule, there may still have been disparate treatment discrimination in the way this rule was administered.

52 *Harrison v Watson* (ADB(NSW) No 3 of 1978, 19 June 1979, unreported).

53 *Oxford v DHSS* [1977] ICR 884, at 886 (EAT(UK)).

54 *Osman*, “Individual Rights,” in Harvey ed *Industrial Relations and Employment Law* (1984) 1/384.

55 *Moberley v Commonwealth Hall* [1977] ICR 791, at 794 (EAT(UK)).

56 *Chattopadhyay v Headmaster of Holloway School* [1981] ICR 132 (EAT(UK)); see also *Wallace v South Eastern Education and Library Board* [1980] IRLR 193, at 195 (Ct App (Nth Ireland)) (reference to a shift in the evidential burden to the respondent, and the necessity for this to be discharged); *Khanna v Ministry of Defence* [1981] ICR 653 (EAT(UK)) (“If the primary facts indicate that there has been discrimination of some kind, the employer is called on to give an explanation and, failing clear and specific explanation being given by the employer to the satisfaction of the industrial tribunal, an inference of unlawful discrimination from the primary facts will mean the complaint succeeds...These propositions are, we think, most easily understood if concepts of shifting evidential burdens are avoided” (*per* Browne-Wilkinson J at 658-59)). See also Pannick, “The Burden of Proof in Discrimination Cases,” (1981) 131 New LJ 895.

57 See, eg, *Griffin v George Buck Consulting Actuaries* 551 F Supp 1385, at 1389 (1982), relying on *Texas Department of Community Affairs v Burdine* 450 US 248, at 256 (S Ct 1981) (The respondent has a burden of “producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate non-discriminatory reason.”) Note, however, that in the United States some courts also refer to a shift in the evidential burden: see *Carter v Newsday Inc* 528 F Supp 1187, at 1191 (1981). For one of the best summary statements of the current United States view, see *Rimedio v Revlon, Inc* 528 F Supp 1380, at 1388 (1982).

58 *Reddrop* 15,29.

59 See, eg, *Hurley v Mustoe* [1981] ICR 490, at 493 (EAT(UK)); although the facts were rather more obvious in that case, it is clear that the court much more closely examined the employer's claim of having applied a neutral rule than was the case in *Reddrop*.

would be irrelevant. Even given that, and therefore accepting that the company was not obliged to prove or even assert that it had operated under a procedure which was not directly discriminatory, the company did in fact claim reliance on its use of a neutral requirement. That being so, the matter does not end there, as will be seen in V below.

D Decisions Based on Appurtenant Characteristics and Imputations: Discriminatory or Not?

In addition to the aspects already discussed in IV.B and IV.C, some observations by Mahoney JA concerning the interpretation of s 39 (1) (b) and (c) of the New South Wales Anti-Discrimination Act, the provisions dealing with characteristics appertaining to, or imputed to, persons of particular marital status, deserve discussion. His Honour's view of the effect of these paragraphs was in summary this: "The general thrust of these two paragraphs is that if an employer desires to discriminate against a person by reference to that characteristic [that is, one appertaining or imputed], it must be because she has that characteristic or, perhaps, because the employer believes she has it in fact."⁶⁰ With respect, the clear meaning of the statute seems to be that an employer may *not at all* discriminate by reference to such a characteristic.

If this provision were intended to have the meaning which Mahoney JA gives it, one might have expected some such wording as:

A person discriminates...on the ground of marital status if, on the ground of...

(a) . . .

(b) a characteristic that appertains generally to persons of his marital status *and which is imputed to him*; or

(c) a characteristic that is generally imputed to persons of his marital status *and which is imputed to him*,

he treats him less favourably...

The Act, however, does not include those emphasised words and for the interpretation which his Honour gives one must read such working into the provisions, but there seems to be no warrant for doing so. The effect of so doing can be illustrated by the following hypotheticals, using race discrimination as the basis.

An employer might make any of the following decisions:

- (1) A is of another race; persons of that race have a foreign accent; I do not like that accent; I will not employ A;
- (2) A is of another race; persons of that race have a foreign accent; A has such an accent; I do not like that accent; I will not employ A;
- (3) A has a foreign accent; I do not like that accent; I will not employ A.

The interpretation which Mahoney JA gives would, if applied to the parallel race discrimination provisions (in similar form in all relevant Australian jurisdictions except at the federal level),⁶¹ have the result that only in making a decision of type 1 would the employer be acting unlawfully, and even then only if, in fact, A did not have, or the employer did not believe that A had, a foreign accent. Yet, in each example the employer would be relying on "a characteristic that

⁶⁰ *Reddrop* 21.

⁶¹ AD(NSW) s 7(1); the parallel provisions in the other jurisdictions are: EO(Vic) s 17(4); EO(SA) s 51(c); EO(WA) s 36(1); RD(Cth) has rather different wording which does not raise this issue so directly.

appertains generally to persons” of a particular race;⁶² whether A may not have that characteristic in fact (as in 1), or A does have it in fact (as in 2), or the employer does not specifically focus on A’s race technically described (as in 3), seems irrelevant from the point of view of the statutory language. The statutory language provides no express qualifications which would exclude cases 2 and 3 from being characterised as discrimination.⁶³

From the point of view of general anti-discrimination policy and likely legislative intention, all three cases should come within the statutory proscription. Example 1 is clearly a case of mindless prejudice, the employer not caring at all even to observe whether or not A has the characteristic which is disliked. Examples 2 and 3 do not display such obvious mindlessness, but the racial prejudice is still clear. In these cases the employer has simply focussed on one of the most obvious signs of a person’s race,⁶⁴ the way he or she speaks. If the reliance upon such signs were allowed under the Act, as the interpretation of Mahoney JA seems to suggest, the effect would be that only reliance on the narrowest of biological indicia of race would be unlawful. The concept of “race discrimination” is, as the legislatures show in these references to characteristics of persons of a particular race, more complex than that. Recognising that race discrimination is a social concept and that few people who indulge in racial discrimination rely on a narrow technical basis in their discriminatory behaviour, what the legislatures have done is to have prohibited race discrimination which operates through all the various social surrogates for the narrow biological proofs. It is precisely because members of particular races do, in fact possess these surrogates as the principal and most obvious signs of their “racialness” that less favourable treatment based on them is unlawful. The same can be said of all the specified discriminatory criteria, including marital status.

Mahoney JA, in coming to such interpretations, may have been influenced by the fear that, again using race and language to illustrate, an employer may not have been able to reject for employment a person who spoke with a foreign accent in such a way that he or she was not able to be understood. If this was the concern, it can, with respect, be relatively easily addressed, in the same way as the express concern of Moffitt P in regard to the facts in *Reddrop* mentioned below.⁶⁵ If an employer adopts a general neutral rule that employees (at least those doing certain work) must be able to speak English (or some other language) or a particular standard, that rule is then subject to the “indirect discrimination” (“disparate impact”) examination provided for in all the statutes;⁶⁶ the same goes for marital status. That is, if the requirement is disparately distributed (as such a language requirement

62 AD(NSW) s 7(1)(b).

63 Cf *Perera v Civil Service Commission* (No 2) [1983] ICR 428, at 433 (Ct App (UK)) which came to a different conclusion but which is distinguishable because the otherwise similar Race Relations Act, 1976 (UK) does not contain the expansive “characteristics” provisions which are found in the Australian statutes (apart from RD(Cth)).

64 Recall that the statutory definitions of “race” also typically include “national origin” and “ethnic origin,” and all of these categories are closely associated with distinctive linguistic characteristics.

65 See text accompanying n 70 below.

66 In this particular case, eg, AD(NSW) s 7(2).

must inevitably be) and the complainant is not able to comply with it, the employer may avoid unlawful discrimination by justifying the requirement as reasonable (in such case, necessary for the job to be done). If the requirement of reasonableness cannot be met, the rule would constitute unlawful discrimination. This is discussed more fully in the following section.

V Reddrop: Was There Disparate Impact Discrimination?

As discussed above, the Court in *Reddrop* concluded that there was no evidence of discriminatory behaviour by the respondent company. However, the Court considered this matter only from the point of view of whether there was evidence of disparate treatment discrimination in terms of s 39 (1) of the New South Wales legislation.⁶⁷ While it will not be an issue in every case of alleged discrimination, the question of possible application of disparate impact provisions⁶⁸ to facts such as in *Reddrop* should not be overlooked. Applied to the facts of this case, such an examination would address the following three questions:

- (a) Did the company apply a neutral rule which may have led to the result of not employing the complainant;
- (b) If the company had a neutral rule, was it applied or administered neutrally;
- (c) If such a rule was applied, does it necessarily avoid liability for unlawful discrimination under the Act?

A Was There A Neutral Rule?

In concluding that the alleged (direct) discrimination had not been proved, Moffitt P took the view that the evidence did not allow one to conclude “that treatment given to the [complainant] was different to that which would be given to a person not having the same status, for example a single person in the same circumstances, or in circumstances which are not materially different”⁶⁹ and interpreted the Tribunal as having said that an employer in the position of the company is not at liberty to give expression to its concern for confidentiality.⁷⁰ Priestley JA went further in saying that “it is necessary to draw the inference that [the company’s] decision...was on the ground of [the complainant’s confidentiality riskiness]”, a ground which he described as an “individual characteristic”.⁷¹ On the basis of these remarks the Court can be said to have treated the respondent company as applying a neutral rule of the form, “the company will not employ persons who cohabit with persons employed by firms in business competition with the company”. The evidence on which the Court relied in coming to this view also demonstrated that, if there was such a rule, this was the basis on which the complainant was refused employment by the respondent company. As such, the rule is one which should have been examined in terms of disparate impact discrimination.

67 See n 1 above for the equivalent sections in other Australian legislation.

68 SD(Cth) s 6(2); AD(NSW) s 39(2); EO(Vic) s 17(5); EO(SA) s 29(5)(b); EO(WA) s 9(2).

69 *Reddrop* 15; it is only implicit in this proposition that Moffitt P saw the company as applying a neutral rule, but nevertheless reasonably unambiguous. Mahoney JA also implicitly, but perhaps more ambiguously, took this view: *ibid* 21-22.

70 His Honour referred to “an extraordinary factual result”: *ibid* 16.

71 *Ibid* 31.

Although the existence of the neutral requirement in the *Reddrop* case emerged as part of the rebuttal of the allegation (or, perhaps, *prima facie* case) of disparate treatment discrimination, the need of disparate impact analysis does not arise only in such circumstances. Even where no suggestion of disparate treatment is involved, the question of the disparate impact of a neutral requirement or condition can be examined.

B Neutral Rules Neutrally Enforced

Before considering a neutral requirement under disparate impact analysis as such, it is appropriate to cast a (further) glance in the direction of disparate treatment analysis. It has already been mentioned that decision-making usually consists of a number of separable elements or processes. It is very important therefore, in examining a claim of discrimination, to disaggregate decision-making processes. A neutral rule (for example, that all job applicants must have fluency in three languages), possibly subject to a disparate impact analysis, may be found operating side by side with covert unintentional disparate treatment (such as in the attitudes of persons vested with certain discretionary powers) and/or with overt disparate treatment (such as a rule allowing the hiring of women over the age of 17, and men over 18). The disaggregation of decision-making processes requires care and subtlety, although separating elements such as those just mentioned is perhaps not so problematic. The matter goes, however, beyond this. All rules, no matter how clear and neutral, require some measure of administration and enforcement. It is possible that an administrator, quite unintentionally but nevertheless unlawfully (if on the ground of a proscribed criterion or related characteristic), may overlook enforcing a neutral rule in some cases or may enforce the rule to different degrees.⁷² Such differential enforcement is, unlike the rule itself, not subject to disparate impact analysis, but rather subject to a disparate treatment analysis. Such application or administration of a neutral rule is as much unlawful "direct discrimination" as the use of a rule which is itself discriminatory on its face, or, what is perhaps closer in form, the exercise of a discretion in a discriminatory manner.⁷³

Treating the company in *Reddrop* as having a neutral rule or policy, as was its claim in giving evidence,⁷⁴ is it clear from the facts that the company applied this rule in a neutral way? The evidence as considered by the Court and the Tribunal suggests otherwise because there was lacking any standard procedure for examining applicants on this point.⁷⁵ At least the point should be made that the Court, even if it perfectly reasonably concluded from the evidence that the company had a neutral rule, did not explicitly address the question of its enforcement at all.

C Neutral Rules Can Be Discriminatory

If the company in *Reddrop* did apply a "neutral rule and did so neutrally, it must immediately be observed that this does not of itself

72 See n 10 above for authority that unintentional discrimination is unlawful.

73 For an example of this last, see *Harrison v Watson* (ADB(NSW) No 3 of 1978, 19 June 1979, unreported). By way of illustration of the general point of this paragraph, see the discussion of cases in the United States where there has been the discriminatory application of a neutral rule in Tribe, *American Constitutional Law* (1978) 1025-1028.

74 See, eg, in the judgement of Moffitt P, *Reddrop* 15.

75 See the discussion of this point in IV.C above.

avoid the possibility of infringement of the Act and of redress to the complainant, and yet the Court seems wrongly to have assumed this. Mahoney JA rightly observes that application of a neutral rule is permissible within the terms of anti-discrimination law. He remarks of the New South Wales provisions that they

"do not...require that the employer, in what he does, treat the complainant as if, contrary to the fact, she was not married or in the relevant co-habitation. The Act requires that each person, in the relevant sense, be dealt with by reference to her individual characteristics; it does not require that she be treated as if she had characteristics which she does not have".⁷⁶

With respect, however, this proposition needs to be qualified in a least two ways. First, the employer may not rely expressly on a person's marital status, in order to address a characteristic of the complainant (such as confidentiality riskiness), since a good motive will not excuse direct (disparate treatment) discrimination,⁷⁷ an element of this jurisprudence which his Honour has elsewhere confirmed.⁷⁸ Second, although it is legitimate for an employer to address such a characteristic of the complainant by a rule which is not based on a specified discriminatory factor, if that neutral rule has a discriminatory *effect* it must be subject to the test of justification.

The view that the adoption of a neutral requirement does not automatically avoid unlawful discrimination follows from the introduction into Australian law of the considerably novel concept of disparate impact analysis. The provision on marital status in the New South Wales Anti-Discrimination Act typifies the provisions in all the statutes⁷⁹ in respect of all discriminatory criteria:

A person discriminates against another person on the ground of his marital status if he requires the person discriminated against to comply with a requirement or condition —

- (a) with which a substantially higher proportion of persons not of the same marital status as the person discriminated against comply or are able to comply;
- (b) which is not reasonable having regard to the circumstances of the case; and
- (c) with which the person discriminated against does not or is not able to comply.⁸⁰

The neutral rule credited to the company by the Court can, in terms of this provision, be regarded as a requirement or condition in the following form: "It is a condition of employment with the company that a person not be in confidentiality-risky cohabitation". As with any requirement or condition, one must ask the following questions:

⁷⁶ *Ibid* 22.

⁷⁷ *Ryan v Umina Beach Bowling Club Ltd* (EOT(NSW) No 27 of 1982, 28 October 1983, unreported) at p 7.

⁷⁸ *Umina Beach Bowling Club Ltd v Ryan* [1984] NSWLR 61, ("For the purpose of determining whether there was discrimination...the Act is not concerned, as such, with why that ground for determination was adopted": *per* Mahoney JA at 65), upholding *Ryan v Umina Beach Bowling Club Ltd*, *ibid*.

⁷⁹ Except RD(Cth); see n 12 above.

⁸⁰ AD(NSW) s 39(2).

- (i) Is the capacity to meet the requirement disparately distributed between groups of different marital statuses;
- (ii) Is the complainant able to comply with the requirement;
- (iii) Is the requirement able to be justified by the company?

(i) It is reasonably likely that married persons⁸¹ are less likely as a group to be able to satisfy the condition so expressed, even if most of them could do so (since very few would be expected to be married to employees of a rival employer). In other words, a higher proportion of persons not married might reasonably be expected to be able to meet this condition than the proportion of married persons.

(ii) The complainant being married could not, as a matter of reasonable practice, meet this condition, and it can hardly have been intended by the legislature that she change her marital status in order to be able to comply.⁸²

(iii) Essential to the decision whether or not the company may have committed discrimination under the quoted provision is consideration of whether or not the neutral rule (which the Court decided the company had applied) was necessary or, in the statutory language, “reasonable having regard to the circumstances of the case”. If the neutral condition can be justified, unlawfulness can be avoided.⁸³ In this case, the question was, with respect, inadequately addressed, if at all, by the Court.

It seems clear that the word “reasonable” in the various Australian provisions excludes a subjective assessment of how appropriate the neutral criterion is. This would accord with the standard use of this word in legal language. So, one would not be concerned with the intention behind the use of a test or a good faith choice of a qualification. Rather, one would have to ask how a reasonable person would regard the requirement. This still leaves a considerable scope in application while it begs the question of what social values are to be allowed to be brought to bear on the matter. Many different and conflicting actions can, in a sense, be reasonable — one can choose between them or balance them only in the light of an acknowledged normative position.⁸⁴ Within the framework of a business it may be “reasonable” (cost-saving, generally efficient) to adopt, for example, a

81 Or, perhaps, married persons and those identified by paragraph (f) of the definition of “marital status” in AD(NSW) s 4(1) (see n 44 above) taken together.

82 For some guidance as to how the expression “able to comply” might be interpreted, see *Mandla v Lee* [1983] 2 AC 548 (HL).

83 This aspect of the statutory rule allays the fears expressed by Moffitt P (see text accompanying n 70 above) that the decision of the Tribunal necessarily means that an employer in the position of the company is not at liberty to respond appropriately to a confidentiality risk by excluding from employment those persons who pose such a risk. An employer may indeed exclude such persons if either the exclusion has no disparate distribution between different groups as defined by the Act’s specified criteria, or, where there is such disparate distribution, if the reasonableness of the rule is proved. The “extraordinary factual result” feared by Moffitt P is, however, allowed by the legislature if such reasonableness cannot be proved. The Tribunal did not address these issues because it limited itself, wrongly it seems given the state of the evidence, only to the issue of “direct discrimination” for which the Act provides no defence of reasonableness: see text accompanying nn 77-78 above. It is particularly regrettable that the Tribunal did not address these issues because, as the trier of fact, it had a better opportunity to discover whether the necessary elements for justification of the company’s rule were present.

84 The balancing of values under discrimination laws is endorsed by Mahoney JA in *Tullamore Bowling & Citizens Club Ltd v Lander* [1984] NSWLR 32, at 47.

method of word-of-mouth recruitment (that is, letting current employees inform their relatives and acquaintances of job vacancies). However, from the point of view of members of racial minorities who never come to hear of the vacancies because they do not move in the relevant social circles, the failure of business managers to allocate resources to a general advertising campaign for new employees can be regarded as quite unreasonable.⁸⁵ This suggests that any court addressing these issues should bear firmly in mind the policy underlying anti-discrimination law, for “an interpretation that gave extensive deference to customary employment practices would reduce it to insignificance”,⁸⁶

In line with such general considerations the demonstration of the necessity of the condition or requirement which was assumed to have been applied in *Reddrop* should have satisfied at least two requirements. First, the existence of a risk to the confidentiality of the company's matters which is posed by the complainant's particular cohabitation should have been firmly established. If part of the consideration of reasonableness involves the balancing of harms, the harm to the company needed to be demonstrated, since the harm to the complainant was unambiguously clear. Second, the reasonable likelihood that such a rule will have an appreciable effect on the risk should have been demonstrated, since there may have been other ways of avoiding the harm to the company without imposing the harm on the complainant. The only evidence before the Court was that of the opinion of the officials of the company and while this may to some extent be relevant to this issue it cannot be sufficient proof of the objective existence of the risk⁸⁷ or the objective usefulness of the rule in reducing that risk; it would also seem that such matters are not appropriately the subject of

85 The courts in the US have also treated such managerial action as unreasonable under the “business necessity” test in disparate impact analysis: *United States v Central Motor Lines, Inc* 33b F Supp 532 (1971); *Parham v Southwestern Bell Tel Co.* 433 F 2d 421 (1970); *Diggs v Western Elec Co, Inc* 587 F 2d (1978). See, also, Commission for Racial Equality (UK), Code of Practice, 1.10, where word-of-mouth recruitment with a discriminatory effect is disapproved under Race Relations Act, 1976 (UK).

86 Lustgarten, “The New Meaning of Discrimination,” [1978] Public Law 178, at 193. See also, *Ojutiku v Manpower Services Commission* [1982] ICR 661, at 670 (Ct App(UK)) (where comments of an industrial tribunal considering the two competing goals of reducing discrimination and maintaining standards were endorsed, *per Kerr LJ*); *Steel v Union of Post Office Workers* [1978] ICR 181, at 187-88 (EAT(UK)).

In *Clarke v Eley (IMI) Kynoch* [1983] ICR 165, at 175 (EAT(UK)) the tribunal considered a “last-in first-out” redundancy policy, treating it as “a necessary means (viewed in a reasonable and common sense way) of achieving a necessary objective, ie, an agreed criterion for selection”. However the court distinguished this method of selection which it saw as having only a limited discriminatory effect from another which was grossly discriminatory, implying that if the former method were, in a particular fact situation, to have a significantly worse discriminatory effect this might remove its justifiable character. Note, however, that a level of justification which would effectively require an employer to justify a failure to introduce an affirmative action programme to redress general patterns of discrimination in the society as a whole has been rejected in the United Kingdom: *Ojutiku, ibid* (*per Eveleigh LJ* at 668).

87 It might even be reasonable to imagine that any risk to the confidentiality of the company's matters would be equally offset by a chance for the company to learn of useful confidential matters about its rival (assuming an equal risk of breaches of confidentiality on both sides, if any exists at all), in which case the justification for the rule could also be brought into question.

judicial notice. Mahoney JA doubted the existence of such a risk,⁸⁸ thereby effectively denying the reasonableness of the rule (despite his ultimate finding for the company). Moffitt P seemed to take the view that there is such a risk and implicitly regarded the company's rule as a reasonable response to this,⁸⁹ but referred only to evidence of the motivation of the officials of the company.⁹⁰ Priestley JA did not consider at all the statutory requirement that the rule must be justified although it is clear that he did regard the company as relying on such a rule.⁹¹ The requirements of the Act are clear: in order to show discrimination the neutral rule or condition which had a discriminatory effect must be one not reasonable in the circumstances of the case. Although the probative burden in discrimination cases is always the complainant, the Court was not, with great respect, justified in merely assuming, as it did, that the respondent's condition was reasonable.⁹²

If the company relied on a neutral rule as the Court seems to allow, all the elements of the statutory definition of "indirect discrimination" seem to have been present: a disparate distribution, an incapacity in the complainant, and a failure to demonstrate the reasonableness of the rule. In other words, while the company may not have committed "direct discrimination",⁹³ it seems reasonably clear that "indirect discrimination" may have been committed. It is a matter of considerable concern that the possibility of disparate impact discrimination which arose from the facts in *Reddrop* was not expressly and systematically addressed by the Court. That this is not by any means the sole example of such a failure (it has occurred in a number of other cases both in Australia⁹⁴ and in the United Kingdom⁹⁵) makes this concern rather urgent.

88 "I doubt whether the proneness to disclose confidences which should not be disclosed is...a characteristic of a married person": *Reddrop* 22. The necessary implication of this is that, if it is not a characteristic of a married person, there would be no such risk posed generally by persons who cohabit.

89 "[A]ny reasonable head of an organisation...would be likely to regard a close personal relationship of an applicant for employment with a key employee of the rival as providing a security risk to the employer": *ibid* 16.

90 *Ibid* 15-16. His Honour also observed that "[i]t is inescapable that any trader which is like security minded would prefer another applicant for employment who did not pose a like risk" (at 16). It is respectfully suggested that this also constitutes no objective proof of the risk. Mahoney JA drew attention to the objective character of the enquiry needed in saying, "if the fact of marriage or the relevant co-habitation results, as a matter of fact, in a position of real difficulty...the employer may take that into account" (emphasis added), although he then went on to conclude that there was a risk without, with respect, satisfying his own objective test and indeed contrary to his own earlier doubts of such a risk (see n 45 above).

91 See the passage quoted from his judgement, text accompanying n 71 above.

92 Cf *Ojutiku v Manpower Services Commission* [1982] ICR 661, at 666 (Ct App (UK)) (where it was said that it was not always necessary to have independent, objective and external evidence, but there are many cases where it would be sensible to do so; implicitly, any evidence must be more than a mere expression of opinion); but note the seemingly undemanding standard of proof applied in *Ghaffer v Council of Legal Education* (noted, (1979) 129 New LJ 1264 (Industrial Tribunal (UK)) (those responsible for a profession should be free to set the standards for entry to it).

93 That is, discrimination under AD(NSW) s 39(1).

94 See, eg, *Director-General of Education v Breen* [1982] 2 IR 93 (Ct App (NSW)); *Stoker v Kellogg (Aust.) Pty Ltd* (ADB(NSW) No 7 of 1982, 11 February 1983, unreported).

95 *McGregor Wallcoverings Ltd v Turton* [1979] ICR 558 (Ct App (UK)); *Thorn v Meggitt Engineering Ltd* [1976] IRLR 241; *Roberts v Tate & Lyle* [1983] ICR 521 (EAT(UK)); *Noble v David Gold* [1980] ICR 543 (Ct App (UK)).

VI Conclusions

Anti-discrimination law is a relatively new phenomenon in Australia. It has statutorily introduced concepts which are still rather unfamiliar to Anglo-Australian lawyers. The extent of this apparent unfamiliarity can be illustrated by observing that the concept of disparate impact discrimination and analysis was introduced into the United States and Europe by judicial creativity within a statutory framework,⁹⁶ while in Australia and in the United Kingdom the same concept, introduced by relatively simple express statutory provisions, remains essentially ignored even in cases where it was clearly the applicable mode,⁹⁷ probably because it is not understood. Even if Australian judges and tribunals have not had (or taken) the opportunity of creativity as has occurred elsewhere, it is vital that the express provisions be read, understood and applied with an awareness of the principles which have been developed in those jurisdictions. This goes both for those sitting in the courts and the tribunals and for those who appear before them. This is not only the case in respect of disparate impact analysis; concepts such as the "but for" test, "-plus" discrimination, the issues of multiple criteria and of stereotyped assumptions or imputations were all, with respect, ignored or poorly dealt with in *Reddrop*. Such matters need at least to be explicitly discussed by the Courts even if, as a result, a different view is taken to that taken elsewhere.

96 Regarding the United States and the development in the European Court of Justice, see the cases cited at n 15 above.

97 See cases cited at nn 94-95 above.