

**JUDGEMENT**

**EQUAL OPPORTUNITY TRIBUNAL  
OF WESTERN AUSTRALIA**

No. 30 of 1990

**BRIAN HEATH**  
Complainant

- against -

**NELAC NOMINEES and  
TAGORA PTY LTD and  
JEAN PIERRE McEVOY**  
Respondents

**BEFORE:** Ms K. O'Brien (Acting President)  
Ms B. Buick (Member)  
Ms P. Harris (Member) Dissenting

Counsel for the Complainant - Ms P. Hogan  
Counsel for the Respondents - Mr S. Scott

**HEARD:** 25 June 1991

**REASONS FOR DECISION**

(Delivered: 8 NOVEMBER 1991)

## INTRODUCTION

The Complainant, Brian Clyde Heath, is a 57 year old Aboriginal man who complains of unlawful discrimination against him in the Foxy Lady Tavern ("the tavern") in Perth on 7 September 1989. He alleged he was requested by a barman in the tavern to leave one bar of the tavern and move to another bar. He alleged that he was asked to do so on the basis of his race. (Each Tribunal member clearly recognised Mr Heath as an Aboriginal person).

In the amended Points of Claim the Complainant alleges that on the ground of:

- (a) his race, and/or;
- (b) a characteristic that appertains generally to persons of that race, and/or;
- (c) a characteristic that is generally impugned to persons of that race; [that] he has been treated less favourably by the Respondents than, in circumstances that are the same, or are not materially different, the Respondents would treat a person of a different race, and/or has been segregated by the Respondents by persons of a different race, contrary to S36(1), S45, S46 of the Equal Opportunity Act 1984.

Essentially the Respondents deny the claim.

It is not in dispute that the Respondents, Nelac Nominees, Tagora Pty Ltd and Jean Pierre McEvoy, are three joint owners of the tavern. The third Respondent, Mr McEvoy, was the day to day manager of the tavern.

The evidence in this case is not lengthy nor complicated. Nor is it factually contentious as few, if any, of the objective facts were in dispute.

### **THE COMPLAINANT MR HEATH**

Mr Heath is a 57 year old Aboriginal man. He was born in Perth on 13 April 1934. For over 40 years he has worked as a seaman. He is a member of the Seamen's Union and the nature of his work is such that he travels extensively, working on different ships for varying periods of time and for different companies. From time to time he has lived in other Australian States, but since 1964 he has been living in Western Australia and more particularly in Fremantle.

Mr Heath is presently a single man but had previously been married to Constance Margaret Herbert who was also called as a witness to support his claim.

### **MR HEATH'S MOVEMENTS ON 7 SEPTEMBER 1989**

On 7 September 1989 Mr Heath had been invited to the Aboriginal Medical Service ("the AMS") in East Perth by his sister. The AMS was holding an open day in the course of the National Aboriginal Day of Celebration Week which is an annual event. Lunch was provided and later in the afternoon there was a corroboree and other entertainment. Mr Heath said "it was (a) strictly non-alcoholic" occasion and he did not consume any alcohol.

Mr Heath arrived at the AMS at about 11 in the morning and left at about 3 o'clock in the afternoon.

Mr Heath had taken his camera to the AMS as his ex-wife, Ms Herbert, worked there as secretary to his sister and he wanted to provide some photographic mementos of the occasion. Some photographs were taken of Mr Heath and other people and they show him wearing the clothes he was in when he went to the tavern. Three of these photographs were tendered in evidence (Exhibit 3). Mr Heath was dressed in light coloured slacks, a black short sleeved shirt was opened to his upper chest and over his shirt was a brightly coloured short sleeved jacket. Mr Heath wore the same jacket to the Tribunal hearing. It was a "safari" type jacket - that is, it had a collar, was hip length and was worn unbuttoned. The Tribunal members considered it to be smart but casual.

After leaving the AMS, Mr Heath walked to the Creative Native Art Gallery in King Street in Perth to view an exhibition by an Aboriginal artist. He ordered a print of one of the paintings of Mt Olga. He paid \$20.00 deposit and was issued with a receipt. A photocopy of a document which was said to be a photocopy of the receipt was tendered. It was not clear from the evidence whether it was a photocopy of the actual receipt or simply a photocopy of the record of the transaction made subsequently. Nothing turns on that matter as Mr Heath was unchallenged in cross examination that he went to Creative Native and the Tribunal has no reason to doubt his evidence on that point.

Mr Heath testified that he spent about an hour at the Art Gallery and then walked to St George's Terrace to catch his bus home to Marmion Street in Fremantle. He testified that he wished to catch the number 157 bus as that went directly to Fremantle and only ran about four times a day. He hoped to catch the bus that left Perth at around 5 p.m.

Mr Heath estimated that he would have left the Creative Native Art Gallery at about 4.30 p.m.

On arriving at the bus stop, which was outside Allendale Square in St George's Terrace Perth, Mr Heath said he realised that he only had a \$20.00 note. As it was peak hour and there were queues waiting for the buses he thought he would go into the tavern and cash the \$20.00 note and buy a drink. He estimated it to be approximately 5 o'clock when he went into the tavern.

We pause here to describe the tavern and its usual clientele.

#### **THE FOXY LADY TAVERN**

The tavern is located in the "lower concourse" of Allendale Square which is a high rise building at 77 St George's Terrace Perth. Allendale Square is situated on the corner of Sherwood Court in St George's Terrace. The tavern can be entered either from Sherwood Court or from St George's Terrace by travelling down escalators.

There are two bars in the tavern, basically of equal size. One of the bars is named the Exchange Bar but is referred to by the staff as the "Executive Bar". The other bar is referred to as the "public bar" and sometimes the "front bar". The prices in the Exchange Bar are 15%-20% higher than in the public bar.

Mr McEvoy testified that 99% of the clientele would be office workers. However,

during the lunch period which he said was from 12 noon to 12.20 p.m. each day, construction workers from nearby construction sites would come to the public bar. According to Mr McEvoy, the owners of Allendale Square expect that the tavern will provide and maintain "a very exclusive service" and have protested on occasions about the construction worker clientele of the tavern.

As to the Exchange Bar, Mr McEvoy testified that the clientele was "[M]ainly, the senior guys in the different offices around the area". The public bar was frequented mainly by "junior" office workers.

#### **WHAT HAPPENED IN THE TAVERN**

Mr Heath's evidence as to what happened in the tavern is as follows:

He entered one of the bars he described as the one closest to the stairs around to the left. It is not in dispute that this bar was the Exchange Bar. The bar was very crowded but Mr Heath noticed a vacant spot at the bar and made for that. He said that the barman looked up and saw him and came over straight away. He thought he was about to be served quickly. The barman said that he was not going to serve him. Mr Heath was unable to recall the exact words the barman used. Mr Heath's evidence was as follows:

*Was there any other conversation between the two of you?--I said to him - - I said, "Why aren't you going to serve me?" I said, "This is a public bar", open to the public I meant by that.*

*MS HOGAN: Yes?---And he turned around - - he changed that and he said, "The public bar - there's another bar there". He said, "The public bar's over there." He said, "You'll have to go there" and I said, "Well, have you got something against Aborigines?" you know, and he said well, in the conversation he said it was an executive bar, you know, and I'd - - he said, "You'll have to - - "In one of the conversations he said, "Oh, you'd have to wear a tie", you know. Well, a fellow come and stood alongside of me and looking around, you know, I could see that there were many people in there casually dressed and I can only recall seeing a couple of people there with suits on, you know, who were obviously, something - - office workers and all that. Most people there were casually dressed, you know, looking at the crowd, and - - and I said to him, I said: "Well - -". The man said: "It's an executive bar", so I notice this fellow standing alongside of me and I said - well, he had a cardigan and open-necked shirt, you know, obviously working gear, you know, not what you'd expect an office-Johnny to wear, and I said: "Well, he is an executive?", and he said: "Yes." You know - and I said to him, I says, somewhere in the conversation, I said: "Have you got something against Aborigines?", and then he said "I'm going to call the police", and then I realised that I -- that I wasn't going to get a drink, time was running out, you know, I hadn't got any change and the bus that was the only bus that I could have caught that day to get home, the one that went straight through, was on the verge of leaving, so I left there. I went over to the paper shop; I bought a Daily News with the \$20, got the change, ran up the stairs and just managed to catch the bus which was just about to leave.*

*MS HOGAN: So how long would you have actually spent in this bar? ---I don't know - only a few minutes.*

*And why was it that you were actually refused service?---Well, I - - the only reason I can think because looking at the - - in the opinion I was, you know, better dressed than most of the people in the bar and when you get to a situation like this, this is what impelled me to ask this fellow if he had anything against Aborigines, and of course his answer to that was that he was going to call the police so, you know, I could see myself getting into all kinds of hassles just simply because I'd gone to a bar to get a drink and get some change, principally. Time was running out.*

When Mr Heath got home that evening he telephoned his sister, told her what had happened in the tavern and asked her what he could do about the matter. She advised him that he could report it to the Equal Opportunity Commission ("the Commission"). The next day, Mr Heath made a verbal report to the Commission.

On 19 September 1989, Mr Heath completed a written complaint on an enquiry/complaint form provided by the Commission. That statement substantially accords with Mr Heath's sworn testimony before the Tribunal. However, in that statement, Mr Heath makes no mention of the question he put to the barman "have you got anything against Aborigines". We shall return to that point later.



When asked by his Counsel how he felt after being refused service he replied:

*Well, I was very angry and humiliated because there it's a very crowded bar, there's all kinds .....it's rush hour; there's all kinds of people milling around through the arcade and that and obviously I'm being refused a drink, you know, in front of all these people, you know, and for no good reason as I could see except, you know, that I'm an Aborigine.*

Under cross examination, Mr Heath conceded that it was possible that he was a little bit dishevelled in his appearance, having walked from the Creative Native Art Gallery to the bus stop in a bit of a hurry.

Mr Heath testified that he had been to the tavern about 6 times previously and been to the Exchange Bar. He said that he was wearing casual dress on those previous occasions and no objection was taken to his dress by any employee on those occasions. He was not asked by either his Counsel or the Respondents' Counsel to otherwise describe his dress on the other occasions.

Under cross examination, Mr Heath testified that there had been other times around Australia where he had been the subject of racial prejudice or discrimination and that that had made him angry. He conceded under cross examination that if he were in a rush and really wanted some change and someone told him to go somewhere else then that would annoy him.

## **THE RESPONDENTS' CASE**

Mr McEvoy, the manager of the tavern, gave evidence for the Respondents. His evidence was in substance confined to what dress standards applied to the Exchange Bar in 1989 and how he expected his staff to assess dress suitability. He also testified as to his assessment of Mr Heath's dress at the relevant time.

The Respondents did not call any evidence as to the actual incident as Mr McEvoy was not in the bar at the time and the barman on duty had no recollection of it. In essence, the Respondents maintained that if Mr Heath were asked to leave the Exchange Bar and move into the public bar, the request had nothing to do with his race but was based simply on the unsuitability of his clothes which did not comply with the standard set by the tavern management.

Mr McEvoy ascertained from computer staff records that the only male barman on duty on 7 September 1989 at the relevant time was Kim Edward Turner. Mr Heath described the barman concerned as aged in his mid to late 20s, of "medium-tallness" with blond hair and of medium build. Mr Turner basically fits that general description save that in 1989 his age was 18 years and he now is 20 years old. Prior to this incident, Mr Turner had been employed at the tavern for at least 6 months. He testified that he had been employed from February 1989 to August 1990.

Mr Turner was unable to recall Mr Heath and had no recollection of speaking to Mr Heath in 1989. He had a recollection of Mr McEvoy speaking to him about the incident

but was unable to recall any details of it. Mr Heath was not asked to identify Mr Turner as the barman who served him. However, the Tribunal finds that Mr Turner was the barman with whom Mr Heath spoke.

Mr Turner testified that there were a few occasions when he would ask customers to move into the public bar because their dress was not up to the standard expected in the Exchange Bar. He was unable to recall any occasion where he had asked somebody to move who had pointed to a similarly clad person. He agreed under cross examination that when dealing with an inappropriately clad person it would be easier to say to that person that he did not have a tie on, but said that he would not use that explanation in requesting somebody to move. He testified that if a person refused to move when requested to do so he would refuse to serve that person. He could only recall one occasion where he called the police in relation to an incident in the Exchange Bar and that was when a drunken customer became violent. He testified that he has never threatened to call the police because a customer was reluctant to move to the public bar. Further, he could not recall any time where someone has said to him "have you got something against Aborigines". That is not to say that Mr Turner's lack of recollection as to these matters means that such incidents have not occurred.

In response to questions put by the Tribunal, Mr Turner testified that if a person were wearing clothes such as depicted worn by Mr Heath in the photographs, he would ask that person to move from the Exchange Bar to the public bar. However, if the public bar were closed then he would allow the person to remain in the Exchange Bar. He went on to say that in his view Mr Heath's clothing did not fit in with the clientele the tavern was

trying to attract.

When questioned how he would approach a situation where a person was inappropriate dressed in the Exchange Bar, Mr Turner testified

*I'd just go up to the person and say "excuse me. I hope you don't mind, but the public bar next door is open and this is more of an executive bar. We have a pretty regular clientele. If you don't mind coming next door, the drinks are a little cheaper" - something like that.*

Mr Turner testified that his brother is married to an Aboriginal woman and over 3 years Mr Turner has got to know her family quite well and has socialised with them. He also disclaimed any prejudice against any race professing to have a number of Asian friends and in particular an Indonesian friend with whom he goes out "practically every weekend". As to the incident outlined by Mr Heath, Mr Turner's evidence did not assist the Commission in determining the accuracy or otherwise of Mr Heath's recollection. However, the Tribunal found Mr Turner to be an honest witness.

It is interesting to note that Mr Heath's conversation with the barman on the evening of 7 September 1989 included a reference by the barman to the Exchange Bar being "an executive bar".

#### DRESS STANDARDS IN THE TAVERN

Mr McEvoy testified that the tavern has differing standards of dress requirements in each bar. In the Exchange Bar the male patrons "are naturally dressed in coats and ties". The dress standard in the public bar is not as strict as it is frequented by building workers.

The Exchange Bar aims to attract "business people" and caters for those with expense accounts, charge cards, private or inhouse accounts and Mr McEvoy testified that those people would not come there if "the guys dressed in work clothes". Even in the public bar, the dress of patrons is "still predominantly suit and tie". Work clothes or anything of that nature are not permitted in either bar.

The tavern generally opens at 11 in the morning. On Monday, Tuesday and Wednesday of each week, the public bar is closed down "quite early" that is about 7.30 to 8 p.m. and the stragglers in that bar are permitted to "drift in" to the Exchange Bar where they will usually have one drink and then go. The biggest trade in the tavern is on a Friday evening.

On Mondays, Tuesdays and Wednesdays, the dress standards are more flexible at closing time although work boots, shorts or singlets are never permitted.

Mr McEvoy testified that on Thursday and Friday evenings the dress standards are more stringently enforced in the Exchange Bar to "keep the smarter set of the executives .....happy. They like to be together and they like to look around and see people well dressed, and enjoying that environment." These instructions are given to staff.

There was no evidence that the Respondents or any of the Respondents' employees were aware of the Equal Opportunity Act. Further, there was no evidence given at the hearing as to what instructions or training, if any, concerning Aboriginal people were given to the Respondents' employees.

Mr Turner was not asked whether he would consider Mr Heath to be an Aboriginal or of Aboriginal descent.

## THE LAW

Discrimination on the ground of race is proscribed in Part III of the Act -

*S.36 (1) For the purposes of this Act, a person (in this subsection referred to as the "discriminator") discriminates against another person (in this sub-section referred to as the "aggrieved person") on the ground of race if, on the ground of-*

- (a) the race of the aggrieved person;*
- (b) a characteristic that appertains generally to persons of the race of the aggrieved person; or*
- (c) a characteristic that is generally imputed to persons of the race of the aggrieved person,*

*the discriminator -*

- (d) treats the aggrieved person less favourably than in the same circumstances, or in circumstances that are not materially different, the discriminator treats or would treat a person of a different race; or*
- (e) segregates the aggrieved person from persons of a different race..."*

Racial discrimination in relation to access to places (e.g. a tavern) is covered by Section 45

*It is unlawful for a person (in this section referred to as the "discriminator") to*

*discriminate against another person (in this section referred to as the "aggrieved person") on the ground of race -*

- (a) by refusing to allow the aggrieved person access to or the use of any place or vehicle that the public or a section of the public is entitled or allowed to enter or use, for payment or not;*
- (b) in the terms on which the discriminator is prepared to allow the aggrieved person access to or the use of any such place or vehicle;*
- (c) by refusing to allow the aggrieved person the use of any facilities in any such place or vehicle that the public or a section of the public is entitled or allowed to use, for payment or not;*
- (d) in the terms on which the discriminator is prepared to allow the aggrieved person the use of any such facilities; or*
- (e) by requiring the aggrieved person to leave or cease to use any such place or vehicle or any such facilities.*

Racial discrimination in the provision of goods and services is covered by Section 46 -

*It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's race-*

- (a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person;*
  - (b) in the terms or conditions on which the first- mentioned person provides the other person with those goods or services or makes those facilities available to the other person;*
- or*
- (c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.*

The Complainant does not have to establish that race was the only (nor even the major) ground for the decisions or conduct of which he complains because Section 5 of the Act specifically provides that -

*"A reference in Part II, III, IV or IVa to the doing of an act by reason of a particular matter includes a reference to the doing of an act by reason of 2 or more matters that include the particular matter, whether or not the*

*particular matter is the dominant or substantial reason for the doing of the act."*

The First and Third Respondents are bodies corporate. The liability of a body corporate may be established under Section 162(1) of the Act which is in the following terms -

*"(1) Where, for the purposes of this Act, it is necessary to establish that a body corporate has done an act on a particular ground, it is sufficient to establish that a person who acted on behalf of the body corporate in the matter so acted on that ground."*

In these proceedings the Complainant bears the onus of proof. He must establish his case on the balance of probabilities. (O'Callaghan v Loder (1984) EOC 92-204).

For a complaint of racial discrimination to be made out the Act requires proof that less favourable treatment was accorded the Complainant "on the ground of" his race. Here therefore, Mr Heath must show the fact of his Aboriginality had a proximate bearing on the relevant decision, act or omission and had a causally operative effect on such (*see Director General of Education v Breen (1984) EOC 192-015 per Street C.J. and Clarkson v the Governor of the Metropolitan Prison and Anor (1986) EOC 92-153).*

Furthermore, the act or omission which constitutes discrimination must be shown to be advertent and done with knowledge of the relevant characteristic. In this case the relevant characteristic is the Complainant's Aboriginality - *see Jamal v The Secretary, Department of Health and Anor (1988) EOC 92-234.*

## FINDINGS



The Tribunal has no doubt that Mr Heath sincerely believed he was requested to move into the public bar because of his Aboriginality. His evidence was unshaken on this point. His undisputed testimony was that he telephoned his sister immediately on reaching home to ask her advice on what he could do and on being told the Commission may be able to assist, he made a verbal complaint the next day. Thereafter on 19 September 1989, he made a written complaint. He has persevered with his complaint for a period of nearly 2 years.

Notwithstanding Mr Turner's inability to recall the incident, it would appear from Mr McEvoy's evidence that he was the only barman on duty at the Exchange Bar at the relevant time and he generally fits the description of the barman with whom Mr Heath dealt. The Tribunal finds that Mr Turner was the barman at the relevant time. Mr Turner was questioned in hypothetical terms as to his manner of dealing with a patron who did not fit the dress requirements of the Exchange Bar. That is outlined above. He denied any prejudice against Aboriginal people, testifying that his brother married an Aboriginal woman and he mixed socially with her and her family. He also claimed to have friends of Asian descent and disclaimed prejudice against any race. He agreed under cross examination that it would be easier to tell a person that he had no tie on but later said he considered the approach to be rude and would deal with the customer as outlined above. Mr Turner has only had cause to call the police once to the Exchange Bar and that was to deal with a drunken and violent patron. He denied that he would threaten to call the police if a customer was reluctant to move to the other bar.

Mr Turner's evidence was unchallenged in cross examination. He had not spoken to Mr

McEvoy about the matter although he did have some recollection of some mention being made of an incident within 2 months of the alleged incident the subject of Mr Heath's claim. He testified in a frank and forthright manner (as did all witnesses). There was nothing in Mr Turner's evidence which caused the Tribunal to doubt it.

Even if Mr Heath's evidence is accepted in totality, it does not establish on the balance of probabilities that Mr Heath was treated less favourably than he would have been if he were not an Aboriginal person. His perception that he was discriminated against is not enough to discharge the burden of proving discrimination on the balance of probabilities. There is a paucity of objective evidence to support his perception. The only evidence which could possibly be interpreted as supporting his perception that he was discriminated against is his evidence that he asked the barman "have you got something against Aborigines?" The Respondents' Counsel in his written submissions to the Tribunal argued, in substance, that such a significant statement is one which would surely have been mentioned in his statement made on 19 September 1989 when the incident was admittedly fresher in his mind. There is merit in this observation. However, Mr Heath testified that he wrote out the statement at the request of somebody (probably from the Commission). Nobody assisted him. The statement was written from memory and was not the result of a question and answer procedure. He stressed that he was "not in the habit of making out statements" and was "not an expert at making statements". This statement was "one of the few statements" he had ever written out.

Given that evidence, the Tribunal does not attach any great significance to Mr Heath omitting his question to the barman from his statement. It is also noteworthy that he did

not describe the barman in his statement and that was an important omission.

The Tribunal is prepared to accept Mr Heath's evidence that during the course of the conversation with the barman, he did ask the question "have you got something against Aborigines?" However, that is not of itself sufficient to prove that he was discriminated against. Taken in conjunction with Mr Heath's evidence that other patrons were casually dressed at the time, the totality of Mr Heath's evidence does not prove on the balance of probabilities that he was discriminated against.

It is possible that Mr Heath, in light of previous prejudice, has been overly sensitive and jumped to the conclusion that he was discriminated against in this instance. It is possible that because of his haste and his admitted annoyance in being asked to go to another bar that he has misinterpreted the request of the barman. However, these are possibilities only and the Tribunal makes no finding as to either possibility.

The Tribunal finds that the Complainant has not discharged the onus of proving on the balance of probabilities that he was discriminated against. That is not to say that the Tribunal disbelieves Mr Heath's evidence or discounts his perception of discrimination. However, his allegation is simply not proved to the required standard.

The Tribunal recognises that it takes a great deal of courage and commitment to pursue a claim of discrimination on the grounds of race. There mere acknowledgment of the possibility of discrimination and the public allegation of discrimination has the potential of diminishing self esteem.

It is regrettable that this matter has taken nearly two years to be heard. Memories fade, witnesses are unable to be located or become unavailable. Further, it is most desirable that allegations of discrimination are resolved quickly - justice should always be swift and sure and it is potentially unjust for a Respondent such as a tavern business to operate under the stigma of an allegation of discrimination, - equally, if not more so, for a person to pursue a claim of discrimination wondering if he or she will be believed. This was not a complicated factual issue and it would have served the interests of both the Complainant and the Respondents had it come on for hearing much earlier. However, as the Tribunal is unaware of the reasons for the lapse of the time between the complaint and the hearing these observations should not be necessarily seen as adversely critical.

## CONCLUSION

The issue of racial discrimination is one which all Australians must confront. Hotels, taverns and bars and the hospitality industry in general must be aware of the risks certain policies and practices (such as dress requirements) carry concerning racial discrimination. Staff training and monitoring of staff practices are essential to avoid racial discrimination which often takes a very subtle form. It is hoped that the tavern in this case and other similar establishments will carefully examine their policies with respect to dress and other standards required with a view to avoiding the risk and indeed the occurrence of either indirect or direct racial discrimination.

The Tribunal dismisses the Complainant's claim for the reasons stated herein.

**REASONS FOR DECISION (Ms P. Harris, dissenting)**

I would uphold the complaint for the following reasons.

It is clear that the success of the Exchange Bar is predicated on its operation as an 'exclusive' establishment. The staff therefore make fine judgements and distinctions concerning those they wish to encourage and those they wish to exclude. This was clear from the evidence of Mr McEvoy with his many references to 'different types of people', his judgements about dress standards and their varying appropriateness, his capacity to justify variations in policy and to defer to what he believed to be his established clientele's wishes.

The evidence also indicated that dress was only one of the ways of assessing customers and that the dress standards themselves were somewhat variably applied. Thus Mr McEvoy acknowledged that standards could be relaxed for established patrons, that different standards applied on Monday, Tuesday, and Wednesday; and that certain casually dressed patrons could drink 'dog bolter beers' in the Exchange Bar when the front bar wasn't open. Ties were not necessarily a requirement and staff therefore interpreted what, in fact, constituted smart casual dress.

It thus became evidence that staff made some assessment of the status of customers, their likely benefit to the Tavern as future patrons, and their acceptability to the established clientele. Such judgements would have to be made quickly and on the basis of a person's

appearance, if most particularly, their dress. In circumstances such as these, there is an inherent likelihood that racial appearance will act as one of the social cues used by staff to indicate the desirability or otherwise of a customer. This for two reasons. First because the physical differences associated with race constitute highly visible points of demarcation which are widely used as bases of social evaluation. Secondly, because styles and choice of dress are not independent of racial group.

It is in this context that the combination of factors that caused Mr Turner to request Mr Heath to move to the front bar needs to be considered. A variety of factors are relevant here. In the first place, Mr Turner's evidence indicated that, during his short training at the Foxy Tavern, he had learned to make and enforce quick judgements based on his own assessment of appearance. Secondly, because styles and choice of dress are not independent of racial group.

It is in this context that the combination of factors that caused Mr Turner to request Mr Heath to move to the front bar needs to be considered. A variety of factors are relevant here. In the first place, Mr Turner's evidence indicated that, during his short training at the Foxy Tavern, he had learned to make and enforce quick judgements based on his own assessment of appearance. Secondly, Mr Heath was a sober and undemanding customer, smartly dressed even though he was not in the 'suit and tie' apparel of many of the male Allendale office workers. Finally, custom was brisk and Mr Turner approached Mr Heath very rapidly. This suggests that there was something about Mr Heath that immediately suggested to Mr Turner that he was the 'wrong' kind of client for the Exchange Bar.

The question which the Tribunal faces is whether this assessment had anything to do with race. In this context one of three interpretations of Mr Turner's actions are theoretically possible. First, Mr Turner did not in fact 'see' Mr Heath's Aboriginality in the sense that race was simply not material to his considerations. Secondly, Mr Turner did react to the fact that Mr Heath was Aboriginal, but his decision was nevertheless based purely on the basis of dress. Thirdly, Mr Turner did recognise that Mr Heath was Aboriginal and this was one of the factors included in the social assessment he had learned to make. While the first two interpretations are innocent under the Act, the third is not.

The first interpretation is the one on which the Respondents' case appears predominantly to rest. It asks us to accept that, on the balance of probabilities, Mr Turner made his evaluation purely on the basis of dress, and that Mr Heath's Aboriginality played no part in his deliberations because he neither reacted to nor registered Mr Heath's race in any important sense. This interpretation, however, appears unlikely. It was not seriously suggested by the Respondents that Mr Heath was not recognised as Aboriginal by Mr Turner. Given this, and the prominence attached to Aboriginal/non Aboriginal relations in Australian society, it does not seem plausible to suggest that race played no part in Mr Turner's reflections one way or another.

The second interpretation - which sets out the possibility that Mr Turner did recognise that Mr Heath was Aboriginal but that his decision was nevertheless based purely on the basis of dress - is not, however, easily sustained by the Respondents' own evidence. For a non-Aboriginal person to request an Aboriginal person to move from the bar (particularly when his or her dress standards are not breaking the advertised minimum

requirements and others are also informally dressed) is surely a difficult task wide open to misinterpretation. Therefore, had Mr Turner recognised Mr Heath as Aboriginal but nevertheless decided to act on the basis of his dress, one would expect him to have some recollection of his decision, of weighing it up and of thinking about the best way in which to explain it to Mr Heath. In fact Mr Turner reported having only a vague and uncertain recollection of the incident when questioned some time later.

I therefore turn to the third interpretation which suggests that Mr Turner did recognise that Mr Heath was Aboriginal and that this was one of the factors involved in his decision. There are two reasons for believing that this was likely to have been the case.

First, Mr Heath's standard of dress was not one to clearly and automatically debar him from the bar. He did not, for example contravene the standards advertised on notices placed outside the bars (prohibiting, on various occasions, work clothes, boots, thongs, and singlets). This suggests that there was something about Mr Heath that rapidly marked him off in Mr Turner's eyes as different. Racial differences provide just such basic social demarcations and, as already argued, Mr Turner's suggestion that they played no part in his decision, one way or another, lends plausibility to the supposition that they may have done.

Secondly, racial differences are expressed in styles of dress and general social presentation as well as in physical variations. It therefore needs to be asked whether or not Mr Turner's assessment of Mr Heath's dress was itself racially neutral. Given that Mr Heath infringed none of the required minimum standards, Mr Turner's assessment



would necessarily have been in relation to the 'smart casual' standard which was required of patrons not wearing suits and ties. Assessing clothing standards in this way is a subjective, value laden, process which carries with it an inherent risk of the imposition of ethnocentric standards. Was this true of Mr Turner's assessment?

In answering this question, it is important to remember that Mr Heath was returning from a celebration at the Aboriginal Medical Service and had dressed for the occasion, considering himself better clothed than most of those drinking at the Exchange Bar. In contrast, Mr Turner did not deem Mr Heath sufficiently well dressed to meet the required standards. The fact that these two different judgements can thus be related to two different institutional settings indicates that cultural assessments are involved. Effectively Mr Heath's choice of clothing was considered not only *different* by Mr Turner but in some way *inferior*, and he thus imposed the culturally specific standards of the Exchange Bar on a patron who had chosen his clothing with care for a celebration involving his own people.

It is important to recognise, however, that Mr Turner was acting as the agent of the policies in place at the Exchange Bar of the Foxy Lady Tavern, policies which had been designed to attract, in the respondents' own words, an 'up market/executive clientele'. Such a definition is unlikely to include many Aboriginal patrons at this time of Western Australian history, and any Aboriginal people choosing to drink at the Exchange Bar would be expected by the management to conform to standards established by and for a non-Aboriginal elite. The decisions which Mr Turner made reflected this and were, in this sense, 'correctly' carried out. The onus of responsibility for his actions, and for the

contravention of the Act, thus lies with the policies behind them.

One last point needs to be made. It has already been indicated that the policies employed at the Exchange Bar left themselves wide open to misinterpretation because of their exclusionary and variable nature. The underlying rationale behind rules designed to include some and exclude others is always subject to misapprehension and the opportunity for confusion grows if such rules are variously applied. The critical issues in this context is that such a situation is particularly ambiguous to members of a minority race. If they are asked to move while others in apparently similar dress remain, a humiliating and understandable fear that race is the causal factor is predicably generated given the prevalence of discriminatory practices in Australian society. Unless a sustained and sensitive attempt is made to explain the decision, the treatment afforded to minority group members is, then, less favourable than that provided to white Australians in similar circumstances (given that the latter have no comparable reason for believing that they are subject to unfair treatment on the basis of race). In this way, the operation of exclusionary rules, with no accompanying attempt to allay their disproportionate effects on minority group members, constitutes less favourable treatment and is contrary to S.46(b)(c) of the Act.

The evidence indicates that the exchange between Mr Turner and Mr Heath was brief and unsatisfactory, with Mr Turner's difficulty in recollecting the incident also suggesting that no attempt was made to be sensitive to Mr Heath's position. As a result, Mr Heath reached the reasonable and unwelcome conclusion that his Aboriginality was behind the request that he move to the front bar and he suffered stress and humiliation as a result.

Even if he had reached the wrong conclusion, he was in this sense treated less favourably than a white Australian in similar circumstances. The capacity to restrict services to an exclusive clientele imposes on the rule makers the obligation to ensure that their practices do not inflict unnecessary distress on minority group members.