

SUPREME COURT OF VICTORIA

COURT OF APPEAL

No. 3751 of 2005

CATCH THE FIRE MINISTRIES INC,
DANIEL NALLIAH and DANIEL SCOT

Appellants

v.

ISLAMIC COUNCIL OF VICTORIA INC
and

Respondent

ATTORNEY-GENERAL FOR THE STATE
OF VICTORIA

Intervenor

JUDGES: NETTLE, ASHLEY and NEAVE, JJ.A.
WHERE HELD: MELBOURNE
DATES OF HEARING: 21 and 22 August 2006
DATE OF JUDGMENT: 14 December 2006
MEDIUM NEUTRAL CITATION: [2006] VSCA 284

RELIGIOUS VILIFICATION - Seminar and articles concerning the religious beliefs of Muslims - Whether presentation of seminar or publication of articles inciting hatred against, serious contempt for or revulsion or severe ridicule of Muslims on the ground of religious belief - Whether conduct engaged in reasonably and in good faith for a genuine religious purpose - *Racial and Religious Tolerance Act 2001*, ss.8, 9 and 11

Judgment Orders and Declarations - Order - Order to publish notice in the nature of corrective advertising - Whether power to make orders under s.23 of the *Racial and Religious Tolerance Act 2001* includes power to make orders in the nature of corrective advertising - Whether order in any event objectionable as lacking specificity - *Racial And Religious Tolerance Act 2001*, s.23; *Equal Opportunity Act 1995*, s.136(a)(iii)

Constitutional Law (C'th) - Implied freedom of communication about government or political matters - Prohibition on engaging in conduct which incites hatred against, serious contempt for or revulsion or severe ridicule of a group of persons on the ground of religious belief - Whether capable of burdening implied freedom - Whether reasonably appropriate and adapted to serve legitimate end - *Racial and Religious Tolerance Act 2001*, s.8.

APPEARANCES:

Counsel

Solicitors

For the Appellants

Mr C.C. Macaulay, S.C. with
Dr K.L. Emerton

Moores Legal

For the Respondent

Mr W.B. Zichy-Woinarski, Q.C.
with Ms D.S. Mortimer, S.C.
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Allens Arthur Robinson

For the Intervenor

Ms Pamela Tate, S.C., S.G., with
Ms K.L. Walker

Victorian Government
Solicitor

NETTLE, J.A.:

1 This is an appeal from Orders of the Victorian Civil & Administrative Tribunal (“the Tribunal”) made on 22 June 2005 and 9 August 2005. Leave to appeal was granted by the Court on 19 August 2005.

2 The first appellant, Catch the Fire Ministries Inc, is a registered non-trading incorporated association which carries on Christian ministry on an Australia-wide basis. The second appellant, Pastor Nalliah, is a full-time registered pastor of the Assembly of God of Australia and a director and the public officer of Catch the Fire Ministries. The third appellant, Pastor Scot is an accredited pastor of the Assemblies of God Church in Australia. He is also a director of Ibrahim Ministries International which is an incorporated non-profit religious organisation and, according to the evidence which he gave before the Tribunal, he has undertaken extensive personal study of the Koran and his main role as a pastor is to speak and teach at seminars and other such gatherings to groups of Christians. The respondent, Islamic Council of Victoria Inc, is an incorporated association that represents Muslims and Islamic societies in Victoria and is the Victorian constituent member of the Australian Federation of Islamic Councils. The Attorney-General of the State of Victoria intervened pursuant to s.78A(1) of the *Judiciary Act* 1903 (Cth).

3 The proceeding before the Tribunal was instituted by a complaint by the Islamic Council of Victoria against Catch The Fire Ministries, Pastor Nalliah and Pastor Scot, that they had engaged in conduct which contravened s.8 of the *Racial and Religious Tolerance Act* 2001 (“the Act”).

4 The impugned conduct consisted of:

- 1) Statements made by Pastor Scot at a seminar presented by Catch the Fire Ministries on 9 March 2002 at the Full Gospel Assembly (YWAM Base) in Middlesex Road, Surrey Hills;

- 2) The publication by Catch the Fire Ministries of a newsletter dated “Summer 2001” and compiled by Pastor Nalliah; and
- 3) The publication by Catch the Fire Ministries on its website of an article entitled “An Insight into Islam by Richard” dated 24 September 2001.

The Islamic Council contended that the conduct incited hatred against, serious contempt for, or revulsion or severe ridicule of the Islamic faith.

5 The Tribunal held that the seminar taken as a whole incited hatred and contempt of and revulsion towards the religious beliefs of Muslims and thereby breached s.8 of the Act; that the statements made in the newsletter viewed objectively and in their totality were likely to incite a feeling of hatred towards Muslims and so breached s.8 of the Act; and that the content of the article, “An Insight into Islam by Richard”, when viewed objectively, incited hatred against and serious contempt for people who are Muslims and so too breached s.8 of the Act. On that basis, the Tribunal made orders in the nature of corrective advertising, to which it will be necessary to refer later in greater detail.

6 The grounds of appeal pressed in argument were as follows:

- (1) The Tribunal erred in the construction of s.8 of the Act;
- (2) A number of the Tribunal’s findings of fact were not open on the evidence;
- (3) Depending upon the correct construction of ss.8 and 11 of the Act, s.8 of the Act infringes the freedom to communicate concerning political and governmental matters which is said to arise from Part III of the Commonwealth Constitution.
- (4) In any event, the orders made by the Tribunal were beyond the jurisdiction of the Tribunal or alternatively not open to be made on the facts.

The Tribunal's construction of section 8

7 Section 8(1) of the Act provides as follows:

(1) A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons....

8 Before the Tribunal, the parties were agreed, and the Tribunal accepted that the test of whether conduct “incites” hatred or other relevant emotion within the meaning of s.8 is one of whether “an ordinary reasonable reader, who is not malevolently inclined or free from susceptibility to prejudice, would be inclined to hatred by the publication or conduct”.

9 The appellants now contend that the correct test is one which requires proof that persons were actually incited to hatred or one of the other specified emotions, and they say that there was none.

10 Before the Tribunal, the parties were also agreed, and the Tribunal accepted that the words “on the ground of” in s.8(1) are designed to create a causal connection between the impugned conduct and the religious belief or activity to which the section refers. In the Tribunal’s view they were similar in meaning to the word “because” in s.18C of the *Racial Discrimination Act 1975* (C’th). The Tribunal observed that s.9(1) provides that a person’s motive in engaging in any conduct is irrelevant and that s.9(2) provides that the religious belief or activity of another does not have to be the only or even dominant ground for the conduct, but that it must be a substantial ground. The Tribunal remarked that, as a consequence, the extent of connection between the conduct and the religious belief may be open to various interpretations. The Tribunal was, however, of the clear view that the conduct in this case had been engaged in “because of the religious beliefs and activities of Muslims who adhere to the religion of Islam.”

11 In this appeal the appellants argue against that construction and submit that

the words “on the ground of the religious belief or activity of another person or class of persons” imply a need for connection between religious beliefs and the hatred or other emotion which may be incited.¹ The appellants contend that, despite the construction which the Tribunal said that it put on s.8(1), the Tribunal erred in fact by failing to draw a distinction between an attack on a person’s or group of persons’ religious beliefs and an attack on persons who adhere to those religious beliefs.

The meaning of “incites”

12 The ordinary reasonable reader test of whether conduct “incites” hatred came from the decision of the New South Wales Administrative Appeals Tribunal in *Kazak v. John Fairfax Publications Ltd*² concerning s.20C of the *Anti-Discrimination Act 1977* (N.S.W.). That section provided that:

“It is unlawful for a person, by public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group.”

13 The New South Wales Tribunal took the view that the word “incites” in s.20C should be given its ordinary meaning of “urge, spur on...stir up, animate, stimulate to do something.”³ It also held that the operation of s.20C was not limited to what it called “actual incitement” and thus that it was sufficient to engage the operation of s.20C that conduct appear as likely to stimulate hatred, serious contempt or serious ridicule. That meant, it was said, that one was to ignore any special characteristics or proclivities to which the audience or potential audience might be subject and to assess the matter by reference to the standard of the “ordinary reasonable reader”. In other words, one was to assume a “person of fair average intelligence who is not perverse, morbid, suspicious of mind or avid for scandal”.⁴

¹ See *Waters v. Public Transport Corporation* (1991) 173 C.L.R. 349 at 400-401.

² [2000] NSWADT 77.

³ Based upon the Oxford Shorter English Dictionary.

⁴ [2000] NSWADT 77 at [31].

14 In my view, however, that reasoning is not altogether apposite in relation to s.8 of the Act. I accept that “incites” in s.8 means “urge[s], spur[s] on...stir[s] up animates[s] or stimulate[s]”. That accords with the plain and ordinary meaning of the word and also with the criminal law’s conception of incitement, upon which s.8 appears loosely to be based. I also allow that incitive conduct is capable of contravening s.8 without necessarily causing hatred or serious contempt or revulsion or serious ridicule. As with the common law criminal offence of incitement, I view s.8 as directed to inchoate or preliminary conduct, whether or not it causes the kind of third party response it is calculated to encourage.⁵ In that sense, the section is prophylactic. But that said, I do not accept that one should exclude from consideration the nature of the audience to whom the conduct is directed.

15 The idea of the “ordinary reasonable reader” belongs to the law of defamation.⁶ It has as its object the protection of individuals against false allegations calculated to lower them in the esteem of their fellows.⁷ Contrastingly, s.8 does not prohibit statements about religious beliefs *per se* or even statements which are critical or destructive of religious beliefs. Nor does it prohibit statements concerning the religious beliefs of a person or group of persons simply because they may offend or insult the person or group of persons. The proscription is limited to that which *incites* hatred or other relevant emotion and s.8 must be applied so as to give it that effect.

16 Evidently, there can be no incitement in the absence of an audience.⁸ It is not a contravention of s.8 to utter exhortations to religious hatred in the isolation of an empty room. If conduct is to incite a reaction, it must reach the mind of the audience. And if conduct is to be perceived as inciting a particular reaction, it must

⁵ *R. v. Quail* (1866) 4 F.&F. 1076; 176 E.R. 914; *R. v. Krause* (1902) 66 J.P. 121; Glanville Williams, *Criminal Law, The General Part*, 2nd Ed. at [195], and see *R. v. Dimozantos* (1991) 56 A.Crim.R. 345 at 349, concerning incitement under s. 321G of the *Crimes Act 1958*.

⁶ *Gardiner v. John Fairfax & Sons Pty Ltd* (1942) 42 S.R.(N.S.W.) 171 at 172.

⁷ Fleming, *The Law of Torts*, 9th Ed. at 522-3.

⁸ Either in the ordinary sense of incitement or in the criminal sense: *Horton v. Mead* [1913] 1 K.B. 154 at 158, per Phillimore, J.

reach the mind of an audience as something which encourages that reaction. So, for conduct to incite hatred or other relevant emotion it must reach the mind of an audience as something which encourages those emotions. So, therefore, the question of whether it has that effect will depend upon the perception of the audience.

17 Of course, where statements are published generally as they might be in a book or newspaper or by posting on a web site, one may need to have regard to all manner of persons who are likely to see them and absorb them.⁹ But it is otherwise where the audience is select. Thus, for example, it is conceivable that a statement made about religious beliefs in the course of a talk-back radio broadcast could run foul of s.8 of the Act while the same thing said as part of intellectual discourse within a seminary or faculty of theology would not have that effect. And examples can be multiplied.

18 In my view, one may usually assume a degree of reasonableness.¹⁰ Parity of reasoning with the law relating to misleading and deceptive conduct suggests that s.8 has in view the effect of conduct on a reasonable member of the class of persons to whom the conduct is directed.¹¹ But, for the reasons already expressed, the perception of a reasonable member of the class of persons to whom conduct is directed will not always be the same as the perception of the so-called ordinary reasonable reader. Whatever the circumstances, it will in each case be necessary to consider the audience and bring it to account.

19 So to say does not deny “the ordinary reasonable reader” a role in the assessment of religious vilification. As will be seen, he or she or at least something very like them has a large role to play in the application of s.11. But for the purposes of s.8 I think the test is different. It is a question of whether the natural and ordinary effect of the conduct is to incite hatred or other relevant emotion in the circumstances of the case.

⁹ *Gerhard v. Bates* (1853) 2 El & Bl 476; 118 E.R. 845.

¹⁰ But see [118] below.

¹¹ *Parkdale Custom Built Furniture Pty Ltd v. Puxu* (1981) 149 C.L.R. 191 at 199, per Gibbs, C.J.

The meaning of “on the ground of religious belief”

20 As has been noticed, the Tribunal construed the words “on the ground of religious belief” as necessitating a causal connection between the religious belief of the person or group of persons against whom the hatred is incited and the conduct by which the hatred is incited. In so doing, the Tribunal said that it considered that the meaning of the words “on the ground of” in s.8 were not dissimilar to the word “because” in s.18C of the *Racial Discrimination Act 1975* (C’th) and therefore were to be interpreted, as French, J. interpreted “because” in *Bropho*,¹² as requiring a causal connection between the impugned conduct and the status of the person against whom the conduct is directed.

21 With respect, however, I think that there are problems with that interpretation. To begin with, French, J. did not so much interpret “because” in s.18C as follow the approach taken by Kiefel, J. in *Creek v. Cairns Post Pty Ltd*,¹³ (which was later approved by the Full Court of the Federal Court in *Toben v. Jones*).¹⁴

22 Secondly, as French, J. observed, Kiefel, J.’s analysis was based on McHugh, J.’s interpretation of s.17(1) of the *Equal Opportunity Act 1984* (Vic)¹⁵ in *Waters v. Public Transport Corporation*.¹⁶ McHugh, J. considered that the words “on the grounds of status or by reason of the private life of the other person” in s.17(1) required the act of the discriminator to be activated by the status or private life of the person alleged to be discriminated against, in the sense that it be one of the factors which caused or moved the discriminator to act as he did. But McHugh, J. was in the minority. The majority considered that it would significantly impede or hinder the attainment of the objects of the *Equal Opportunity Act 1984* if s.17(1) if one were to

¹² (2004) 135 F.C.R. at 125.

¹³ (2001) 112 F.C.R. 352 at 358.

¹⁴ (2003) 129 F.C.R. 515 at 525, per Carr, J.

¹⁵ Section 17(1) of the *Equal Opportunity Act 1984* provided that:

“A person discriminates against another person ... if on the grounds of the status or by reason of the private life of the other person the first mentioned person treats the other person less favourably”

¹⁶ (1991) 173 C.L.R. 349 at 401.

adopt that approach. They held that it was enough that a material difference in treatment be based on the status or private life of the person less favourably treated.¹⁷ With respect, I prefer the majority view.

23 Thirdly, it appears to me that s.9(1) of the Act, by expressly providing that a person's motive in engaging in any conduct is irrelevant, confirms that "on the ground of" in s.8(1) is to be interpreted as the majority interpreted those words in the *Equal Opportunity Act* in *Waters*. In effect, it gives statutory force to the view first expressed by the House of Lords in *R. v. Birmingham City Council*¹⁸ and later adopted by Deane and Gaudron, JJ. in *Australian Iron & Steel Pty Ltd v. Banovic*¹⁹ and then by Mason, C.J. and Deane and Gaudron, JJ. in *Waters*, that intention or motive to discriminate (or in this case to engage in conduct which incites hatred), though it may be relevant so far as remedies are concerned, is not a necessary condition of liability.

24 In anti-discrimination legislation in general it is necessary and sufficient that conduct be engaged in on the ground of the status or attributes of the person and, except for remedies, it is irrelevant what moves or actuates the conduct.²⁰ So too, in my opinion, under s.8 of the Act it is both necessary and sufficient to engage the operation of the section that conduct incite hatred or other relevant emotion towards a person or group of persons which is based on their religious beliefs and, except for remedies, it is irrelevant what moves or actuates the conduct.

The Tribunal's reasoning

25 The Tribunal referred at some length to sections of the Seminar transcript and to a tape recording of the Seminar and, based on that material, concluded that Pastor Scot had made the following statements at the Seminar in contravention of s.8,

¹⁷ (1991) 173 C.L.R. 349 at 359, per Mason, C.J. and Gaudron, J. and at 382, per Deane, J.

¹⁸ [1989] A.C. 1155.

¹⁹ (1989) 168 C.L.R. 165 at 176.

²⁰ A large number of the authorities are analysed in the judgment of Chernov, J.A. in *Kapoor v. Monash University* (2001) 4 V.R. 483 at 484[3]-[47].

namely:

- (1) That the Qur'an promotes violence and killing - p.4; looting, killing and destroying people - good for Muslim people - p.24.
- (2) Muslim scholars misrepresent what the Qur'an says by varying the emphasis, depending upon the audience - pp.4-5.
- (3) That the Qur'an teaches that women are of little value, e.g.:
 - (a) woman is like a field to plough, use her as you wish - p.6;
 - (b) in the Hadith Bukhari woman, dog and donkey are of equal value influencing prayer of a Muslim man - p.7.
- (4) That Allah is not merciful. The thief's hand is cut off for stealing. Mohammed did not spare anybody. Amputation occurs for even the stealing of an egg - p.10.
- (5) Muslims lie for the sake of Islam and that it is "all right", they have to hide the truth - pp.10.
- (6) Muslims are demons - pp.13-14.
- (7) The practice of abrogation, that is cancellation of words from the Qur'an and Hadiths solely to fit some particular purpose or personal need - pp.14-17.
- (8) The concept of Silent Six Jihad, some of which are use of business connections - p.6; using money to induce people convert to Islam - p.17; training of Muslims in Madrassahs, and the statement there are millions of people right now under training in Madrassahs, implying a threat to Australia - 18.
- (9) People do study for six to seven years they become true Muslims. And we call them terrorists, but they are true Muslim; they have read the Qur'an, they have understood it and now they are practising it, that is the connection between the Qur'an and terrorism - p.19.
- (10) Muslims intend to take over Australia and declare it an Islamic nation - p.23.
- (11) Mohammed trained the entire nation and he took literally, part in the Holy War. He showed Muslims how pleasant it is and if you are killed in the Holy War you can be brought back to life because dying as a martyr is such a wonderful thing - p.32; Allah will remit the sins of martyrs and bring them into paradise, a reference to a connection to suicide bombing - p.33; parents bringing up their children for martyrdom, where there is a reference to a teenage son will be a suicide bomber and if

killed he can intercede for his mother and father and relatives - p.34.

- (12) Muslim people have to fight Christians and Jews - p.38; humiliate them - p.39; fight them until they accept true religion - p.40.
- (13) After reference to the bombing of the Trade Centre in New York it is mentioned that the person who masterminded it stated that "The Holy War is the spirit, it is the soul of Islam. If you remove it, nothing left, so that is the truth about the matter" - p.43.
- (14) That the Qur'an states that Allah misleads and deceives people" - p.48, and referred to "Allah as the greatest deceiver" - p.50. The Qur'an states that there is a "list of sins which Muslims are not supposed to do, however if needed, then that's a different story", but we will look at later. Sin is a relative thing in Islam" - p.55, and that Allah says if you will not commit sin, Allah will destroy you - p.56.
- (15) That Muslims are taught that children should obey their parents, but if the parents are not Muslim, then children have a responsibility to mistreat them and to deal with them harshly, so when you are true Muslim, as you know David Hicks, you have heard of him, now he has responsibility to do that because he is true Muslim. So when true Muslim, you have to destroy your relative and so on, so that's the commandment of Allah, you cannot just ignore it - p.59-60.
- (16) There is a reference to the Qur'an allows the use by Muslims of prostitutes - p.60-61.
- (17) Allah says "Do not covet", that's a good thing, but then Allah says if you are true Muslim, Allah has promised you plenty of spoil, so you go for looting, you go for Holy War and Allah will give you a lot of spoil - p.64. "That the Qur'an allows a Muslim to have a child wife because the holy prophet was in his fifties when he married a seven year old girl." - p.71.
- (18) "That Muslims derive money from drugs, so they make a lot of money and they can spread Islam and fulfil their desire" - p.71.
- (19) Refers to the fact that it was thought that he was Muslim and had converted to Christianity, what would be the responsibility of fundamentalists in that respect, to which the audience said "Kill, kill" p.86. That in Australia in Islamic houses violence is very common because they know that beating is not wrong according to the Qur'an. Allah says "Scourge your wife" - p.95. That Muslims in Australia double their population in less than seven years. They are growing because they control the Immigration Department - p.97.

The Tribunal also made reference to some statements made at the Seminar about accepting, tolerating, reaching out to and loving Muslim people, but said that those things did not alter its view. As the Tribunal put it:

“It should be noted that from time to time there is talk of witnessing to Muslims. There is also talk about how to socialise with them and to do all things necessary to convert them to Christianity. However, if one looks at objectively what took place and applied the test set out in [Kazak], then I am of the view that the Seminar taken as a whole, breaches section 8 of the Act because it incites hatred, contempt and revulsion, because of the religious beliefs of Muslims. Furthermore, there are many passages in the transcript which are designed to ridicule Muslims. These statements about Muslims and their religious beliefs and practices produce laughter from the audience. Examples are contained at pp.18-19, 33, 37, 44, 46, 48. As an example, it is stated that Allah has 99 names and the Hadith “tells us Allah has actually hundred names, but the hundredth name is not known to Muslim people, that’s only known to a camel. So you have to inquiry from a camel to find out the hundredth name”. There are numerous other stories throughout the seminar of a similar kind, and looked at objectively, are designed to ridicule Muslims and their beliefs.

In support of the view that much of the Seminar was concerned with the witnessing to Muslims, reference should be made to the evidence of the witness Mathews, who states that the prominent feature of the Seminar was an injunction to love Muslims. It may well be that this was part of the reason for the Seminar. However, it does not fit well with an examination of the substantial part of the Seminar, which is clearly anti-Muslim. On any view it mocks their religious beliefs and practices, that is, that they live their lives substantially in accordance with Qur’anic injunctions. Although I have serious reservations about the explanation about witnessing to Muslims, I am prepared to accept that, viewed objectively, it could be accepted as such. However, that fact does not justify what was otherwise said by Pastor Scot.”

The Tribunal did not at that point mention whether it took into account any statements of the latter kind that were included in the article and the newsletter. But much later in the reasons, after referring to an amount of expert evidence as to the accuracy of Pastor Scot’s statements concerning Muslim religious beliefs, the Tribunal returned to what had been said at the Seminar and stated that in addition to reading the transcript the Tribunal had listened to the tape recordings on a number of occasions, and that:

“...what the audio does is to produce a fairly significant alteration in the import of what was said by Pastor Scot. It is obvious, in my opinion, that the method of personal presentation can be a significant factor in the interpretation of what is meant to be conveyed by the speaker. Applying the objective test to which I have referred, I have found the oral presentation is a significant step or, more accurately, it is an important feature which demonstrates that Pastor Scot has, on the ground of the religious belief or activity of another person or class of person, engaged in conduct that incites hatred against, serious contempt for or revulsion or severe ridicule of that other class or class of persons. That class of persons are Muslims in general, but in respect to these proceedings Victorian Muslims.

“I have been assisted in making findings by the expert evidence which has been called in this case, namely Father McNerney, Professor Bouma and Dr Kazi. Furthermore, I’ve had regard to the evidence of Mr Thomas, Mr Jackson and Dr Eades. I have taken into account such evidence subject to limitations. Having said that, the issue of vilification could have been determined upon the basis of an objective assessment of the tapes of the seminar, and without regard to either the evidence of the lay witnesses or with very little reliance upon the expert evidence. However, the fact is that the three lay persons were present, heard what was said, and were able to describe the effect which it had on those present, and therefore the issue of incitement.

I find that the conduct of the seminar by Pastor Scot, when looked at objectively, and having regard to the context of the public act, and applying the test set out in [Kazak] at first instance, and that referred to in *John Fairfax Publications Pty Ltd v. Kazak* (2002) N.S.W.A.D.T.A.P. 35 at paragraph 16 constitutes a breach of section 8.”

...

Pastor Scot, throughout the Seminar, made fun of Muslim beliefs and a conduct. It was done, not in the context of a serious discussion of Muslims’ religious beliefs; it was presented in a way which is essentially hostile, demeaning and derogatory of all Muslim people, their god, Allah, the prophet Mohammed and in general Muslim religious beliefs and practices

Time and again this occurs and, on any view, produces a response from the audience at various times in the form of laughter.

...

The Seminar was not a balanced discussion. It was a process of taking literal translations from the Qur'an, and making no allowance for their applicability to modern day society. The ordinary, reasonable reader would understand from the public act, that he or she was being incited to hatred towards, or serious contempt for, or serious ridicule of a person on the ground of religion. As was indicated in [*Kazak*], many readers will disagree with the sentiments expressed by Pastor Scot, but that is not the test. The test is whether the ordinary reasonable reader who is not malevolently inclined or free from susceptibility to prejudice, would be inclined to hatred, ridicule, contempt or revulsion by reason of the presentation of the Seminar. I find that the evidence of the three lay witnesses is probative of the fact, that what was said amounted to incitement. The two lay witnesses called by the respondent had a different view, but I prefer the complainant's witnesses whose evidence I find to be more consistent with my listening to the tape."

28 Finally, the Tribunal referred in detail to the parts of the Newsletter and the article which it said were in contravention of s.8. So far as the Newsletter was concerned, the Tribunal determined that an article entitled "2002 - Will Australia be a Christian Country?" contravened the section because statements in it:

"Viewed objectively, and in their totality, these statements are likely to incite a feeling of hatred towards Muslims. They seek first of all to create fear in those who read the article of being harmed by Muslims. Further, the statement [t]hat they are increasing in numbers while, 'Aussies' are on the decline, suggesting that they are seeking to take over Australia, which is consistent by the quote said to be made by an Imam. I find that this breaches section 8 of the Act."

29 So far as the article was concerned, the Tribunal said that it was a clear breach of s.8 because it:

"...suggests that Islam is an inherently violent religion and it was not possible to separate Islam from terrorist groups. He implies that Muslims endorse the killing of people based upon their religion, *e.g.* the tribe of Jews referred to in the Qur'an. He characterises terrorism as the very nature of Islam itself and suggests that the prophet is a paedophile, that the Qur'an teaches that the killing of innocent people is sanctioned and it teaches hate, not love. There is no attempt in the article to distinguish between moderate and extremist Muslims. The content of the article, when viewed objectively, incites hatred against and serious contempt for people who are Muslims. Again, as with the Newsletter, I find that the respondent does not obtain the benefit of

the exemption because the person's conduct could not be regarded as reasonable, and in good faith."

Analysis of the Tribunal's reasoning

30 With respect, there are several aspects of that reasoning which I take leave to doubt. The first of them arises out of the adoption of the *Bropho* test and, consequently, the Tribunal's conclusion that the words "on the ground of [religious beliefs]" imply a causal connection between religious beliefs and impugned conduct. In effect the Tribunal decided that the Seminar contravened s.8 because the Tribunal was satisfied that Pastor Scot was moved or caused by the religious beliefs of Muslims to make the statements which he did at the Seminar, and that an ordinary reasonable person who was not malevolently inclined or free from susceptibility to prejudice would be inclined by Pastor Scot's statements to hate Muslims. But, for the reasons which I have given, I do not consider that that was the question which needed to be decided. In my view the question was whether, having regard to the content of the statements in the context of the whole of the Seminar, and to the nature of the audience in the sense that I have described, the natural and ordinary effect of what was stated was to encourage the hatred²¹ of Muslims based on their religious beliefs.

31 It is true that the Tribunal stated that it was satisfied that the Seminar as a whole "incites hatred, contempt and revulsion, because of their religious beliefs". But given that the Tribunal's reasoning was expressly based on the *Bropho* test, it is to be assumed that the Tribunal was there using the expression "because of their religious beliefs" in the same way that it had used it when defining the meaning of the words "on the ground of". That is to say, as representing a causal connection between the religious beliefs and the conduct.²²

²¹ Or other stipulated emotion.

²² Indeed on this appeal, the respondents submitted that it should be concluded that the Tribunal used the expression in that fashion.

32 The second difficulty, as I see it, is that, because the Tribunal adopted the *Bropho* test instead of directing itself to the question of whether the Seminar as a whole incited hatred of Muslims based on their religious beliefs, it did not give a great deal of consideration to the distinction between hatred of the religious beliefs of Muslims and hatred of Muslims because of their religious beliefs. The Tribunal appears to me to have assumed that the two conceptions are identical or at least that hatred or other relevant emotion of or towards the religious beliefs of Muslims must invariably result in hatred or other relevant emotion of or towards Muslims. In my view, that is not so.

33 I do not overlook that Muslims are defined by their religious beliefs - as persons who profess Islam²³- and therefore that to incite hatred or other relevant emotion of or towards the religious beliefs of a Muslim may result in hatred or other relevant emotion of or towards the Muslim. But it is surely not to be assumed that it must do so. Muslims are not the only class of persons who are defined by their religious beliefs. So are adherents to other faiths, including Judaism and Christianity.²⁴ And there are any number of persons who may despise each other's faiths and yet bear each other no ill will. I dare say, for example, that there would be a large number of people who would despise Pastor Scot's perception of Christianity and yet not dream of hating him or be inclined to any of the other stipulated emotions.

34 No doubt the purpose of the Act is to promote religious tolerance. But the Act cannot and does not purport to mandate religious tolerance. People are free to follow the religion of their choice, even if it is averse to other codes. One need only think of the doctrinal differences which separate the several Christian denominations or the Muslim sects in order to see the point. Equally, people are free to attempt to persuade other people to adopt their point of view. Street corner evangelists are a

²³ Which as the proper name of orthodox Muhamadism is understood as the manifesting of humility or submission and outward conformity with the law of God [Allah] : *Oxford English Dictionary*, citing Lane.

²⁴ Among others.

commonplace example. Rightly or wrongly, that is the nature of religion, or at least it is the nature of some religions as they are understood, and in this country it is tolerated. Accordingly, s.8 goes no further in restricting freedom to criticise the religious beliefs of others than to prohibit criticism so extreme as to incite hatred or other relevant emotion of or towards those others.²⁵ It is essential to keep the distinction between the hatred of beliefs and the hatred of their adherents steadily in view.²⁶ Beyond that, it is a matter for the law of defamation or the law relating to misrepresentation and misleading and deceptive conduct or, possibly, criminal sanctions.

35 The third difficulty with the Tribunal’s reasoning, as I perceive it, is that the Tribunal’s failure to observe the distinction between hatred of beliefs and hatred of adherents to beliefs has resulted in the Tribunal deciding the matter on the basis that the Seminar was not a “balanced” discussion of Muslim beliefs. Hence, the significance of the Tribunal’s observation, already referred to, that:

“The Seminar was not a balanced discussion. It was a process of taking literal translations from the Qur’an, and making no allowance for their applicability to modern day society.”,

and further observations, later in the reasons for decision, that:

“...I find that it constitutes a breach of section 8 of the legislation.

In that regard I have taken into account the evidence of Father McInerney and Dr Kazi which was to the effect that the conduct of the Seminar was not a fair representation of Islamic religious beliefs. I have also had regard to the views of Professor Bouma.

... interpretation of the Qur’an by Pastor Scot represented the views of a small group of fundamentalists, namely, Wahabbists, who are located in the Gulf states, and who are a minority group, and their views bear no relationship to mainstream Muslim beliefs and, in particular, Australian Muslims.”

²⁵ Cf. *R. v. Keegstra* [1990] 3 S.C.R. 697; (1990) 61 C.C.C. 3d 1 at 59e-60a; *Gunduz v. Turkey* [2005] 41 E.H.R.R. 5.

²⁶ The point is helpfully illustrated by Morris, J. in his decision as President of the Tribunal in *Robin Fletcher v. The Salvation Army Australia Southern Territory General Work*, [2005] VCAT 1523 [7] and [8].

The problem with that is that the verity of Pastor Scot's statements about the religious beliefs of Muslims was irrelevant to the matters in issue. The question for the purposes of s.8 was whether what was said by Pastor Scot taken as a whole and in context was such as to incite hatred of or other relevant emotion towards Muslims on grounds of their religious beliefs. Whether his statements about the religious beliefs of Muslims were accurate or inaccurate or balanced or unbalanced was incapable of yielding an answer to the question of whether the statements incited hatred or other relevant emotion. Statements about the religious beliefs of a group of persons could be completely false and utterly unbalanced and yet do nothing to incite hatred of those who adhere to those beliefs. At the same time, statements about the religious beliefs of a group of persons could be wholly true and completely balanced and yet be almost certain to incite hatred of the group because of those beliefs. In any event, who is to say what is accurate or balanced about religious beliefs? In point of fact, the most that could ever be said is that a given point of view may diverge to a greater or lesser degree from the mainstream of generally accepted views on the subject. In my view it was calculated to lead to error for a secular tribunal to attempt to assess the theological propriety of what was asserted at the Seminar.

The fourth difficulty with the Tribunal's reasons flows from the third. The Tribunal's concentration on the issue of whether Pastor Scot's statements represented a "balanced" presentation of the religious beliefs of Muslims, and the Tribunal's conclusion, based on Father McInerney's opinion, that they did not, appear to me to have resulted in the Tribunal disregarding significant aspects of Pastor Scot's statements which, at least arguably, went a long way to ameliorating any risk of inciting hatred of Muslims (even if they did nothing to redress the imbalance perceived by Father McInerney). Thus, to take the Tribunal's 19 findings as to what Pastor Scot said at the Seminar:

First finding

38 Pastor Scot did not say at T4 that that the Qur'an promotes violence and killing. He said that:

"... I have been asked to teach what the Qur'an teaches on subject of the Holy War. What is real belief in Islam concerning the Holy War.

The reason is that because there is so much teaching about jihad and we hear conflicting teaching on the subject. I have read, I have seen a few books on that but people who have written books, they have not much knowledge of Islam.

...

I have written... it's called 'Selected Teaching of the Qur'an'. In that ... that booklet - it is about sixty pages A4 size - I have cited more than 300 references concerning jihad in the Qur'an. So there's a lot more concerning jihad in Qur'an.

Concerning prayer: there is a great Islamic scholar - Al-Tibri, he mention[s] there are 99 verses in Qur'an concerning prayer, but concerning jihad there are more than 300 verses. So there's more writing on jihad than any other pillar of Islam in Qur'an...."

39 Equally Pastor Scot did not say at T24 that "looting, killing and destroying people - good for Muslim people". What he said was that:

"Then we read in chapter 8 verse 65, Mohammed was commanded by Allah that he should exhort Muslim by telling that twenty Muslim they will be overcoming 200 non-Muslim. So if there are twenty Muslim they can easily defeat an army of 20...200 non-Muslim people. So we read that in Qur'an chapter 8 verse 65.²⁷

However, chapter 8 verse 65 was cancelled later. We read in chapter 8 verse...66 says - oh it's too much for twenty people to defeat 2000 (200), so you will defeat double of the people.²⁸

²⁷ According to the Transcript, the Pickthall translation of Chapter 8 Verse 65 of the Koran, is as follows:

Sura 8:65. O Prophet! Exhort the believers to fight. If there be of you twenty steadfast they shall overcome two hundred, and if there be of you a hundred (steadfast) they shall overcome a thousand of those who disbelieve, because they (the disbelievers) are a folk without intelligence.

²⁸ According to the Transcript, the Pickthall translation of Chapter 8 Verse 66 of the Koran is as follows:

Sura 8:66. Now hath Allah lightened your burden, for He knoweth that there is weakness in you. So if there be of you a steadfast hundred they shall overcome two hundred, and if there be of you a thousand (steadfast) they shall overcome

But you know that again that's not true, because Israel is a very tiny country and the surrounding nations have been trying to destroy it for fifty years, and they have not succeeded. So but that's what Allah says here in chapter 8 verse 65 and 66.

The we further will see Allah has told in chapter 2 verse 216 that 'warfare is ordained for you'.²⁹ There is not escape. You have to fight. You have to kill. And Allah says that 'you may not like it, but it is good for you that you take part in the Holy War'.

...

So when we think of good thing, or bad thing, what Islam says good, need not be good, as we understand. So Allah says 'fighting - warfare - is ordained' and 'its good for you'. It's good for you that you loot people, you kill people, you destroy people. You may not like it but Allah says 'It's good for Muslim people'."

Second finding

40 Pastor Scot did not say at T4-5 that "Muslim scholars misrepresent what the Qur'an says by varying the emphasis, depending upon the audience". What he said was that:

"But Muslim scholar, they have a dilemma, when they are talking to you in Western world, they have to present one side of the Qur'an that is not violent, there is no room of fighting, killing. Not at all. And they will read for you verses from Qur'an.

On the other hand, the same Muslim scholar, when he addresses to Pakistani Muslim, or a Saudi Arabian Muslim, or Iranian Muslim, he will be telling you [them]...how important it is to kill people, to fight for sake of Allah. So same scholar just speaking here, totally different picture. Same scholar goes to Pakistan he totally paints different picture.

Why is it so? *It's not his fault.* Actually Qur'an is a wonderful book. It has both teaching. So when we read Qur'an carefully we find out that there are many verses in Qur'an, which speak non-violence. And then there are many, many more verses in Qur'an, which speak nothing but violence." (My emphasis)

two thousand by permission of Allah. Allah is with the steadfast.

²⁹ At this point in the Seminar, Pastor Scot was showing a slide on the overhead projector of the Pickthall translation of Chapter 2 Verse 216 of the Koran, as follows:

Sura 2:216. Warfare is ordained for you, though it is hateful unto you; but it may happen that ye hate a thing which is good for you, and it may happen that ye love a thing which is bad for you. Allah knoweth, ye know not.

Third finding

41 At T6 Pastor Scot did say that "... in Islamic teaching, according to the Holy Qur'an there is not much value of woman". But he followed that immediately with the observation that:

"We read in Qur'an...Sura 2, verse 223, it say there that woman is like a field to plough, so you use her as you wish.³⁰ So its like a piece of land. So that's the value which the holy book of Muslim people put on a woman."

Fourth finding

42 Pastor Scot did not say at T10 that that Allah is not merciful. What he said was that:

"...in the Qur'an, chapter 5 verse 38, it says - right hand of a thief should be cut off.³¹ Now if Allah is merciful, why thief's hand should be chopped off? And according history of Islam, Mohammed did not spare anybody. If anybody found is stealing, even stealing an egg, his right hand is chopped off.³²

Fifth finding

43 Pastor Scot did not say at T10-11 that "Muslims lie for the sake of Islam and that it is 'all right', they have to hide the truth". What he said was that he had advised one of his adherents to put a question to a Muslim missionary as to why, if Allah were merciful, the Koran said at Chapter 5 verse 38 that a thief should have his hands cut off as an exemplary punishment from Allah. According to Pastor Scot, the Missionary's answer was to state emphatically that Chapter 5 verse 38 of the Koran

³⁰ According to the Transcript, the Pickthall translation of Chapter 2 Verse 223 of the Koran is as follows:

Sura 2:223: 'Your women are a tilth for you (to cultivate) so go to your tilth as ye will...'

³¹ According to the Transcript, the Pickthall translation of Chapter 5 Verse 38 of the Koran is as follows:

Sura 5:38: As for the thief, both male and female, cut off their hands. It is the reward of their own deeds, an exemplary punishment from Allah. Allah is Mighty, Wise.'

³² It was not put to Pastor Scot and there was no evidence that Mohammed did spare anybody. found is stealing.

did not say that, and as a result the adherent later complained to Pastor Scot that he had misled her. Pastor Scot then went on:

“I said [to the adherent after she expressed upset over the Missionary’s response] ‘Lady, calm down.’ I pulled out two three Qur’an and I opened all the chapters... I mean all the Qur’an, and in different Qur’an it was different verse numbers. So I said, [to the adherent] ‘That Muslim p[riest] he knows it’s in Qur’an.’ But because lying for sake of Islam is all right. So he know that. He had just to go four verses up and it’s there. But why he will tell that this is what Allah says. They have to hide the truth.

Now Bible tells us you know the truth, the truth will set you free, but Muslim people, when they come [to] some teaching, which they don’t like people should know, they will tell the truth. They will not tell the truth. They will hide the truth. They will tell lies ...”

Sixth finding

44 Pastor Scot did not say at T13-14 that Muslims are demons. What he said was that:

“And when [the prophet Mohammed] left the city [of Al-Taif] we are told in Islamic history, this book [the Koran] tells life of Mohammed that even some people threw stone at him, so he was ... his face was bleeding and he started praying to Allah, that ‘Allah help me’.

And Allah helped him and we read in Qur’an, the holy book of Islam, in chapter 46 of the Qur’an, verse 28 to 31, chapter 46 verse 28 – as I told, chapter in Arabic is called Sura – Sura 46 verse 28 to 31.³³ It says there that Allah sent a group of demons – in Arabic it’s called a ‘jinn’ – a group of jinn, a group of demons came to Mohammed and those demon – we read in the holy Qur’an – that those demon they heard the Qur’an and they became Muslim. And not only they became Muslim, they said that now they would go to the people and they will tell other people that now a prophet has come after Moses who has a book, and if you’ll hear him some of your sin will be forgiven. So those demons, those jinn, they not only became Muslim, they became Muslim missionary demon.

³³ According to the Transcript, the Pickthall translation of Chapter 2 Verse 223 of the Koran is as follows:

Sura 46:28-31. Then why did those whom they had chosen for gods as a way of approach (unto Allah) not help them? Nay, but they did fail them utterly. And (all) that was their lie, and what they used to invent. And when We inclined toward thee (Muhammad) certain of the jinn, who wished to hear the Qur’an and, when they were in its presence, said: Give ear! and, when it was finished, turned back to their people, warning. They said: O our people! Lo! we have heard a scripture which hath been revealed after Moses, confirming that which was before it, guiding unto the truth and a right road. O our people! Respond to Allah’s summoner and believe in Him. He will forgive you some of your sins and guard you from a painful doom.

So we read that story in the holy Qur'an, chapter 46 verse 28 to 31. But if you read translation by Yusuf Ali he writes in footnote, in this translation he writes footnote. 'Here jinn does not mean demon, here jinn means clever people'. So if you do not have much understanding of Islam you'll say 'Oh, It's just a clever people it's not demon'.

But if you read the same story in chapter 72 of the Qur'an, that's called Sur Al Jinn. It's chapter 72 verse 1 to 15 you read the same same story. That Allah sent a group of demon to Mohammed and they became Muslim. And then these demons, they tried to enter heaven. When they tried to enter heaven, Allah hits them with shooting star. So when you look at night and you see the shooting star in heaven, actually they are Muslim demons, [they're] trying to enter heaven and Allah is hitting them with shooting star. That is the real reason according to the Holy Qur'an, chapter 72."

Moreover, a little later at T19, Pastor Scot added:

"OK. Then then next one is mysticisms. That is also not violent jihad. There are many Western drawn to mysticism. Now mystic people they are called Sufis. They are linked with spiritual powers. *You know I told you a group of demon had become Muslim, and they are good demons. They are not bad demons, they are Muslim demons.* So they contact them and with the help of those demon they can do lot of things." (My emphasis)

Seventh finding

45 Pastor Scot did not say at T14-17 that the practice of abrogation was the cancellation of words from the Qur'an and Hadiths solely to fit some particular purpose or personal need. What he said was that there are 33 types of abrogation, of which he explained four in some detail: namely (1) where words of the Qur'an and their legal application have been cancelled, of which he gave as an example the so-called satanic verse, Chapter 53 verse 19;³⁴ (2) where words which remain in the Koran no longer have any legal function, of which he gave as an example Chapter 24 Verse 15;³⁵ (3) where words had been in the Koran by then Allah had cancelled them;

³⁴ According to the Transcript, the Pickthall translation of Chapter 53 Verse 19 of the Koran is as follows:

Have ye thought upon the Al-Lat and Al-'Uzza.

Here no reference is made to a Sura chapter or verse – only a reference to page number in the book "The Life of Muhammad".

³⁵ According to the Transcript, the Pickthall translation of Chapter 4 Verse 15 of the Koran is as follows:

Sura 4:15. As for those of your women who are guilty of lewdness, call to witness four of you against them. And if they testify (to the truth of the allegation) then confine them to the houses until death take them or (until) Allah appoint for them a way

and (4) circumstantial abrogation, where there were competing or inconsistent verses in the Koran, which one applied according to the circumstances, of which he gave as examples, Chapter 2 verse 256,³⁶ which he said provides that there is no compulsion in religions and Chapter 24 verse 3, which he said provides that believers shall only marry believers.³⁷

Eighth finding

46 Pastor Scot did speak of the concept of Silent Six Jihad, some of which are use of business connections – T16; using money to induce people to convert to Islam – T17; and training of Muslims in Madrassahs [sic]. He did not, however, imply that they were a threat to Australia. What he said was that:

“But [a] couple of months ago I was in America and I was hearing a debate between some scholar[s]. One scholar pointed out that in Pakistan there are 39,000 training schools. Now [at] this training school, where he studied, there were 2,500 students there in that training school. So there are millions of people right now, under training in Madarassas, in Pakistan, and they are true Muslim.”

Ninth finding

47 Pastor Scot did say at T19 that:

“So when people read that [the Hadith], they study that for six year, seven year, they become true Muslim. And we call them terrorist, but actually they are true Muslim because they have read the Qur’an, they have understood it, and now they are practising it.”

(through new legislation).

³⁶ According to the Transcript, the Pickthall translation of Chapter 2 Verse 256 of the Koran is as follows:

Sura 2: 256. There is no compulsion in religion. The right direction is henceforth distinct from error. And he who rejecteth false deities and believeth in Allah hath grasped a firm handhold which will never break. Allah Is Hearer, Knower.

³⁷ According to the Transcript, the Pickthall translation of Chapter 2 Verse 221 of the Koran is as follows:

Sura 2: 221. Wed not idolatresses till they believe; for lo! a believing bondwoman is better than an idolatress though she please you; and give not your daughter in marriage to idolaters till they believe, for lo! a believing slave is better than an idolater though he please you. These invite unto the Fire, and Allah inviteth unto the Garden, and unto forgiveness by His grace, and expoundeth His revelations to mankind that haply they may remember.

But he did not say that that is the connection between Islam and terrorism.

Tenth finding

48 Nor did Pastor Scot say at T23 that Muslims intend to take over Australia and declare it an Islamic nation. What he said was that:

“There was a[n] article written September last year, that was first week of September 2001. There’s that magazine called Maccabees [the Maccabean]. That’s a Jewish magazine published in Sydney. That magazine says, in first week of September 2001 edition of that magazine says, that one Rabbi he met Chief Mufti of Muslim people, Islamic community.

A Mufti is like a ...he is like, say, it’s a religious leader who has the greatest political as well as religious authority for the Muslim people.

So that Chief Mufti, that ... when he was interviewed, Rabbi asked him, that what is your plan for Australia? And that Chief Mufti said ‘Our plan for Australia is that we will declare it Islamic nation when there’ll be 51% Australian [Islamic].’”³⁸

Eleventh finding

49 Pastor Scot did say at T32 that Mohammed trained the entire nation and he literally took part in the Holy War; showed Muslims how pleasant it is and if you are killed in the Holy War you can be brought back to life because dying as a martyr is such a wonderful thing; and Allah will remit the sins of martyrs and bring them into paradise. But Pastor Scot did not at that stage make any reference to suicide bombings. He referred instead to a slide (slide 15) which was then showing on the overhead projector, as follows:

“...the Prophet of Islam trained every man and woman forming a national militia whose w[h]ole object was to establish the kingdom of Allah on earth. He created a taste for military life and he directly inspired his men with courage and bravery by himself taking an active part in all their military exercises and parades. He had proper arrangements for the nursing of the sick and the wounded in the battlefield. Instead of a paid army Mohammed

³⁸ It is also to be noted, however, that in cross examination Pastor Scot agreed that what had appeared in the Maccabean magazine was not an article but a letter to the editor and that the interview with the Mufti which was referred to in the letter had taken place some years before the letter was published in the magazine in the first week of September 2001.

used to divide the booties among the soldiers who acquired them. The system of paying to the holy warriors, according to their looting made the Muslims more enthusiastic for the Jihad: *Al-Hadis Miskat ul-Masahib Vol. 2 Chapter 23 , Under Military Organization P.341-2.*"

Later at T33 Pastor Scot said:

"However, these are the cases we read in chapter 3 verse 197 [of the Koran].³⁹ We read there 'truly Allah will remit the sins of the martyr and then bring them into paradise'. So if you want to be sure of your paradise you should be surely dead man. To [be] dead sure, you have to be dead OK in Islam for salvation and that's why there are hundreds of thousands Muslim people waiting in queue for suicide bombing."

50 As to parents bringing up their children for martyrdom, he said at T34 that:

"Now we read here 'Martyrs are jubilant because of their reward.' So that's chapter 3 verse 169 to 171.⁴⁰

51 He then referred to President Abdul Bashir, President of Sudan, whose brother he said had been killed some years before and of a party which the President had held to celebrate the fact that his brother would be passing into paradise in accordance with the reward for martyrs promised in the Koran, and he continued:

"Then we, we read in Qur'an chapter 4 verse 69⁴¹ that martyrs, they can intercede. So that's a big attraction for parents to give their children for martyrdom. Because if their son, teenage son will be suicide bombing, he is killed there, then that son can intercede for his mum, for his dad, for his

³⁹ According to the Transcript, the Pickthall translation of Chapter 3 Verse 195 of the Koran is as follows:

Sura 3: 195. And their Lord hath heard them (and He saith): Lo! I suffer not the work of any worker, male or female, to be lost. Ye proceed one from another. So those who fled and were driven forth from their homes and suffered damage for My cause, and fought and were slain, verily I shall remit their evil deeds from them and verily I shall bring them into Gardens underneath which rivers flow - A reward from Allah. And with Allah is the fairest of rewards.

⁴⁰ According to the Transcript, the Pickthall translation of Chapter 3 Verse 169 of the Koran is as follows:

Sura 3: 169-171. Think not of those, who are slain in the way of Allah, as dead. Nay, they are living. With their Lord they have provision. Jubilant (are they) because of that which Allah hath bestowed upon them of His bounty, rejoicing for the sake of those who have not joined them but are left behind: That there shall no fear come upon them neither shall they grieve. They rejoice because of favour from Allah and kindness, and that Allah wasteth not the wage of the believers.

⁴¹ According to the Transcript, the Pickthall translation of Chapter 4 Verse 69 of the Koran is as follows:

Sura 4:69. Whoso obeyeth Allah and the messenger, they are with those unto whom Allah hath shown favour, of the prophets and the saints and the martyrs and the righteous. The best of company are they!

[aunts], for his uncles, for brother, sister.”

Twelfth finding

52 Pastor Scot’s observations about Muslims having to fight Christians and Jews and humiliating them were lengthy, complex, and at places bewildering. As it appears to me, there are large steps in the logic (or illogic) of it and much that depends on assertion about the way in which passages in the Koran are properly to be interpreted. But in the end, it is clear that Pastor Scot was laying down for his audience what he interpreted the Koran to say about the command of Allah that Muslims should fight against those who are not of the Islamic faith in order to convert them to Islam, and not about the way in which his audience should regard people who are of the Islamic faith. The relevant parts of the seminar began with an anglicised reading of Chapter 9 Verse 29 of the Koran, by another speaker as follows:

“Fight against those who believe not in Allah nor in the Last Day nor forbid that which has been forbidden by Allah and his Messenger. And those who acknowledge not the religion of the truth, example Islam, among the people of the scriptures, the Jews and the Christians, until they pay the Jizya or the poll tax, with willing submission and feel themselves subdued.”⁴²

53 Pastor Scot then continued with his address as follows:

“Yeah. So here Allah is saying that Muslim people, they have to fight with the People of the Book. Why? Because people of the Book are, we read there, they are cursed by Allah. Christians and Jews are cursed by Allah. Why? Because they worship idols and they worship false deity.⁴³ (My emphasis).

What are false deity, according to the Qur’an? We read that in the Qur’an

⁴² According to the Transcript, the Pickthall translation of Chapter 9 Verse 29 of the Koran is as follows:

“Fight against such of those who have been given the Scripture as believe not in Allah nor the Last Day, and forbid not that which Allah hath forbidden by His messenger, and follow not the Religion of Truth, until they pay the tribute readily, being brought low.”

⁴³ As appears from T38, Pastor Scot based that conclusion on Chapter 4 verses 51-2 of the Koran, which are as follows:

Sura 4:51-52. Hast thou not seen those unto whom a portion of the Scripture hath been given, how they believe in idols and false deities, and how they say of those (idolaters) who disbelieve: ‘These are more rightly guided than those who believe?’ Those are they whom Allah hath cursed, and he whom Allah hath cursed, thou (O Muammad) wilt find for him no helper.

chapter 9 verse 30 that Jews say Ezra is the Son of God. You know that? It's a new revelation, which Allah gave to the prophet of Allah. So Jews say 'Ezra is the Son of God', and Christians say 'Messiah is the Son of God' and that's why we are worshipping false deities. OK. And that so Muslims they have to fight.

And we read in chapter 5 verse 17⁴⁴ Jim Rodwell's translation, 'Infidels now are they who say verily, 'God is Messiah'. So when we say, 'Jesus is God', we are infidels, we are ...we are pagans, we are unbelievers. So that's why Muslims have responsibility to fight with us. And [what]Allah can never forgive is associating anybody else with God. So when we say, 'Jesus is God' that is unforgivable sin."⁴⁵

Pastor Scot said next:

"This ... chapter 19 verse 88 to 92⁴⁶ it says, when people say God has a son it's such a big sin that all the heavens, according to Islam there are seven heavens, they all want to break into pieces, because they are hearing such a big lie. All the earth want to break into pieces, all the mountain they want to break into pieces with shame by hearing that God has a son. It's such a big lie, such a big sin, according to the Holy Qur'an."

Pastor Scot concluded that part of the Seminar with reference to Chapter 9 verse 29 of the Koran, saying:

⁴⁴ According to the Transcript, the Pickthall translation of Chapter 5 Verse 17 of the Koran is as follows:

Sura 5:17. They indeed have disbelieved who say: Lo! Allah is the Messiah, son of Mary. Say: Who then can do aught against Allah, if He had willed to destroy the Messiah son of Mary, and his mother and everyone on earth? Allah's is the Sovereignty of the heavens and the earth and all that is between them. He createth what He will. And Allah is Able to do all things.

⁴⁵ It is apparent from T38 that Pastor Scot ascribed that last observation to chapter 4 verse 48 and chapter 5 verses 72-72 of the Koran, of which the Pickthall translation reads:

Sura 4:48. Lo! Allah forgiveth not that a partner should be ascribed unto Him. He forgiveth (all) save that to whom He will. Whoso ascribeth partners to Allah, he had indeed invented a tremendous sin.

Sura 5: 52-73. They surely disbelieve who say: Lo! Allah is the Messiah, son of Mary. The Messiah (himself) said: O Children of Israel, worship Allah, my Lord and your Lord. Lo! whoso ascribeth partners unto Allah, for him Allah hath forbidden paradise. His abode is the Fire. For evil-doers there will be no helpers. They surely disbelieve who say: Lo! Allah is the third of three; when there is no Allah save the One Allah. If they desist not from so saying a painful doom will fall on those of them who disbelieve.

⁴⁶ According to T39 of the Transcript, Chapter 19 Verses 88-92 of the Pickthall translation of the Koran is as follows:

Sura 19: 88-92. And they say: The Beneficent hath taken unto Himself a son. Assuredly ye utter a disastrous thing whereby almost the heavens are torn, and the earth is split asunder and the mountains fall in ruins, that ye ascribe unto the Beneficent a son, When it is not meet for (the Majesty of) the Beneficent that He should choose a son.

“And that’s why, in chapter 9 verse 29,⁴⁷ Allah says that Muslim have to fight with people of the Book. And if they... if they become Muslims then that’s wonderful, if they don’t become Muslims then they have to pay Jizya, poll tax, protection money. And if they don’t pay protection... Not only do they have to pay protection money, they have to be humiliated, make them low, utterly subdue them. Not only that you pay them Jizya, but also they can ask you your wife, your daughter. They can humiliate you doing anything and we don’t have time to look... look into history the whole Muslims have been doing that. Because Allah says they have to humiliate them. They have to utterly subdue them so to disgrace them, make them very little, according to the holy Qur’an – saghiroon – so that’s what they have to do.”

Thirteenth finding

54 At T43 Pastor Scot did indeed mention the man who had masterminded a bombing of the World Trade Centre. He said this:

“...there was one Islamic scholar in University of Al-Azhar. Do you know where Al-Azhar is? That’s in Cairo that is the oldest and the greatest Islamic University. And the man I’m referring, his name is Sheik Umar. You might have heard there was a bombing of the Trade Centre few years ago in New York. He was the mastermind behind it. And when he was teaching at Al-Azhar University one junior lecturer asked him, ‘Why do you emphasise so much about the Holy War?’ And Sheik Umar said that ji...the Holy War is the spirit, it is the soul of Islam. If you remove it, nothing [is] left. So that it the truth about the matter.”

55 But of course it is not suggested that what Pastor Scot said about Sheikh Omar was incorrect⁴⁸ and, just as importantly, very shortly after referring to Sheikh Omar Abdel Al-Rahman, Pastor Scot went on to say this:

“...As I mentioned in Pakistan, millions, not 1, 2, 3 but millions of people are trained in these Madrasas where they are taught these things and where every group goes to get training in Islam, in Pakistan, in those Madrasas. Because they want to learn true Islam.

⁴⁷ According to T39 of the Transcript, Chapter 9 Verses 29 of the Pickthall translation of the Koran is as follows:

Sura 9:29. Fight against such of those who have been given the Scripture as believe not in Allah nor the Last Day, and forbid not that which Allah hath forbidden by His messenger, and follow not the Religion of Truth, until they pay the tribute readily, being brought low.

⁴⁸ I take judicial notice of the fact that Sheikh Omar Abdel Al-Rahman, sometime professor of Al-Azhar Al-Sharif University and spiritual leader of Al-Jihad Al-Jadid was convicted and imprisoned in the United States for his involvement in the 1993 bombing of the World Trade Centre, New York.

However, we have not to be fearful of Muslim people because all Muslims are not same. Majority, vast majority of Muslim they don't know what's in Qur'an. [He referred then to an educated Muslim and continued]...

So now please remember, we are not here learning how to fight with Muslim, we are leaning here how we can love Muslims and help them to see the truth. This is the purpose of the sitting here. OK, we are learning [what] we need to know [of] Islam so that we know what their holy book teaches we also know what our Bible teaches and then we can present gospel to Muslim people. Like in Pakistan it's forbidden to share gospel with Muslim. Many, you might have heard people are even given death sentence and so on because people can charge you with blasphemy and that's very serious (My emphasis).

But in spite of all those circumstance in Pakistan, I shared gospel for very long time, from 1965 'till 1987. So that's a few years there. And I was able to share gospel on all levels, on ordinary level, people on the street, and villages and suburbs and in cities, and people who are very educated, people who are illiterate."

Fourteenth finding

56 It is true that Pastor Scot spoke at T48 of Allah and deceit, but it is apparent from the context that Pastor Scot was referring to what he interpreted the Koran to say on the subject. He began the relevant section of the Seminar by observing that he had listed at page 4 of his booklet "Selected Teaching" some 30 references from the Koran where (according to Pastor Scot) Allah says that he guides whom he will and he misleads whom he will. Pastor Scot went on to explain, tortuously, that he based that claim on passages of the Koran such as Chapter 3 verse 54⁴⁹ and Chapter 8 verse 30, wherein he said, in English translations, Allah is referred to as the best of schemers and the best of plotters against the disbelievers, but in Arabic the term is "Allah Khair-ul-Makrin" and in Arabic "Khair-ul-Mkrin" 'means greatest of all deceivers'. Pastor Scot moved on then at T50 to contrast that with the asseveration in *John* Chapter 14 Verse 6 that Christ is the Way, the Truth and the Life, in an apparent endeavour by Pastor Scot to persuade his audience that the version of Christianity

⁴⁹ According to the transcript the Pickthall translation of Chapter 3 Verse 54 and Chapter 8 Verse 30 of the Koran is as follows:

Sura 3:54. And they (the disbelievers) schemed, and Allah schemed (against them): and Allah is the best of schemers.

Sura 8:30. And when those who disbelieve plot against thee (Oh Muhammad) to wound thee fatally, or to kill thee or to drive thee forth; they plot, but Allah (also) plotteth; and Allah is the best of plotters.

which he espoused was superior to Islam.

Fifteenth finding

57 At T59 Pastor Scot said that there is a very heavy teaching in Islam that children should obey their parents. He was at that stage of the Seminar contrasting fundamental precepts of Christian morality with fundamental precepts of Muslim morality and noting the considerable degree of similarity between the two. As the Tribunal observed, Pastor Scot went on then to assert that, if parents are not Muslim, Muslim children have the responsibility to mistreat them and to deal with them harshly. It is important to note, however, that this remark about the obligation of children to kill their parents was limited to the state of holy war. As Pastor Scot put it:

“Then concerning honoring parents, there’s a very heavy teaching that Muslim children should obey their parents. However, if parents are not Muslim then Muslim children have responsibility to mistreat them and to deal with them harshly. And I didn’t mention when I was teaching on Jihad because Allah has taught that Muslim they can only be friend with Muslim people, not with non-Muslim. And here [*scil* in Holy War] Allah says that Muslim should not befriend even their parents or their brethren or any close relative if they are not Muslim. And In Holy War Muslim have been killing their... children have been killing their parents, and children have been killing their parents [*sic*], and parents have been killing their children in Holy War because they were one group was Muslim other not Muslim. So when you are true Muslim, as you know David Hicks you have heard of him, now he has responsibility to do that because he is true Muslim. So when you are true Muslim you have to destroy your relative and so on. So that’s the commandment of Allah, you cannot just ignore that.”

Sixteenth finding

58 At T60 Pastor Scot said that:

“Then Allah says do not commit adultery. That of course is forbidden. Muslim should not commit adultery however, Allah says in chapter 4 verse 25 in Arabic language ‘*istum matatam*’ that means you can hire a woman for enjoyment. And Ajar means payment. ‘Ajar arun’ means payment for woman. So that’s chapter 4 verse 24 in Arabic language it says that you give her, once you have enjoyed with her. So you give the payment of her.”

That appears to misrepresent the text of chapter 4 verse 24 of the Koran of which the Pickthall translation is set out at T60 as follows:

Sura 4:24. And all married women (are forbidden unto you) save those (captives) whom your right hands possess. It is a decree of Allah for you. Lawful unto you are all beyond those mentioned, so that ye seek them with your wealth in honest wedlock, not debauchery. And those of whom ye seek content (by marrying them), give unto them their portions as a duty. And there is no sin for you in what ye do by mutal agreement after the duty (hath been done). Lo! Allah is ever Knower, Wise.

Seventeenth finding

59 At T60 Pastor Scot did say what is attributed to him by the Tribunal about the Koran promising plenty of spoil. With respect, however, the effect of the observation can only be understood in the context of what had earlier been said in the Seminar about the concept of bootie in Holy War, and once it is appreciated that at T64 Pastor Scot was in the course of making the point that there a different sections in the Koran which appear to say the opposite thing to each other. As Pastor Scot put it:

“Then Allah says, ‘Do not covet.’ That’s a good thing, but then Allah says ‘If you’re true Muslim Allah has promised you plenty of spoil’. So you go for looting, you go for Holy War and Allah will give you a lot of spoil. OK, so that was a bit of..., I thought you may [wish to] understand what the Qur’an teaches on these subjects.”

Eighteenth finding

60 At T71 Pastor Scot did imply that money is derived from the sale of illicit drugs which is used to sponsor Muslim proseletysm. As he put it:

“And concerning money, I mean we think of money but Muslim pour money in evangelism and building mosque and so on. So they have a lot of money, which mostly comes from oil, and all of you know that as it was mentioned during Sptember 11th that 70% of the drugs, which go to England, they are from ...Afghanistan and other Islamic countries. So they make a lot of money from there also so that they can spread Islam and fulfill their desire.”

Nineteenth finding

61 Finally, what was said about “kill, kill”, although distasteful, was said in the specific context of a story about events in which Pastor Scot claimed he was involved when he travelled to Egypt in 1995 and, he said, it was thought by some there that he had converted from Islam to Christianity. The idea that Allah says “scourge your

wife” was simply a reiteration of the text of chapter 4 verse 34 of the Koran, of which, according T95, the Pickthall translation reads:

Sura 4: 34. Men are in charge of women, because Allah hath made the one of them to excel the other, and because they spend of their property (for the support of women). So good women are the obedient, guarding in secret that which Allah hath guarded. As for those from whom ye fear rebellion, admonish them and banish them to beds apart, and scourge them. Then if they obey you, seek not a way against them. Lo! Allah is ever High, Exalted, Great.

62 Regrettably, at T97 Pastor Scot did assert, incorrectly, that the population of Muslims in Australia is growing such as to double every seven years and said that: “So that is how they are growing, so because they have control over our Immigration Department and they bring all type of people”. But, importantly for present purposes, he then went on immediately to add:

“So that’s ...they are very successful and they are growing rapidly, so we need a lot of worker. OK. I will ask you please to pray that God will release more worker and He may raise you to work among Muslim. And I will be very happy to, to train you, to help you, equip you so that we be effective worker among Muslims. So we need that, we need that badly, not only in Australia but elsewhere as well.

And then we read in Acts chapter 10 verses 3 to 8 there’s a dream where Cornelius, he saw angel and he called for Peter. As I mentioned there are many Muslims who are seeing angels and are seeing Lord Jesus Christ and they are turning to Christ. So we need to pray that such things should be more often happening, and many more Muslim will come to know Jesus as their Lord and Saviour. You know that this Cornelius, he was not a Jew but he was seeking for truth. There are many Muslim, who are seeking for truth. They are not happy with their life.”

63 I add that, like the Tribunal, I have listened to the tape recording of the Seminar, although I confess that I lacked the endurance to do it more than once. Unlike the Tribunal, however, I was unable to perceive from the tape anything in the manner of Pastor Scot’s delivery which rendered his statements more likely to incite the audience to hatred or other relevant emotion of or towards Muslims. To the contrary, as it seemed to me, what one hears is a speaker who, although endowed with an admirable command of the English language, speaks it as a second language with all the difficulties which that sometimes entails. I hear a degree of nervousness in delivery, a pattern of speech which is idiomatically incongruous and consequent

double entendre which the speaker sounds not to have intended. Admittedly, his style is given to ridicule at places, and the ridicule results in cynical laughter at places. But on any analysis his plea to love Muslims and to “minister” to them comes across as sincere enough as do the sounds of his audience’s reaction to it.

64 The fifth difficulty with the Tribunal’s reasons, as I perceive it, is that the Tribunal’s concern with the balance or imbalance of Pastor Scot’s presentation of Muslim religious beliefs led the Tribunal to treat as being relevant some evidence given by three recent converts to Islam to the effect that they had attended the Seminar and were upset by what they had heard. The Tribunal explained its use of that evidence as follows:

“The use of their evidence is confined to the fact that these individuals attended the Seminar, and their evidence is probative of the method of delivery and conduct which occurred. The real question is the weight which should be given to such evidence, given that these were subjective interpretations of what was said, and taking into account that it was a subject matter which went to the basis of their religious belief. *The extent to which they were upset at what they saw and heard is, a factor to be taken into account.* Each said that they were very upset at the proceedings and, indeed, Eades said that he was in tears. That fact must also be taken into account in determining their objectivity.” (Emphasis added).

65 Arguably, that may mean no more than that, because the witnesses were upset by Pastor Scot’s statements, it was more probable that the statements were sufficiently vehement to invoke hatred or other relevant emotion of or towards Muslims on the basis of their religious beliefs. If so, the reasoning would be unexceptionable. But I think it unlikely that that is what it means; for, immediately after making those observations, the Tribunal continued, as follows:

“The extent to which such evidence can be used was discussed by Hely, J. in *Jones v. Scully*. His Honour observed that people affected by what was said and done was subjective, but was admissible to the limited extent that a Court or Tribunal can use such evidence, but it is not determinative of the actual result. Therefore it may be used in a narrow fashion. Furthermore, even if the three individuals did not attend the seminar, it would not prevent the complaint from being made to the Equal Opportunity Commission, and to this Tribunal subject to proof.” (See the comment in *Jones v. Scully* at paragraph 99).

66 *Jones v. Scully*⁵⁰ was concerned with s.18C of the *Racial Discrimination Act 1975* (C'th). It prohibits a person from doing an act "that is reasonably likely in all the circumstances, to offend, insult, humiliate or intimidate another person or group of people". Not surprisingly, therefore, Hely, J. said at paragraph 99 of his reasons for judgement, that:

 "...evidence, for example, that a member of a particular racial group was offended by the conduct in question would be admissible on, ...the issue of contravention..."

67 But that is not so under s.8 of the Act; for the question under s.8 is not whether the conduct offends a group of persons but whether it incites hatred or other relevant emotion of or towards that group of persons. Things might well be said of a group of persons which would be deeply offensive to those persons and yet do nothing to encourage hatred or other relevant emotion of or towards those persons. Plainly, therefore, evidence of the feelings of a group of persons about whom statements are made cannot be used under s.8 of the Act in the way in which Hely, J. said that they could be used for the purposes of s.18C of the *Racial Discrimination Act 1975* (C'th).

68 Furthermore, although the Tribunal said at another point in its reasons that it would be possible to look no further than the transcript of the Seminar in order to conclude that the Seminar contravened s.8 of the Act, it is apparent that the evidence of the three Muslim witnesses was material to the Tribunal's decision. Much later in the reasons for decision, the Tribunal returned to the evidence of the three Muslim witnesses and said, in its conclusions, that:

 "I find that the evidence of the three lay witnesses is probative of the fact, that what was said amounted to incitement."

That statement implies the Tribunal may not have come to the same conclusion if it had understood that such evidence cannot be used for the purposes of s.8 in the way in which Hely, J. said in *Jones v. Scully* that it may be used for the purposes of s.18C of the *Racial Discrimination Act 1975*.

⁵⁰ (2002) 120 F.C.R. 243.

69 Last, on this aspect of the matter, it appears to me that each of the problems to which I have now referred is reflected one way or another in the manner in which the Tribunal dealt with the effect of Pastor Scot's exhortations to his audience to love Muslims despite what he perceived to be the shortcomings of Islam, and to strive to turn Muslims from Islam to Christianity as he conceived of it.

70 First, as a result of the following the *Bropho* test, the Tribunal saw the expression "on the ground of religious beliefs" as signifying a causative link between the religious beliefs and the conduct which was impugned and so, as it seems to me, analysed Pastor Scot's injunctions to love and convert Muslims in terms of whether they were moved or activated by religious beliefs rather than in terms of the effect which they were likely to have on the remainder of the Seminar to incite hatred or other relevant emotion of or towards Muslims. Hence, it will be recalled, the Tribunal said:

"In support of the view that much of the Seminar was concerned with the witnessing to Muslims, reference should be made to the evidence of the witness Mathews, who states that the prominent feature of the seminar was an injunction to love Muslims. *It may well be that this was part of the reason for the Seminar.* However, it does not fit well with an examination of the substantial part of the Seminar, which is clearly anti-Muslim. On any view it mocks their religious beliefs and practices, that is, that they live their lives substantially in accordance with Qur'anic injunctions. *Although I have serious reservations about the explanation about witnessing to Muslims, I am prepared to accept that, viewed objectively, it could be accepted as such. However, that fact does not justify what was otherwise said by Pastor Scot.*" (My emphasis)

71 As should now be appreciated, the question for the purposes of s.8 was not whether the will to "witness" to Muslims could or should be seen as the reason or part of the reasons for the Seminar and, if it were, whether it "justified" what Pastor Scot said. The question was whether what Pastor Scot said about "witnessing" to Muslims sufficiently conditioned the effect of his criticisms of the religious beliefs of Muslims to preclude causing hatred of or other relevant emotion towards Muslims because of their religious beliefs.

72 Secondly, inasmuch as the Tribunal treated as being relevant what it perceived

as the imbalance of Pastor Scot's presentation of Muslim religious beliefs, it appears to me that the Tribunal analysed the effects of Pastor Scot's injunctions to love and to witness to Muslims in terms of whether they sufficiently redressed the criticalities in Pastor Scot's presentation on Islam to make it a "balanced" presentation. Thus as will be recalled, the Tribunal said:

"The Seminar was not a balanced discussion. It was a process of taking literal translations from the Qur'an, and making no allowance for their applicability to modern day society. The ordinary, reasonable reader would understand from the public act, that he or she was being incited to hatred towards, or serious contempt for, or serious ridicule of a person on the ground of religion."

73 Significantly, I do not see in that analysis any consideration of why, despite the perceived imbalance of Pastor Scot's assertions about Islam, his exhortations to his audience to love and to "witness" to Muslims would not have prevented the Seminar as a whole inciting hatred or other relevant emotion of or towards Muslims among the non-Muslims to whom the Seminar was directed or likely to be conveyed.

74 Thirdly, as a result of treating conduct which mocks beliefs of persons as necessarily equivalent to conduct which incites hatred or other relevant emotion of or towards persons because of their religious beliefs, and, consequently, as a result of taking into account the Muslim witnesses' evidence of their sense of upset at what they heard at the Seminar, it appears to me that the Tribunal assessed the effect of Pastor Scot's injunctions to love Muslims and to "witness" to Muslims in terms of whether the injunctions were sufficiently anodyne to ameliorate the upset suffered by the three Muslim witnesses. Hence, as will be recalled, the Tribunal stated that:

"Pastor Scot, throughout the Seminar, made fun of Muslim beliefs and conduct. It was done, not in the context of a serious discussion of Muslims' religious beliefs; it was presented in a way which is essentially hostile, demeaning and derogatory of all Muslim people, their god, Allah, the prophet Mohammed and in general Muslim religious beliefs and practices."

75 In the result, the only specific attention which the Tribunal paid to the question of whether Pastor Scot's injunctions to love and to witness to Muslims were sufficient

to prevent the Seminar inciting hatred or other relevant emotion of or towards Muslims, was to refer to the evidence of one of the Muslim complainants, Mr Thomas, thus:

“...when Pastor Scot referred to the need to love Muslims, the words were in fact inconsistent with the manner of his presentation, and what he was saying about Muslims in general. He said that the presentation portrayed Muslims as dumb, childish, incapable of thinking for themselves, misguided and therefore dangerous.”

76 But, for the reasons already stated, the affront to the feelings of the Muslim witnesses was largely if not wholly irrelevant. The concentration needed to be upon the members of the audience who were not Muslims. What demanded to be assessed was whether the effect of the injunctions to love and to witness to Muslims was sufficient to prevent hatred or other relevant emotion by the non-Muslims towards Muslims.

77 In fact, the Seminar was replete with statements by Pastor Scot, to which neither Mr Thomas nor the Tribunal made any reference, favourable to Muslims and *ex facie* calculated to persuade an audience of non-Muslims to love and “witness” to Muslims (despite Pastor Scot’s perception of the shortcomings of Islam). I have referred already to a number of passages in which Pastor Scot inveighed his audience to the need to love and convert Muslims to his perception of Christianity. But in addition I draw particular attention to the following as being significant:

“...So we need to pray that somehow we will be able to minister to them [Muslims] and those who are back-slidden they will come back to Christ and accept Him as their Lord and Saviour.

Then Mark chapter 14 verse 12 says that when we pray and we believe, then things do happen. So we need to pray with faith, OK, and not with unbelief. Because during last 30 years, three zero, thirty years, there have been more Muslim converted to Christ as compared to other 13 hundred and 70 years. 13 hundred and 70 year, there have not been so many Muslim become Christian, but during last thirty years there have been lot of Muslims becoming Christians. Why? Because now now Muslim people are training them about the truth of Qur’an, but when people are reading Qur’an they are understanding it, many of them are turning to to Bible. They don’t like that religion. So we need to pray and not to give up. And I believe this century is century of

Muslim people. I am not pr... praying for million but I'm praying for hundreds of millions Muslim to come to Jesus, accept Him as their Lord and Saviour. And I believe they will come, because God is raising up us. If we do not raise up then God may allow a bit more trouble in our country so that we wake up. He is shaking us up. He wants to prepare us so that we can digest Muslim, large communities, we can accept them in our churches. We are prepared to help them to establish in Christ Jesus.

OK. Now let's see...There are things we need to do, and there are things, which we need not to do when we are sharing gospel with Muslim. So to share gospel with Muslim we must be informed of Islam...

...you have to be very clear and you have to repeat the answer many time, because it is very new for them...when you are talking to Muslim you need to repeat over and over again so that it makes sense to them, they can understand what you are saying.

And then you have to talk about the positive portrayal of Jesus in the Qur'an, because there are many positive things concerning Jesus in the Qur'an. As I told that in this booklet I have listed 93 references concerning Jesus and many of them, they are positive....So we need to to know that bit more deeper. Then we can portray that to Muslim people and that builds, builds a bridge between their understanding and us. Then give literature and take literature from Muslim people. That's very useful.

When they offer you Qur'an, don't be afraid of Qur'an. We know it's not from our God but there are a lot of things in Qur'an which are very similar from Bible...

...

Then give them personal testimony. That's very important. If you can spend time to prepare your testimony...

...

The next thing we look at is, we have to be very respectful and sensitive to people. If we are not sensitive, then we will not have major impact on their life. We have to be culturally sensitive: in Islamic culture they have high respect for their Holy Book. So if you have not respect for Qur'an, you will not have any impact on Muslim so you don't tell what's in Qur'an.

...

...We say that we never do anything without prayer, but prayer is not the only thing we do. OK. We do everything with prayer, but practical love is very important. I have heard so many stories in Australia

when people that have come out of detention centre and they have seen love of Christ in people, people have shared with them their resources, and *their* food and they have loved them, they have cared [for] them, and so many Muslim, young Muslim, old Muslim, women, children they have become Christian because they have seen practical love of Christ. It's very important. OK.

So it's not just a theory, that you have very good theory. No it's a practical thing, so you have to show that practice. Jesus didn't say that 'Go and, and preach gospel to all the nations'. Before He said that, He said, 'Love your neighbour like yourself.' That was the first thing and then He said, 'Go and preach gospel.' So we have to love them li...as ourselves. In our neighbourhood, wherever they are in need, we help them OK. Practical love.

And then of course we started with... Love... and love should be not only in theory, in word, but it should be shown in practice. You invite them for cup of tea. You invite them for dinner, for lunch. And you may go out for a cup of coffee or something like that. So develop some relationship with them and show hospitiaily. And these are practical things we need to look at.

...

Now there are a few things we must not do when we are sharing gospel with Muslim people. Let's look what are some of those things.

Very important as I mentioned earlier, that if I would have spoken against Mohammed I would have been in heaven from '95 onward. But we need to be very sensible we must not speak negatively. They don't want to hear anything against Mohammed, whether true or not. Even they don't want to hear the truth about Mohammed. That's very important, so we have to be very sensitive. But at the same time I will never tell you that you tell lies to Muslim. You are a Christian. If you are a Christian you should always tell the truth but we need not to tell the whole story about Mohammed. OK. So that's very important. You have to be respectful to them...

Then you should not criticise their faith. Then do not start with Trinity because that is very difficult for them to understand, so try to avoid it. Only when you have already built friendship, and they are a bit mature in understanding, then you can tell few things which I told you earlier.

..

Then of course do not criticize their culture. If you look down upon their culture, that's not good. So God has created all cultures. God has no preference of one culture over another. And we say that when Jesus comes in culture, He does not destroy culture, but He transforms culture. So there is no culture better than another culture. So we should not discredit their culture.

And then we should not criticise their dress. That's the way they live. That's fine. And do not witness to, get emotionally involved with opposite [sex] as I've explained that earlier.

...it's not good testimony to drink in front of a Muslim. So you have to be very careful.

OK. Similarly, if you do eat pork at home, but if you are eating that don't offer that to a Muslim...

Do not expect too much too soon...

And then of course, never give up. O.K. That's very important. So we know that we are not fighting for victory, we are fighting from victory. Our Lord Jesus Christ, He has defeated the enemy. OK. He has crushed the head of Satan, of the enemy. So He is the victorious Lord. And He is the One before [whom] every knee will bow, and every tongue will confess that He is the LORD. So that's where we are going from."

78 Despite the extent of those exhortations, the only indications that the Tribunal gave them any degree of attention are the Tribunal's recitation, without comment, of various parts of Pastor Scot's cross-examination⁵¹ and of Pastor Nalliah's cross-examination⁵² and the observation earlier set out of talk "from time to time" about witnessing to Muslims, "socialis[ing] with them" and "convert[ing] them to Christianity". And even those few references were discounted immediately with the observation that if one looked *objectively* at what took place and applied the *Kazak* test, the Seminar taken as a whole breached s.8 "because it incited hatred, contempt and revulsion, because of the religious beliefs of Muslims."

79 With respect, however, on any objective assessment of the Seminar taken as a whole, it was surely arguable on the basis of Pastor Scot's exhortations to his audience to love and "witness" to Muslims that the *raison d'être* of his Seminar was to infuse his audience with an understanding of the Koran (as he perceived it) so that they might effectively convert Muslims to Christianity (as he perceived it). Indeed his peroration was that, despite the inadequacies of Islamic doctrine (as he perceived them), his audience should love Muslims and seek to inculcate in them a Christian

⁵¹ See paragraphs 213, 214, 217, 290, and 291 of the reasons for decision.

⁵² See paragraphs 311, 332, 339 and 341 of the reasons for decision.

understanding of the Deity (as he conceived of it). If, therefore, it were properly to be concluded that the Seminar incited hatred or other relevant emotion of or towards Muslims (as opposed to their religious beliefs), the terms of Pastor Scot's exhortations to love and to witness to Muslims, and their likely effect on the non-Muslims present, required a good deal more analysis than peremptory dismissal as "talk from time to time".⁵³

80 I do not doubt that some Muslims may have regarded Pastor Scot's observations on the meaning of the Koran as deeply offensive, and perhaps been outraged by the fact that things to that effect should be said in a public place; even if the place were no more public than a Catch the Fire Ministries Hall in suburban Surrey Hills⁵⁴ and the effect were limited to an audience largely comprised of born-again Christian fundamentalists. I dare say too that there may well be people who, although not Muslims, would think it a far better thing if people like Pastor Scot kept his ideas about the Koran and Islam, and for that matter Judaism and Christianity, to himself and left others to do likewise. It is at least arguable that the world would be a happier place if he were bound to do so. But that is not the law. As has been seen, the prohibition in s.8 is not a prohibition against saying things about the religious beliefs of persons which are offensive to those persons, or even against saying things about the religious beliefs of one group of persons which would cause another group of persons to despise those beliefs. It is against saying things about the religious beliefs and practices of persons which go so far as to incite other persons to hate persons who adhere to those religious beliefs.⁵⁵ And as a matter of logical analysis, it does not suffice to establish incitement to hate a group of persons⁵⁶ to show that scorn has been poured on the religious beliefs or practices of that group of persons (although it may be relevant).

81 In my view the Tribunal erred in the application of s.8, at least because it

⁵³ *Transport Accident Commission v. Bausch* [1998] 4 V.R. 249 at 261-262, per Tadgell, J.A.

⁵⁴ cf. *Gooden v. Herkes* [1934] V.L.R. 258 at 261.

⁵⁵ Or to experience one of the other catalogued emotions towards those persons.

⁵⁶ Or to experience one of the other catalogued emotions towards those persons.

applied the *Bropho* test instead of the correct test of whether the Seminar as a whole or the articles incited hatred of Muslims based on their religious beliefs, and possibly also in the other respects I have mentioned. I would for that reason set aside the Tribunal's determination and remit the matter to the Tribunal for redetermination.

Section 11

82 Section 11 of the Act provides that:

“A person does not contravene section 7 or 8 if the person establishes that the person's conduct was engaged in reasonably and in good faith—

(a) ...

(b) in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for—

(i) any genuine academic, artistic, religious or scientific purpose; or

(ii) any purpose that is in the public interest; or

(c) in making or publishing a fair and accurate report of any event or matter of public interest.”

83 The Tribunal construed s.11 as placing the onus on the appellants to establish that they had acted *bona fide* and in good faith for a genuine religious purpose and concluded that it was not satisfied that they had succeeded in bringing themselves within the section. The appellants do not dispute that, if they had engaged in conduct which incited hatred or other relevant emotion of or towards a person or group of persons on the ground of their religious beliefs, they would have borne the burden of establishing that the conduct was engaged in *bona fide* and reasonably for a genuine purpose within the meaning of s.11. They contend, however, that the Tribunal made a number of errors in the interpretation and application of the section.

84 The Tribunal was of the view that s.11 should be interpreted in accordance with the following observations of French, J. in *Bropho* upon the meaning of s. 18D of

the *Racial Discrimination Act 1975* (C'th):⁵⁷

“How does this approach operate in the context of s.18D? It requires a recognition that the law condemns racial vilification of the defined kind but protects freedom of speech and expression in areas defined in paragraphs (a), (b) and (c) of the section. The good faith exercise of that freedom will, so far as practicable, seek to be faithful to the norms implicit in its protection, and to negative obligations implied by s.18C. It will honestly and conscientiously endeavour to have regard to and minimise the harm it will, by definition, inflict. It will not use those freedoms as a ‘cover’ to offend, insult, humiliate or intimidate people by reason of their race or colour or ethnic or national origin.”

...

“Generally speaking the absence of subjective good faith, for example, dishonesty or the knowing pursuit of an improper purpose, should be *sufficient* to establish want of good faith for most purposes. But it may not be *necessary* where objective good faith, in the sense of a conscientious approach to the relevant obligation, is required. In my opinion, having regard to the public mischief to which s.18C is directed, both subjective and objective good faith is required by s.18D in the doing of the free speech and expression activities protected by that section.

A person acting in the exercise of a protected freedom of speech or expression under s.18D, will act in good faith if he or she is subjectively honest, and objectively viewed, has taken a conscientious approach to advancing the exercising of that freedom in a way that is designed to minimise the offence or insult, humiliation or intimidation suffered by people affected by it. That is one way, not necessarily the only way, of acting in good faith for the purpose of s.18D. On the other hand, a person who exercises the freedom carelessly disregarding or wilfully blind to its effect upon people who will be hurt by it, or in such a way as to enhance that hurt may be found not to have been acting in good faith.”

85 In the Tribunal’s view, Pastor Scot had not acted *bona fide* in the subjective sense, in accordance with that formulation, because:

“I found Pastor Scot to be passionate with regard to his religious beliefs. He sought to quote to the Tribunal the Bible, rather than answer questions directly. Ultimately, however, he would produce a responsive answer. However, his evidence was very unsatisfactory in many ways.

⁵⁷ (2004) 135 F.C.R. 105 at [95], [101], [102].

There were two aspects of his evidence which I found totally unsatisfactory and which create in my mind substantial doubts about his credibility as a witness. Firstly, in his witness statement he states that he has written books on Islam and that they had been distributed in seminars. In evidence he actually nominated a title to those books (see T1901) and he said that he had distributed approximately 20,000 of them. In fact he had not written three books. None of the books have been published and, indeed, have not been completed. Having read his witness statement, I had assumed that these were published books. In fact they are photocopies of part of what he has written, which has been photocopied and sold under a different name at conferences and seminars. He sells the photocopies of the uncompleted books for between \$10 and \$15, although he gives some of them away. Furthermore, the books are sold under the name Sadiki, which give the impression that it is a Muslim name.

Secondly, the way in which he dealt with the Qur'an verse 38 to 40 gave me great concern with regard to his ability to put forward an honest and fair representation of Islam. I am of the view that he deliberately omitted verse 39 so as to give an anti-Islamic interpretation of a Qur'anic verse. Indeed, when his attention was directed to this, his explanation was that there were time constraints. He then gave an explanation (T2114-2116) which I find extraordinary, namely that he omitted it because verse 38 requires amputation, verse 39 says if you repent you will be forgiven, but he said this relates only to a second offence, and that was the reason for his omission of that verse. Despite the arguments of Mr Perkins to the contrary, I find that assertion illogical and unsustainable. In my view, viewed objectively, it was an act [which] was deliberately deleted by him to support his views with regard to the Qur'an.

These are only two examples as to why I have substantial doubts with regard to his credibility. Overall, he was negative in his approach to Islam and its religious teachings.”⁵⁸

...

“... Having listened to him on the tapes and having carefully read the transcript, I am of the view that he is a person who appears to have a commitment to his religious beliefs. However, I am of the view that he is prepared to do whatever is necessary, to convey those beliefs to other individuals. He is a person who I found was not a credible witness insofar as his general presentation was concerned, as well as the issues I have particularly identified. In the final analysis, I have considerable doubts with regard to his credibility. Whether that failure is due to a deliberate refusal to accept matters put to him or that he is so involved in his religious teaching, as to fail to see the real issues, is a matter which I have given serious consideration. On balance, I think that he

⁵⁸ Reasons at [273].

was not a credible witness. I found him to be evasive and I have considerable doubt that what he told the seminar was his real beliefs about the Qur'an. I do not accept that he has acted in the presentation of that seminar in good faith, applying a subjective test."

86 On that basis the Tribunal concluded that:

"...In my view, the presentation of an unbalanced Seminar, albeit purporting to express the views of a particular individual, when viewed subjectively leads me to the conclusion that it was not an exercise of good faith. In my view, having made findings with regard to the credibility of Pastor Scot, I find he did not conduct the Seminar in good faith. Nor do I find that, when viewed objectively, it can be said that this was a Seminar conducted in good faith. In my opinion, the absence of a finding of good faith, denies to the respondent the protections which are contained within section 11. Further, I conclude that the seminar was not conducted reasonably having regard to the definition of that word in *Bropho's* case. It was not conducted reasonably because it was 'excessive'. It was a one-sided delivery of a view of the Qur'an and Muslims' beliefs, which were not representative. It was designed to put Muslim people and their beliefs in a bad light.

The respondents have failed to meet the criteria set out in section 11, that is, acting reasonably and in good faith. Having regard to that finding, arguments with regard to 'genuine religious purpose', or 'the public interest' only arise if the conduct meets that criteria."⁵⁹

87 The appellants argue that the Tribunal fell into error by deciding the question of whether the conduct was engaged in in good faith without first or at the same time considering whether the purpose for which the conduct was engaged in was a genuine religious purpose. Despite the Tribunal's adverse remarks about the credit of Pastor Scot as a witness, the appellants contend that it is apparent from the passages of the reasons for decision set out above that the Tribunal ultimately decided the question of subjective good faith on the basis that it did not consider that the presentation of an unbalanced Seminar when viewed subjectively was capable of being an exercise in good faith and therefore that it did not need to consider whether the conduct was engaged in for a genuine religious purpose. In the appellants' submission, it is axiomatic that the Tribunal could not properly have reached a conclusion about whether Pastor Scot acted with subjective good faith for a genuine

⁵⁹ Reasons at [385].

religious purpose without first considering whether his purpose was a genuine religious purpose. It follows, they say, that the Tribunal must have fallen into error.

88 I am not sure that the Tribunal did fall into error in that fashion. On one view of what was said, it appears that the Tribunal was simply not satisfied that Pastor Scot's statements to the Seminar about the meaning of the Koran reflected Pastor Scot's true belief about the meaning of the Koran. Hence, the Tribunal was not satisfied that Pastor Scot acted with subjective good faith. With respect, if that were the Tribunal's process of reasoning, there would be no error in it. Whatever else the concept of goodwill entails, I consider that it demands subjective honesty. Consequently, it could not be an exercise in good faith for the purposes of s.11 for a person to make a statement which the person knew to be untrue, even if he or she honestly believed in the purpose for which the statement was made and honestly believed that it was necessary or desirable to make the statement in order to achieve that purpose.

89 In case the matter is remitted to the Tribunal, however, it is appropriate that I say something further about the effect of s.11. Contrary to the approach of the Tribunal, I do not accept that the test of *bona fide* and reasonably for the purposes of s.11 is the same as the test laid down by French, J. in *Bropho* for the purposes of s.18D of the *Racial Discrimination Act 1975* (C'th). Under s.11, the question is whether the conduct in which a person ("the defendant") has engaged should be seen as having been engaged in reasonably and in good faith for a genuine academic artistic religious or scientific purpose. In my view it follows that, assuming no lack of honesty, one should ordinarily start with the identification of the purpose for which the defendant is said to have engaged in the conduct and determine whether it answers the description of an academic artistic religious or scientific purpose.

90 Plainly enough, comparative religion and proselytism are both "religious purposes" and, for the purposes of this part of the exercise, it does not matter which religions are being compared or to which religion persons are sought to be converted. Accordingly, if, as in this case, a defendant's alleged purpose is "to explain to

Christian people certain aspects of Islamic teaching and to encourage and equip Christian believers⁶⁰ to share their faith with Muslims”, then, subject to what follows, it is difficult to think that it would not qualify as a “religious purpose”. Equally, for argument’s sake, if the facts were that someone of the Islamic faith made statements contrasting aspects of Islam with aspects of Christianity in order to explain those aspects of Christian teaching to Muslims and thereby to encourage and equip Muslims to share Islam with Christians then, subject to what follows, it is difficult to think that that would not qualify as a “religious purpose”.

91 Having come to that point, I consider that one should next inquire as to whether the defendant’s alleged purpose was a “*genuine* religious purpose”. As I see it, that would depend simply on whether the defendant’s alleged religious purpose in engaging in the conduct were truly the defendant’s purpose in engaging in the conduct. If it were, it would be a *genuine* religious purpose. If it were not, or if the defendant had engaged in the conduct for more than one purpose of which the dominant purpose or purposes was or were not a religious purpose or purposes, it would not be.

92 Having reached that point, I think that one should move next to the question of whether the defendant had engaged in the conduct *reasonably and in good faith* for the genuine religious purpose. According to ordinary acceptation, to engage in conduct *bona fide* for a specified purpose is to engage in it honestly and conscientiously for that purpose.⁶¹ In my view that appears to be the intent of s.11. The legislative requirement that the conduct be engaged in not only in good faith but also reasonably means that objective standards will be brought to bear in determining what is reasonable. Despite what has been held under s.18D of the *Racial Discrimination Act*, I see no reason to load objective criteria into the conception of good faith in s.11, or otherwise to treat it as involving more than a “broad subjective assessment” of the defendant’s intentions. In my view, the requirement that conduct have been engaged

⁶⁰ Presumably that means the same thing as “Christian people”.

⁶¹ *Black’s Law Dictionary* 7th Ed. at 701; *Bropho v. Human Rights and Equal Opportunity Commission* (2004) 135 FC.R. 105 at 120, per French, J.

in *bona fide* for a genuine religious purpose within the meaning of s.11 will be established if it is shown that the defendant engaged in the conduct with the subjectively honest belief that it was necessary or desirable to achieve the genuine religious purpose.

93 That then leaves the question of whether the conduct was engaged in *reasonably* for the genuine religious purpose, and plainly as I see it that does involve an objective analysis of what is reasonable and therefore calls for a determination according to the standards of the hypothetical reasonable person.

94 Therein, however, is a further complication. It is not all that long ago that the standards of the hypothetical reasonable person were spoken of in terms of the man on the Clapham omnibus.⁶² So long as the population of this country was of predominantly Anglo-Celtic extraction, that was perhaps as apposite here as it was in United Kingdom. But today, as in the United Kingdom, our society is different. It is now a polytopic multicultural society and we recognise, and indeed the Preamble to the Act makes clear, that the standards of reasonable persons are the standards of an open and just multicultural society. Accordingly, where as here the conduct in question consists in the making of statements for a religious purpose, the question of whether it was engaged in *reasonably* for that purpose must be decided according to whether it would be so regarded by reasonable persons in general judged by the standards of an open and just multicultural society.⁶³

95 Such an assessment may not always be easy. A society which consists of varied cultural groups necessarily has the benefit, and bears the burden, of a plurality of standards. Hence, in this society, to speak of persons in general is to speak of persons who in large part have different standards. And to speak of what is reasonable among them it is to invoke an idea which as between them is to a considerable extent informed by different standards. Nevertheless, experience has

⁶² *Hall v. Brooklands Auto Racing Club* [1933] 1 K.B. 205 at 224.

⁶³ See and compare *Director of Public Prosecutions v. Collins* [2006] 1 W.L.R. 2223 at 2231, per Lord Carswell.

taught us that reasonable members of an open and just multicultural society are inclined to agree on the basics.

96 In my view one is entitled to assume that a fair and just multicultural society is a moderately intelligent society. Its members allow for the possibility that others may be right. Equally, I think, one is entitled to assume that it is a tolerant society. Its members acknowledge that what appears to some as ignorant, misguided or bigoted may sometimes appear to others as inspired. Above all, however, one is entitled to assume that it is a free society and so, therefore, one which insists upon the right of each of its members to seek to persuade others to his or her point of view, even if it is anathema to them.⁶⁴ But of course there are limits. Tolerance cuts both ways. Members of a tolerant society are as much entitled to expect tolerance as they are bound to extend it to each other. And, in the scheme of human affairs, tolerance can extend each way only so far. When something goes beyond that boundary an open and just multicultural society will perceive it to be intolerable despite its apparent purpose, and so judge it to be unreasonable for the purpose for which it was said.

97 In *Bropho*,⁶⁵ French, J. made the point that the question of whether something is said *bona fide* and reasonably for a genuine purpose may depend as much on the place where it is said and by whom it is said as it does upon its content. So, to adopt and adapt his Honour's example, what is said at a religious seminar by a true believer in one religious faith concerning the perceived inadequacies of the tenets of another might be regarded as said *bona fide* and reasonably for a genuine religious purpose of "witnessing" to adherents of the other persuasion, even though, if the same thing were said on talk-back radio by a person who had no religious beliefs and no interest in "witnessing" to those who do, it would be totally unacceptable.

98 Of necessity, the standards of an open and just multicultural society allow for differences in views about religions. They acknowledge that there will be differences

⁶⁴ *Bonnard v. Perryman* [1891] 2 Ch. 269 at 284; *Coleman v. Power* (2004) 220 C.L.R. 1 at 97[253]; *Australian Broadcasting Corporation v. O'Neill* [2006] HCA 46 at [31], per Gleeson, C.J. and Crennan, J., *cf.* at [113] - [115], per Kirby, J. *in diss.* but not in point of principle.

⁶⁵ (2004) 135 F.C.R. 105 at 128[80]-[81].

in views about other peoples' religions. To a very considerable extent, therefore, they tolerate criticism by the adherents of one religion of the tenets of another religion; even though to some and perhaps to most in society such criticisms may appear ill-informed or misconceived or ignorant or otherwise hurtful to adherents of the latter faith. It is only when what is said is so ill-informed or misconceived or ignorant and so hurtful as to go beyond the bounds of what tolerance should accommodate that it may be regarded as unreasonable.

The orders

99 Having found that the appellants had contravened s.8 and failed to bring themselves within s.11, on 22 June 2005 the Tribunal made the following orders:

- “(a) On or before 31 August 2005, the First, Second and the Third Respondents are jointly to publish a statement on the First Respondent’s website (currently located at www.catchthefire.com.au) and on the front page of its standard Newsletter which reproduces exactly, without addition or qualification and at least in a font size 10, the statement set out in the Annexure to these orders (‘the statement’).⁶⁶
- (b) The First Respondent is to maintain that statement on its website for a period of 12 months, namely until 31 August 2006.
- (c) On or before 31 August 2005, the First, Second and the Third Respondents are jointly to place the statement, over two consecutive weeks in:
 - (i) a Saturday edition (News Book One) and a Monday edition of The Age newspaper, on pages 5, 7 or 9, with the size for the area of the statement not less than 17cm wide x 10.8cm high;
 - and
 - (ii) a Saturday edition and a Monday edition of the Herald Sun newspaper, on pages 7 or 9, with the size for the area of the statement not less than 14.9cm wide x 12.2cm high,and, with a heading, in bold and in at least font size 20, reading ‘Breach of Racial and Religious Tolerance Act’.”

⁶⁶ The text of the statement appears in the Annexure.

100 Then on 9 August 2005, after the appellants had refused to undertake not to continue to make statements to the effect of those made at the Seminar and in the Newsletter and article, the Tribunal further ordered that the first Respondent (its officers, employees and agents), second Respondent and third Respondent be restrained from

“(a) making, publishing or distributing in Victoria (including on the internet), whether in writing or orally and whether directly or indirectly, any statements and, or alternatively, information, suggestions and implications, to the same or similar effect as those found by the Tribunal to have breached the *Racial and Religious Tolerance Act 2001*(Vic) (see paragraphs 80, 379, 387, 390 of the Reasons for Decision);

(b) making, publishing or distributing in any other State or Territory of Australia (including on the internet), whether in writing or orally and whether directly or indirectly, any statements and, or alternatively, information, suggestions and implications, to the same or similar effect as those found by the Tribunal to have breached the *Racial and Religious Tolerance Act 2001* (Vic) (see paragraphs 80, 379, 387, 390 of the Reasons for Decision).”

101 The appellants contend that it was beyond power for the Tribunal to order publication of an advertisement in the form of the annexure because, in the appellants’ submission, it makes no reference to any loss or damage or injury suffered by the respondent; it is not in the form of an apology or admission or anything that is referable to hurt or injury suffered by the respondent as a result of the impugned conduct; and it is in the nature of corrective advertising which, in the absence of a specific corrective advertising power like s.86C(2)(d) of the *Trade Practices Act 1974* (C’th) the Tribunal has no power to make.

102 I do not accept that contention. Assuming for the sake of argument that the Tribunal had been correct in finding that the appellants contravened s.8 of the Act, the Tribunal would have had power under s.136(a)(iii) of the *Equal Opportunity Act 1995*⁶⁷ to make an order that the appellants do anything specified in the order with a view to redressing any loss, damage or injury suffered by the complainant as a result of the

⁶⁷ See *Racial and Religious Tolerance Act 2001*, s.23.

contravention. In the case of a representative complainant, like the respondent, I take that to mean redressing the loss etc suffered by the persons whom the complainant represents. Granted that a contravention consists in inciting hatred of or other relevant emotion towards a person or group of persons because of their religious beliefs, and that a corrective advertisement cannot compensate them for that state of affairs in the way that an award of damages or even an apology might do, I consider that it is obvious that an advertisement of the kind set out in the annexure is likely to go a long way to redressing the sense of hurt and therefore injury suffered by those against whom hatred or other relevant emotion has been incited.

103 The suggestion that there could be no power to order corrective advertising without a specific power to that effect is not persuasive. The power conferred by s.136(a)(iii) is in terms very broad and I can see no basis in law, and none was suggested, to read it down just because the Commonwealth Parliament thought fit in an unrelated Commonwealth Act to confer an express advertising power for a different purpose.

104 The appellants further contend, however, that, regardless of the question of power, the orders made on 9 August 2005 were too wide, unqualified and uncertain to be allowed to stand and ought be set aside. I accept that contention.

105 For the reasons already given, I am of the view that the orders of the Tribunal ought to be set aside and the matter remitted to the Tribunal for reconsideration. But the point is well made that the orders made on 9 August 2005 lack the sort of specificity and precision which is essential for injunctive orders and, in any event, that they go too far. They purport to prevent the respondents saying anything in substance or to the effect of the statements identified as having been made in the Seminar, Newsletter and article and, on any analysis, there is nothing in a number of those statements which could conceivably contravene s.8, assuming without deciding that it may be held that others do.

106 For example, it cannot be that any of the statements referred to in sub-

paragraph (1), (4), (6), (7), (8), (10), (11) or (13) of paragraphs 80 and 379 of the reasons for decision contravene s.8 - assuming of course that one is speaking about the statements as they were made by Pastor Scot as opposed to the way in which they have been characterised in paragraphs 80 and 379. Similarly, paragraphs 387 and 388 of the reasons for decision, taken together, refer to the whole of the Newsletter article "2002 - Will Australia be a Christian Country?" In my view, it cannot be that every statement in the article is capable of contravening s.8. Moreover, even if one takes only those parts of the article which are specifically identified in paragraph 387, I do not think it can be a contravention of s.8 to refer to an event which occurred in Saudi Arabia, provided that what is said is the truth, despite the fact that it may not reflect favourably on Muslims in that country. Nor do I think it can be a contravention of s.8 to refer to what an Imam has said in Australia, provided he said it, even if it may reflect or be perceived to reflect unfavourably on Muslims in Australia.

107 So to say is not to deny that things of that kind might be so combined with other statements as to incite hatred of persons or other relevant emotion towards persons on the basis of their religious beliefs. But that is a different matter. It is one thing to find that an article as a whole infringes s.8 and it is another to enjoin publication of anything which is said in the article. It would be an extreme case indeed where the former justified the latter. I also note in passing that the Tribunal found only that the totality of the article was "*likely* to incite a feeling of hatred towards Muslims" whereas the test is whether it incited hatred and so whether the natural and ordinary effect of the article was to encourage hatred of Muslims because of their religious beliefs. It may be that the two things are the same, but considerable care needs to be exercised.

108 Turning then to the article "An Insight into Islam by Richard" which is mentioned in paragraph 390 of the reasons for decision, the reference is to the article as a whole and yet again there are significant parts of the article which could not conceivably amount to a contravention of s.8. They include reports on the intolerance

which is shown towards Christianity in Saudi Arabia; the fact that the Bin Laden Corporation is prospering in Saudi Arabia; and that Osama Bin Laden proclaimed the attack on the New York World Trade Centre on 11 September 2001 as “punishment from almighty Allah”. They also include passages of the article such as:

“I have personally met many Muslims who were far kinder and nicer than a lot of Americans and non-Muslims that I know

“In other words, most Muslims really don’t live out the 7th century cultural ideas of Islam’s founder...They are very much like what some people in America would call ‘nominal Christians’. They believe in Islam because their parents told them [it] is true, but have no real knowledge [as] to its real specifics.

“You see, Muslims have consciences too that bear witness to what is right and wrong.

“Again - this does not mean that every Muslim is a terrorist or a murderer... I have met some wonderful people in the Middle East that I miss even today.

“As Christians we are not called to hate Muslims. But we are called to discern what is true and false and not to blindly accept beliefs that are destructive and contrary to Jesus’ life of love and justice. We are called to love Muslims with the love of Christ. Love your Muslim friends and share with them the true message of the love of God that is found in Christ. Many of them are desperately waiting to find the eternal life that Jesus promises in John 3:16, 5:24, 6:40, 10:10, 10:28; Romans, etc.”

109 It is the same with the Newsletter. Assuming for the sake of argument that there are statements in the Newsletter which may be held to contravene s.8, there are many which clearly do not. They include:

“Many Christians around the world believe that ‘Allah’ of the Muslims is God the Father we serve...

Church youth groups are mainly geared to entertain the youth. Are we producing disciples or mere entertainers?..

I get very worried when I see one church grow to thousands, while other churches are struggling to survive...

Dear Pastors, if we can somehow stop & attract the presence of the Holy Spirit into the church I believe the Holy Spirit himself is more user friendly than any ‘program’ & He will draw men unto the Father

We need to love Muslims with all our heart, However difficult it may

be. I love them so much – even though I almost lost my life and my family trying to preach to them about Jesus in Saudi Arabia. As I travel and minister I have met many Muslim’s [sic] who have turned to Jesus from countries such as Iran, Iraq, Saudi Arabia, Afghanistan, Pakistan, Ethiopia, Indonesia, Malaysia, Sudan. Many of them turned to Christ because they met Jesus personally or some Christian dared to tell them that Jesus loves them.

Let’s love the Muslim, let’s reach them to Christ [sic]...”

110 In short, the point is that, if any republication of any parts of the Seminar or the Newsletter or the article are to be prohibited, it will be necessary to identify precisely the parts which offend the section and to prohibit republication of any statement in terms or substantially to the effect of those which are so identified.

Constitutional validity

111 The appellants finally contend that, if s.8 were construed as prohibiting incitement of hatred of religious beliefs as opposed to hatred of persons because of their religious beliefs, and if s.11 were construed as applying to a statement concerning the religious beliefs of a person or group of persons only if the statement were “balanced” or “not excessive or one-sided”, s.8 would infringe the freedom of communication on governmental and political matters which has been held to arise from ss.7, 24, 64 and 128 of the Constitution.⁶⁸ If my view as to the meaning and effect of ss.8 and 11 is correct, the question does not arise.

112 In deference, however, to the arguments of counsel, and in case this matter is to go any further, I add that I take *Lange v. Australian Broadcasting Corporation*⁶⁹ to have established that the implied freedom first recognised in *Theophanous v. Herald & Weekly Times*⁷⁰ is limited to communications which relate to “political or government” matters and that, since the decision in *Coleman v. Power*,⁷¹ the test of validity is:

⁶⁸ *Lange v. Australian Broadcasting Corporation* (1997) 189 C.L.R. 520 at 561; *APLA Ltd v. Legal Services Commissioner* (N.S.W.) (2005) 79 A.L.J.R. 1620 at 1636.

⁶⁹ (1997) 189 C.L.R. 520.

⁷⁰ (1994) 182 C.L.R. 104.

⁷¹ (2004) 220 C.L.R. 1.

- First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?
- Secondly, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s.128 for submitting a proposed amendment of the Constitution to the informed decision of the people?⁷²

113 As at present advised, I do not consider that s. 8 of the Act effectively burdens freedom of communication about political matters in the sense which was contemplated in *Lange*.⁷³ But if it did then, based upon the observations of Gleeson, C.J. in *Coleman v. Power*,⁷⁴ I consider that it would be appropriate and adapted to serve a legitimate end, namely, the prevention of religious vilification, in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s.128 for submitting a proposed amendment of the Constitution to the informed decision of the people.⁷⁵

Conclusion and orders

114 For the reasons given, I would allow the appeal and set aside the orders of the Tribunal. I would remit the proceeding to the Tribunal, to be constituted by a different member, to be heard and decided again without the hearing of further evidence.

⁷² (2004) 220 C.L.R. 1 at 77[196]-[197].

⁷³ See and compare *Brown v. Classification Board* (1998) 82 F.C.R. 225 at 258; *Holland v. The Queen* (2005) 222 A.L.R. 694 at [223]; *APLA Ltd v. Legal Services Commissioner (N.S.W.)* (2005) 79 A.L.J.R. 1620 at 1636 and 1662.

⁷⁴ (2004) 220 C.L.R. 1 at 32[32].

⁷⁵ Cf. *Jones v. Scully* (2002) 120 F.C.R. 243.

Post script

115 Since writing this judgment, I have had the opportunity to read in draft the reasons for judgment of Neave, J.A. and Ashley, J.A. and, with the benefit of their insight, I wish to add three things to what I have written.

116 First, for the purposes of determining what constitutes “incitement”, although I have concluded that one may usually assume a degree of reasonableness among an audience, as Neave, J.A. demonstrates, that will not always be so.

117 Secondly, as Neave, J.A. and Ashley, J.A. both observe, the effect of a publication is for relevant purposes to be determined by consideration of the publication as a whole. It is a point which I endeavoured to make in what I wrote but, in view of what they have said, I fear I may not have done so with sufficient clarity. With respect, they are right to emphasise the importance of the point.

118 Thirdly, as Ashley, J.A. explains, the way in which the appellants conducted their case below made the task for the Tribunal extraordinarily difficult and, in the circumstances, the fashion in which the Tribunal dealt with the matter is in my view worthy of high praise. As it is, the point of law on which the appeal is to be allowed was not only not argued below but in effect is contrary to the way in which the appellants conducted their case. Obviously, the Tribunal cannot be criticised for deciding the matter as it did.

ASHLEY, J.A.:

119 I have had the great advantage of reading in draft the reasons for judgment of Nettle, J.A. and of Neave, J.A. I agree with their Honours that the appeal should be allowed. I agree also that the proceeding should be remitted to the Tribunal to be determined on the evidence already adduced. But notwithstanding that their Honours’ reasons are very detailed, there are some matters which I wish to add.

120 First, it is right to acknowledge the prodigious amount of work which was evidently undertaken by the learned County Court judge who, as Vice President, constituted the Tribunal. It is plain indeed from his reasons that the Tribunal's task was made more difficult than it need have been by the manner in which the proceeding was conducted - for the most part, though not exclusively so, by the appellants. I should give just two examples.

121 Both sides, but particularly the appellants, seem to have made the trial an attempted enquiry into the objective truth or otherwise of statements made about Islam at the seminar and in the other impugned publications - which assumes that this was an issue susceptible of resolution by a lay tribunal. Whilst such evidence was not altogether irrelevant - likewise the evidence of Messrs Thomas and Eade, and Ms Jackson - it seems to have become a principal battleground; and that was not justified.

122 Again, it seems clear from the Tribunal's reasons that the appellants pursued a number of arguments which were fanciful, or were otherwise a distraction from identification and resolution of the real issues in the case. The Tribunal noted submissions, for instance, that -

- The Islamic Council of Victoria was a political pressure group seeking to oppose the opinions of others about the Qur'an. (This, at least by implication, was the appellants' explanation for the proceeding having been brought.)
- Islam was not a religion; or alternatively, was both a religion and a political system.
- Distribution of the Qur'an was illegal, as being a seditious act.
- Any class of persons was Muslims worldwide (although, according to some of the evidence, the beliefs attributed to Muslims at the seminar were held by only an extremist splinter group). It followed that "Victorian Muslims" were not a relevant class of persons for the purposes of s.8(1) of the *Racial*

123 Second, with respect to proof of incitement, it appears to have been common ground at trial that there was an objective aspect to be considered – that is, the inciting effect, if any, of the impugned conduct upon an “ordinary reasonable reader.” But before this Court the appellants contended, if there was any objective aspect to the required enquiry (which they disputed), that it must be “more closely aligned to the attributes of the likely audience of the impugned communication.” A question of statutory construction – that being a question of law, see s.148(1) of the *Victorian Civil and Administrative Tribunal Act 1998* – was thus agitated on the appeal which the Tribunal was not asked to address.

124 Third, it is a corollary of the matter just mentioned, I agree with Nettle, J.A. and Neave, J.A. that the appellants’ argument in this Court was well-founded. It provides one of the reasons why the appeal must be allowed. But the Tribunal could bear no criticism in that connection.

125 Fourth, the appellants argued in this Court, as I understand it, that the Tribunal had been right to apply *Bropho v. Human Rights & Equal Opportunity Commission*,⁷⁶ in giving meaning to the words “on the ground of the religious belief or activity of another person or class of persons,” where found in s.8(1) of the Act. They complained that the Tribunal, having correctly construed the words “on the ground of” as requiring a causal link between the religious belief or activity and the conduct engaged in, then erroneously resolved the proceeding by considering whether the religious beliefs of Muslims provided the basis upon which the audience was incited to hatred etc of that class of persons.

126 The respondent, for its part, submitted that the so-called *Bropho* construction was correct;⁷⁷ and that it was correctly applied.

127 Nettle, J.A. and Neave, J.A. have concluded, however, that the proper

⁷⁶ (2004) 135 F.C.R. 105 at 125, [71] per French, J.

⁷⁷ See respondent’s outline of argument at [49]-[57].

construction of the words “on the grounds of the religious belief or activity of another person or class of persons” does not require a causal connection between the religious belief or activity and the conduct engaged in; but rather pertains to the question whether an audience was incited to hatred of a particular person or class of persons because of the religious belief or activity of such person or class. Their Honours have then considered whether the Tribunal’s wrong approach led it into error; and have concluded – though not for identical reasons – that it did so. The Tribunal should not be criticised for adopting a construction of the particular words in s.8(1) which seems not to have departed from submissions made at trial; and which did not depart from submissions made before this Court.

128 Fifth, concerning the issue of construction just mentioned, I consider, with respect, that the *Bropho* formulation – really, the formulation by Kiefel, J. in *Creek v. Cairns Post Pty Ltd*⁷⁸ – was justified by the language of s.18C(1)(b) of the *Racial Discrimination Act 1975* (Cth). It is true that in *Cairns Post* Kiefel, J. applied the opinion of McHugh J in *Waters v. Public Transport Corporation*⁷⁹ concerning the construction of s.17(1) of the *Equal Opportunity Act 1984* (Vic); and that his Honour’s construction of that provision was in the minority. But it was another matter whether his Honour’s approach assisted the construction of the provision which fell for consideration in *Cairns Post*; and in my opinion it did. That section, set out by Neave, J.A. at [138] in her reasons, speaks of an act being done, of it being reasonably likely to have a particular effect upon certain persons, and of it being “done because of” qualities of those persons. As I see it, the language of the provision, construed in an orthodox way, ran strongly in favour of the conclusion which Kiefel, J. reached.

129 What I take to have been the correctness of *Cairns Post* leaves untouched the question whether the language of s.8(1), considered consistently with the general conceptual approach commended by Mason, C.J. and Gaudron, J. in *Waters*,⁸⁰ leads to

⁷⁸ (2001) 112 F.C.R. 352 at [23].

⁷⁹ (1991) 173 C.L.R. 349 at 401.

⁸⁰ *Supra*, at 359-360, Deane J agreeing at 382.

the conclusion arrived at by Nettle, J.A and Neave, J.A. Not without doubt, I have concluded that it does. The structure of s.8(1), though not patent as to the relevant connection, is akin to the provision considered in *Waters*. The language of s.1(a) favours the construction preferred by their Honours. So does the language of s.9(1), which provides that in determining whether there has been a contravention of, inter alia, s.8, “the person’s motive in engaging in any conduct is irrelevant.” Such a construction is also favoured by the view taken by the New South Wales Administrative Decisions Tribunal in *Kazak v. John Fairfax Publications Limited*⁸¹ concerning s.20C(1) of the *Anti-Discrimination Act 1977* (NSW), although that provision was a clearer case of the relevant connection. Again, the construction which their Honours, and I, favour is consistent with the conceptual approach of which Mason, C.J. and Gaudron, J. made mention in *Waters*.

130 The difficulty with such a construction, I consider, mainly lies in the language of s.9(2). The sub-section reads this way:

“In determining whether a person has contravened section 7 or 8, it is irrelevant whether or not the race or religious belief or activity of another person or class of persons is the only or dominant ground for the conduct, so long as it is a substantial ground.”

131 Read naturally, the (race or) religious belief of the other person or class of persons is associated with the “ground for the conduct.” That is inconsistent with the construction of s.8(1) which each of the members of this Court prefers. On the other hand, such a conception sits ill with s.9(1), and is quite inconsistent with the language of s.1(a). I think it should probably be explained as an inept attempt, drawn from language used in anti-discrimination legislation of another kind, to deal with an issue other than motive – in which case s.9(1), and what it conveys, and as well the other considerations which I have mentioned, should be regarded as continuing to tell in favour of the preferred construction of s.8(1).

⁸¹ [2000] NSWADT 77.

Sixth, the reasons for judgment of Nettle, J.A and of Neave, J.A, as I mentioned a little earlier, do not wholly coincide. Concerning the differences, I should say this: First, concerning the question of incitement, I prefer the formulation that it should be decided by reference to an “ordinary” rather than a “reasonable” member of the audience class. See, in that connection, the reasons of Neave, J.A. at [158]. Second, I prefer to leave it as an open question – for it need not be decided – whether the Tribunal fell into error by eliding hatred of beliefs and hatred of persons who hold those beliefs. Third, I adopt the like position with respect to the question whether the Tribunal’s consideration of lack of balance in the seminar presentation led it into error. Fourth, concerning the seminar, I agree with Nettle, J.A. that the application of the correct audience test was likely to have been more favourable to the appellants than the test which the Tribunal applied. Fifth, I agree with Neave, J.A. that the import of a publication,⁸² so far as incitement is concerned, may be disclosed from consideration of its entirety rather than by discrete examination of its component parts. But it needs to be remembered that any number of nothings cannot make a something.⁸³

NEAVE, J.A.:

This case concerns the construction and application of s.8 of the Victorian *Racial and Religious Tolerance Act 2001*, which was enacted to protect individuals and groups from vilification on the ground of their religious beliefs, without unduly restricting the right of members of the community to freely express their views about religious matters.⁸⁴ The words and conduct which were alleged to have breached s.8 are described in Nettle, J.A.’s judgment.

⁸² Of whatever kind – oral, print, internet.

⁸³ This, in my opinion, is an apposite concept, notwithstanding that it derives from the “combination of errors” ground of appeal in criminal cases. See, recently, *R. v. Gell* [2006] VSCA 255 at [5] per Callaway, J.A.

⁸⁴ See Preamble to *Racial and Religious Tolerance Act 2001*. See also s 1 which sets out the purposes of the Act as (a) “to promote racial and religious tolerance by prohibiting certain conduct involving vilification of person on the ground of race or religious belief or activity” and (b) “to provide a means of redress for the victims of racial or religious vilification.”

134 For the reasons set out below I agree with the conclusion of Nettle, J.A. that the Tribunal made errors of law in its interpretation of s.8, which vitiate the Tribunal's decision that the appellants breached the Act. I therefore agree that the appeal should be allowed and the matter remitted to a differently constituted Tribunal, to be heard and decided without the hearing of further evidence.

Issues

- 135 The appellant contends that the Tribunal erred
- (a) in construing s.8 of the *Racial and Religious Tolerance Act 2001*;
 - (b) by having regard to the evidence of Mr Thomas, Mr Eade and Ms Jackson in determining whether there had been a breach of s.8;
 - (c) by making a finding that the appellants breached s.8, which was against the weight of the evidence;
 - (d) in construing s.11 of the *Racial and Religious Tolerance Act 2001*, which provides that certain conduct is not unlawful, even though it would otherwise be caught by s.8;
 - (e) by failing to find that s.8 of the *Racial and Religious Tolerance Act 2001*, is invalid, because it breaches the freedom to communicate about political and governmental matters which is implied in the Commonwealth Constitution;
 - (f) by making orders which were beyond the power of the Tribunal, or invalid because they were insufficiently precise.⁸⁵

Each of these submissions is considered below.

⁸⁵ See appellants' Grounds of Appeal and Outline of Argument.

Did the Tribunal construe s.8 of the Racial and Religious Tolerance Act 2001 correctly?

136 Section 8 of the Racial and Religious Tolerance Act provides that

“(1) A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons

(2) For the purposes of sub-section (1) conduct –

- (a) may be constituted by a single occasion or by a number of occasions over a period of time; and
- (b) may occur in or outside Victoria.”

137 The appellant submits that the Tribunal erred in construing s.8. In particular it is contended that the Tribunal

- incorrectly applied the words “on the grounds of the religious belief or activity of another person or class of persons,” to the grounds on which the hearer or reader of the words was incited to the relevant response, rather than to the grounds on which the alleged inciter engaged in his or her behaviour;
- failed to distinguish between inciting “hatred” or other relevant emotion⁸⁶ against a religious belief (which is not prohibited by s.8) and inciting hatred against a person or class of persons, on the grounds of their religious belief;
- incorrectly regarded s.8 as applying to words or conduct which was “likely” to incite the relevant response; and
- incorrectly considered the effect of the words used by the alleged inciter on an “ordinary reasonable” reader or hearer rather than on the particular audience which heard or was likely to hear the relevant words.

⁸⁶ In this judgment I refer to incitement of “serious contempt for, or revulsion or severe ridicule of” a person or class of persons as incitement of a “relevant emotion.”

Do the words “on the ground of the religious belief or activity” apply to the words or acts of alleged inciter or to the reaction of his/her audience?

138 The appellants submit that the words “on the ground of the religious belief or activity” of a person in s.8(1), should be interpreted in the same way as the words “because of the race” etc were interpreted in *Bropho*.⁸⁷ In *Bropho* a complaint was made under *Racial Discrimination Act 1975*, s.18C(1), which provides that

“It is unlawful for a person to do an act, otherwise than in private, if:

- (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
- (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.”

French J held that this provision required a causal connection to exist between the act which was done and the characteristics of the person or group affected by the act.⁸⁸

139 The appellants contend that the Tribunal erred by purporting to follow the *Bropho* test in applying s.8, but not actually doing so. It is said that the Tribunal incorrectly considered the causal link between the religious beliefs of Muslims and the hatred or other relevant emotion which was incited in others, rather than examining the causal connection between the behaviour alleged to have an inciting effect and the religious beliefs of Muslims.

140 I agree with Nettle, J.A. at [20]-[24], that the *Bropho* test does not apply to s.8. The different manner in which the Victorian legislation deals with vilifying behaviour makes French J’s reasoning inapplicable to the Victorian Act. The *Racial Discrimination Act 1975*, s.18C is not concerned with incitement, but with acts which are reasonably likely to “offend, insult, humiliate or intimidate another person or a group of people.” It requires the impugned conduct to be considered from the perspective of the person said to have been vilified and says that the act must be done “because of” the race, colour or national or ethnic origin of a person or group.

⁸⁷ *Bropho v. Human Rights and Equal Opportunity Commission* (2004) 135 F.C.R. 105 at [63].

⁸⁸ *Ibid* at [63].

141 By contrast, s.8 of the *Racial and Religious Tolerance Act* determines whether the words or conduct are unlawful by reference to their effect on the relevant audience.⁸⁹ To put it another way, the Victorian legislation is not concerned with whether the alleged inciter has been actuated by the religious belief of a person or class of person, but with whether the audience was incited to hatred (or other relevant emotion) of another group, because of that groups' religious beliefs.

142 The wording of s.8 of the Victorian Act is similar to that of the New South Wales *Anti-Discrimination Act 1977* s.20C(1) which provides that

(1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group.

143 In *Kazak v. John Fairfax Publications Ltd* the New South Wales Administrative Decisions Tribunal said that

"there must be a causal connection between the race of the person or group of persons concerned and the feelings of hatred, serious contempt or severe ridicule which are incited by the public act..."⁹⁰

...

"The grounds on which the public act was performed is not relevant, it is the ground on which the reader was incited to hatred etc which is relevant."⁹¹

144 This view was not challenged on the appeal from the first instance decision to the Administrative Decisions Tribunal Appeal Panel.⁹² In my opinion the same principle applies in Victoria, subject to the qualification below. Section 9(1) provides that the person's motive in engaging in conduct which incites hatred is irrelevant. As Nettle, J.A. says at [23]-[24] of his judgment, this supports a construction of s.8 which

⁸⁹ N. Rees and K. Lindsay, *Australian Anti-Discrimination Law: Text, Cases and Materials* (Oxford University Press) (forthcoming). The question of the kind of audience which should be considered is dealt with at [25] below.

⁹⁰ [2000] NSWADT 77 [70]. (The decision was of the Equal Opportunities Division of the ADT).

⁹¹ *Ibid* at [69].

⁹² *John Fairfax Publications Pty Ltd v. Kazak* [2002] NSWADAP 35 [16] and note my disagreement with the "ordinary reasonable reader" test in [158] below.

does not require that the behaviour of the inciter be “moved or actuated” by the religious belief of the persons against whom hatred or other relevant emotion is incited.

145 Although s.8 requires a causal connection between the feelings of hatred or other relevant emotion which are incited and the religious belief of the vilified person or group, I note that this creates some difficulties in interpreting s.9(2) of the *Racial and Religious Tolerance Act 2001*.

146 Section 9(2) says that

“In determining whether a person has contravened section 7 or 8 , it is irrelevant whether or not the ... religious belief or activity of another person or class of persons is the only or dominant ground *for the conduct*, so long as it is a substantial ground.” [emphasis added].

147 This mirrors provisions in anti-discrimination legislation which prohibit discrimination based on specified characteristics (for example sex and race), which are designed to deal with cases where discrimination is based on more than one characteristic, for example the situation where a person is not hired, or is fired from a job because she is a woman (a prohibited ground of discrimination) and because she has a very unpleasant speaking voice. In this context provisions similar to s.9(2) are intended to provide a remedy for people who are discriminated against on a prohibited ground, even though the discrimination was not based solely on that ground.

148 Along similar lines, s.9(2) of the *Racial and Religious Tolerance Act* makes it clear that s.8 applies, even where there is more than one basis on which hatred or other relevant emotion is incited. For example s.9(2) covers the case where hatred or other emotion is incited on two grounds, only one of which is covered by s.8 - for example on the grounds that a person is both disabled⁹³ and a Muslim.

⁹³ In the absence of this provision, such a person might, in some circumstances, have a remedy under the *Equal Opportunity Act* for discrimination in a particular area such as employment but might not have a remedy for the conduct covered by s.8 of the *Racial and Religious Tolerance Act*.

149 The purpose of s.9(2) is evident in cases where the vilification is based on more than one ground. The difficulty is that by requiring religious belief or activity to be at least a “substantial ground” for the inciter’s behaviour, s.9(2) supports a construction of s.8 which requires a link between (in this case) religious belief and the factor which motivated the conduct of the inciter. This issue does not arise under the New South Wales *Anti-Discrimination Act 1977*, because the provision equivalent to s.9(2) applies only to discrimination and not to vilification. As the New South Wales Administrative Decisions Tribunal pointed out in *Kazak* “this is logical because ‘on the ground of’ in the vilification provisions relates to the relationship between race and incitement, not race and the public act.”⁹⁴ In my view however, the presence of s.9(2) in the *Racial and Religious Tolerance Act* does not require that the words “on the ground of” in s.8 be interpreted differently from the way it was interpreted in *Kazak*.

150 The hypothetical question raised by the presence of s 9(2) however is whether it is unlawful under s.8 for a person to use words which are neither subjectively based on the fact that members of a group have a particular religious belief, nor objectively referable to the religious beliefs of that group, but which, would, in the context in which they are uttered, incite hatred in the audience, on the grounds of the religious belief of those other persons. For example suppose that a person incites hatred against people living in a public housing block, without making any reference to, or even being aware of their religious persuasion. Suppose that this statement incites hatred etc in the minds of other people living in the same area who are aware of the religious beliefs of the majority of the people living in that public housing block and who attribute their hatred to the fact that the people living there are adherents of a particular faith. In these circumstances the religious belief of the people living in the block is not a “substantial ground” for the inciting conduct, as required by s.9(2), but it may be the reason why the statement has incited hatred in the minds of the audience.

151 Although s.8 is primarily concerned with the ground on which hatred or other

⁹⁴ *Kazak v. John Fairfax Publications Pty Ltd* [2000] NSWADT 77 at [69].

relevant emotion was likely to be incited in the minds of the audience, I doubt whether it would apply in the circumstances described in [150]. In other words, s.8 may not apply where there is no link at all between the conduct of the inciter and the religious belief of the “victims,” even though other persons were incited to hatred by the words used by the alleged inciter, and their hatred was based on the religious belief of the victim group.

152 As a practical matter, however, it is unlikely that a person’s words or acts will be likely to incite others to hate people on the grounds of their religious belief where there is no link at all between the words or actions of the alleged inciter and the religious beliefs of the victims. Further, it is unnecessary to determine the effect of s.9(2) in such circumstances because there is no doubt that the alleged inciting conduct was actuated by Pastor Scot’s, Pastor Nalliah’s and Catch the Fire Ministry’s attitudes to Islam. Nevertheless, s.8 requires the Tribunal to consider whether conduct was likely to incite hatred or other relevant emotion in the minds of the audience against Muslims, because of their religious belief in Islam.

Does s.8 require that incitement actually occur, or is it sufficient that the words or conduct are likely to incite hatred or other relevant emotion?

153 The appellant’s outline of submissions contends that s.8 requires “proof that persons were actually incited to hold the very strong emotions in this section.” It is said that the Tribunal wrongly interpreted the section as covering conduct which simply has the tendency to incite hatred or other emotion, even if it does not actually do so.⁹⁵ It is submitted that the Tribunal should not have relied on the New South Wales Administrative Decisions Tribunal Appeal Panel in *John Fairfax Publications Pty Ltd v. Kazak*,⁹⁶ which held that acts which were “likely to incite” were caught by religious vilification provisions, because that case was concerned with s.20C of the New South Wales *Anti-Discrimination Act 1977*.

⁹⁵ Outline of Submission [45].

⁹⁶ [2002] NSWADTP 35.

154 Section 20C(1) is set out in [142] above. The relevant words of the New South Wales section are very similar to those of the Victorian legislation. In my view the approach taken in *Kazak* should be applied in interpreting s.8 of the *Racial and Religious Tolerance Act*. I therefore agree with Nettle, J.A.⁹⁷ that the Tribunal did not err in finding that s.8 covers conduct which is capable of causing hatred of or other relevant emotion towards a person or class of persons on the grounds of their religious belief, even if it does not actually succeed in provoking that response.

Does s.8 require consideration of whether the ordinary reasonable reader would be incited to hatred or other relevant response?

155 In *Kazak* the Administrative Decisions Tribunal Appeal Panel held that s.20C of the *Anti-Discrimination Act 1977* required consideration of whether

“the ordinary reasonable reader [could] understand from the ... act that he/she is being incited to hatred towards or serious contempt for, or severe ridicule of a person or persons on the ground of race.”⁹⁸

156 The appellant submits that the Tribunal erred by relying on this “objective test” of incitement. Alternatively, even if this approach was correct the Tribunal erred

“in attributing to the ordinary reasonable reader broad, general characteristics and ascribing the relevant social and historical context of the conduct as that which may be presumed to be part of the ordinary reasonable reader’s knowledge and experience of human affairs.”

157 Section 8 is not directed at religious vilification in the abstract but is concerned with the effect of the alleged inciter’s words or conduct on those exposed to that behaviour. If that were not the case, a person could deliberately inflame the emotions of people known to have prejudiced views towards a particular religious group and then avoid the application of s.8 by saying that the behaviour would not have incited an ordinary reasonable audience. With one minor qualification, I therefore agree with Nettle, J.A.’s view that s.8 requires consideration of the effect of the conduct on a

⁹⁷ At [14].

⁹⁸ [2002] NSWADTP 35 at [16] and see also [12].

member of the class to which it is directed.⁹⁹

158 The minor qualification relates to Nettle, J.A.'s reference in [18] to a "reasonable" member of the class to which that conduct is directed. Despite the common use of the concept of reasonableness, both in the common law and in legislation, I have avoided that formulation because the concept of "a reasonable member of the class" may be inappropriate in the context of racial or religious vilification. For example, in considering whether anti-semitic remarks made to a group of neo-Nazis were likely to incite them to hatred or other relevant emotion it would be both absurd and offensive to consider the effect of those words on a "reasonable" neo-Nazi. For that reason it may be more appropriate to consider the effect of the words or conduct on an "ordinary" member of the class to which it is directed, taking account of the circumstances in which the conduct occurs. I would therefore agree with Nettle, J.A.'s view at [19] that the test for the purposes of s.8 is "whether the natural or ordinary effect of the conduct is to incite hatred or other relevant emotion in the circumstances of the case."

159 Those circumstances include both the characteristics of the audience to which the words or conduct is directed and the historical and social context in which the words are spoken or the conduct occurs. It is trite to remark that the social and historical context in which words are spoken or behaviour occurs, alters from time to time. Changes in social context mean that words directed against members of a particular racial or religious group could be found to have the relevant inciting effect at one time, which they would not have at another time. For example words attacking a racial or religious group at a time when Australia was at war with a country from which members of that group originally came might be likely to incite hatred or other relevant emotion against members of that group, whilst the same words said in peacetime would not be likely to incite this response. Whether particular words have this effect is a question of fact. Social context is also relevant in considering the effect of s.11 of the *Racial and Religious Tolerance Act*.

⁹⁹ At [17].

Summary of s.8

160

In my view therefore, s.8 should be construed as follows.

- The phrase “on the grounds of religious belief” does not refer to the ground which caused the alleged inciter to act, but to the ground on which people exposed to the alleged inciter’s words or conduct were incited to hatred, or other relevant emotion against another person or group.
- It is not necessary to show that the audience was actually incited to hatred, serious contempt for, or revulsion or severe ridicule of, a person or class of persons, on the grounds of their religious belief. A breach of s.8 occurs if the words or conduct has the tendency to incite that response.
- In considering whether s.8 has been breached, it is necessary to take account of the effect of the words or conduct on an ordinary member of the audience to which they were directed.

161

It follows from the above that I agree with Nettle, J.A.¹⁰⁰ that the question which the Tribunal was required to ask itself was whether the statements made by Pastor Scot at the seminar, the newsletter compiled by Pastor Nalliah and the publication by Catch the Fire Ministries of the article “by Richard” on its website, were, in the current social context, likely to incite hatred, serious contempt for, or revulsion or severe ridicule of Muslims, because of their religious beliefs, in the minds of the persons to whom those statements were directed.¹⁰¹

Did the Tribunal’s errors in construing s.8 vitiate its conclusion that the section was breached?

162

It follows from the above that the Tribunal made two errors of law in construing s.8. First, it regarded the words “on the grounds of religious belief” as requiring reference to the ground actuating the alleged inciter, rather than to the

¹⁰⁰ At [30].

¹⁰¹ The issue of the nature of the audience is considered below.

ground on which the audience was incited to hatred or other relevant emotion. Secondly, it considered the effect of the words used at the seminar on an ordinary reasonable reader, rather than on the audience to which the words or conduct was actually directed.

163 Do these errors require the decision of the Tribunal to be set aside? The court may decline to set aside the Tribunal's orders, even if the Tribunal has erred in law, where that error does not vitiate the Tribunal's decision.¹⁰² In *Australian Broadcasting Tribunal v. Alan Bond and Ors* the High Court considered the effect of s.5(1)(f) of the Commonwealth *Administrative Decisions (Judicial Review) Act 1977* which allows review on the basis that the decision involved an error of law. Toohey and Gaudron, JJ. said that

“For an error of law to be involved in a decision something more than the mere occurrence of error is necessary. The error must have contributed to the decision in some way, or at the very least it must be impossible to say that it did not so contribute. Conversely, an error is not involved in a decision if it did not contribute to the decision or if the decision must have been the same regardless of the error. Thus to show that an error of law is involved in a decision it is necessary, at the very least, to show that the decision may have been different if the error had not occurred.¹⁰³”

164 The question then is whether the Tribunal's decision may have been different, if it had interpreted the words “on the ground of religious belief” as applying to the audience rather than the alleged inciter correctly, and if it had considered the effect of the words on the audience to which they were directed

Did the misapplication of the Bropho test vitiate the Tribunal's decision?

165 At [12] of the learned Vice President's Reasons for Judgment he said that

“In my view, the use of the words ‘on the ground of’ are designed to create a causal connection between the ‘conduct’ and the religious belief or activity.”

¹⁰² *De Bon v. Transport Accident Commission* (1995) 21 M.V.R. 518.

¹⁰³ (1990) 170 C.L.R. 321 at 384.

He went on to qualify this requirement by reference to s.9 and said that

“what is abundantly clear in this case is that the statements made, whether orally or in writing, (the latter including the newsletter and the article) are made because of the religious beliefs and activities of Muslims who adhere to the religion of Islam.”

166 In these passages the learned Vice President applied the *Bropho* test, instead of considering whether the statements made were likely to incite the audience to hatred or other relevant emotion against Muslims on the ground of their Islamic beliefs. Consistently with the *Bropho* test his Honour discussed the factors which actuated Pastor Scot and Pastor Nalliah at various other points in his Reasons.¹⁰⁴

167 On the other hand, his Honour also considered the link between the effect of the statements on the audiences to which they were directed and the religious beliefs of Muslims¹⁰⁵ and made various references to both the first instance decision and the decision of the ADT Appeal Panel in *Kazak*.¹⁰⁶ Much of his Honour’s analysis is implicitly concerned with the effect of the statements at the seminar on the audience, rather than on the factors motivating the speaker. Counsel for the appellants accepted that this was the case. Indeed the appellant’s outline of argument says that

“Although [his Honour] expressly adopted the view that the causal reference of the religious belief was to the conduct, his Honour in fact applied a test more consistent with the view that the relevant connection was between religious belief and the feelings of hatred that may be incited. In so doing, his Honour erroneously adopted and applied a *Kazak* test.”

168 His Honour asked whether the appellants’ words were actuated by their own views about the religious beliefs of Muslims (the *Bropho* test). However he also considered whether the effect of the statements made by the alleged inciters on the audiences to which the words were directed, was to incite hatred against Muslims on the ground of their Islamic beliefs. Is the decision of the Tribunal vitiated by the fact

¹⁰⁴ For example Reasons for Decision [190]-[346].

¹⁰⁵ For example at [14]-[16].

¹⁰⁶ At paragraphs [14]-[17] his Honour referred to the test in *Kazak* set out above. Other examples of references in the Reasons to the effect of the statements on the audience are set out at [69] [81] [250].

that His Honour applied the *Bropho* test?

169 The appellants submitted the Tribunal's reliance on *Bropho* resulted in it making other errors of law. It was said that the Tribunal had erred

- by failing to distinguish between inciting hatred or other relevant emotion against a religious belief and inciting hatred or other relevant emotion of persons holding that belief;
- by considering whether Pastor Scot's presentation at the seminar provided an accurate and balanced representation of Islamic beliefs;
- by failing to give adequate weight to whether Pastor Scot's injunctions to the audience that they should love and "witness to" Muslims, was sufficient to prevent the seminar from breaching s.8.

170 The first two submissions are discussed below. The third question - whether the Tribunal erred by placing insufficient weight on Pastor Scot's injunctions to love Muslims, while attacking their beliefs - is discussed later in this judgment.

Did the Tribunal err by failing to distinguish between hatred of a religious belief and hatred of persons holding that belief?

171 The appellants submit that the Tribunal did not distinguish between behaviour which incites hatred of a particular religious belief, which is not prohibited by s.8, and behaviour which incites hatred or other relevant response to people who hold that belief. To put it another way, it is said that the Tribunal asked itself whether the words used at the seminar, and the material in the newsletter and on the website were likely to incite hatred, serious contempt for, or revulsion or serious ridicule of the religion of Islam, instead of considering whether the audience was incited to hatred of Muslims, because of their religious beliefs.

172 Nettle, J.A. has held that this ground of appeal is made out. In his opinion, the application of the *Bropho* test, which requires consideration of whether the conduct of the inciter was actuated by the religious beliefs of the "victims" of incitement, led the Tribunal to elide the difference between hating the religion of Islam and hating

Muslims, because of their belief in Islam.

173 The legislation aims to strike a balance between protecting freedom of speech and protecting people from vilification on the grounds of their race and religious belief. It would be inconsistent with this aim to interpret the legislation so as to make it impossible for people to proselytise for their own faith or to criticise the religious beliefs of others.

174 There are two main ways in which this balance is struck. First, as Nettle, J.A. points out at [34], s.8 is concerned with the incitement of extreme responses. The words or conduct alleged to be unlawful must incite “hatred or severe contempt or revulsion or serious ridicule.” Secondly, s.11 exempts behaviour which would otherwise be unlawful, if it is engaged in reasonably and in good faith for a genuine religious purpose.

175 Nettle, J.A. also regards the distinction which s.8 draws between behaviour which incites hatred against persons holding particular religious beliefs, and behaviour which incites hatred of beliefs per se, a mechanism for balancing the goals of freedom of speech and protection of people from religious vilification, though as he acknowledges, the effect of attacking person’s religious beliefs may in some circumstances incite hatred, or at least contempt or severe ridicule, of those persons.

176 I would place less emphasis on this distinction than Nettle, J.A. While s.8 is clearly concerned with vilification of people, not of beliefs, I am not convinced the failure to clearly enunciate the distinction led the Tribunal into error in this case. Where a person comes from a racial or religious background which differs from that of the majority of the population, the ways in which they differ are often regarded by others as having greater significance than the ways in which they are similar. To put it another way, differences of religion or race may define minorities in ways in which they are not seen as defining those who belong to the majority. In the Australian context, for example, the fact that an Anglo-Celtic person is Protestant or Roman Catholic is no longer regarded as an essential point of difference. By contrast, in the

current social context, the fact that a person is a Muslim may be portrayed by some and seen by others as a characteristic which determines their identity.¹⁰⁷ Attributing characteristics to people on the basis of their group membership is the essence of racial and religious prejudice and the discrimination which flows from it.

177 I have said that the question whether statements criticising a religion incite hatred or other relevant emotion against persons, or only against their beliefs, is a question of fact, which must be considered in the social and historical context in which the remarks are made. In my view it was open to the Tribunal to regard statements attacking Muslim religious belief as capable of inciting reactions of severe contempt, revulsion or serious ridicule of Muslim persons, in an ordinary member of the audience to which those remarks were directed.

Did the Tribunal err by taking account of the accuracy and truth of the statements?

178 I also agree with Nettle, J.A. that the fact that the Seminar was not “balanced” is not determinative of the issue that the Tribunal was required to address and that it was unwise for the Tribunal to attempt to assess the theological accuracy of what was said at the Seminar. As Nettle, J.A. says, it is theoretically possible that a person may make false statements or entirely unbalanced statements about a religious belief which nevertheless do not incite hatred [this would be the case for a very favourable depiction of religious belief which is, in fact quite misleading.] It is also possible that a person may make true statements about the characteristics associated with a religion eg “Muslims have a duty to proselytize” which may, in particular circumstances, incite hatred. Section 11 of the *Racial and Religious Tolerance Act*, which is discussed below does not provide that the fact that words are true takes them outside s.8 of the

¹⁰⁷ Note also psychological research on discrimination that shows that that people who are unfamiliar tend to be seen as entirely defined by their differences from the norm. See, for example, Linville and Jones, ‘Polarized appraisals of outgroup members’ (1980) 38(5) *Journal of Personality and Social Psychology* 689; Linville, Fisher and Salovey, ‘Perceived Distribution of the Characteristics of In-Group and Out-Group Members: Empirical Evidence and a Computer Simulation.’ (1989) 57(2) *Journal of Personality and Social Psychology* 165; Park and Judd, ‘Measures and Models of Perceived Group Variability’ (1990) 59(2) *Journal of Personality and Social Psychology* 173.

179 In my opinion however, the Tribunal’s discussion of the issue of “balance” in the views expressed by Pastor Scot was not an irrelevant consideration, in determining whether s.8 had been breached, so that reference to it would, without more, require the decision to be set aside. It cannot be overlooked that religious vilification can involve the use of misleading statements about a particular religious belief. One example may be the “blood libel” of the Jews, which was historically used in parts of Europe to used to whip up anti-Semitic actions by Christians.¹⁰⁹ For that reason I do not think that the Tribunal erred in having some regard to questions of balance or accuracy, at the stage when it was considering whether the statements were likely to incite hatred or other relevant emotion.

180 Although I differ from Nettle, J.A. in relation to these two matters, it is nevertheless clear that the Tribunal incorrectly applied the *Bropho* test, rather than the *Kazak* approach in interpreting the words “ on the grounds of religious belief” in s.8. I therefore cannot be satisfied that the Tribunal would not have reached a different conclusion if it had correctly applied the *Kazak* approach, instead of the *Bropho* test.

Did the Tribunal’s error in applying the “ordinary reasonable reader” test vitiate its decision?

181 I take a different view about the effect of the Tribunal’ s misapplication of the “ordinary reader test.” The material published on the web site was accessible to any member of the community. Thus the Tribunal was required to consider whether its effect was likely to incite hatred or other relevant response among a broad audience. Given the fact that any person could have read the materials on the website, the fact that the Tribunal considered the effect of the article by “Richard” on an ordinary

¹⁰⁸ Section 11 provides that certain statements made reasonably and in good faith do not breach s.8. The issue of truth is likely to be relevant in applying this test. I note in passing that the recent amendments to Victorian defamation laws have meant that truth alone is no longer an absolute defence to defamation; refer to s.26, *Defamation Act*, (2005) (Vic).

¹⁰⁹ “Blood libel” is an anti-Semitic myth that Jews used human blood for ritual purposes. In *Warman v. Kyburz*, (2003) CHRT 18 at [43], the Tribunal cited the work of Dr Karen Mock, identifying the “blood libel” as one of the “traditional anti-Semitic themes”.

reasonable member of the community, rather than on some more limited class of readers, did not, in my opinion, contribute in any relevant way, to the decision made by the Tribunal, in relation to the material on the web site.

182 I am also of the opinion that this particular error would not have resulted in the Tribunal reaching a different decision on whether Pastor Scot's words at the Catch the Fire Ministries seminar and the newsletter published by Pastor Nalliah breached s.8, than the decision it would have reached if it had applied the correct test. The *Kazak* test, which considers the effect of the words on "an ordinary reasonable reader, who is not malevolently inclined nor free from prejudice,"¹¹⁰ seems to me to be more favourable to these particular appellants, than the correct test, which considers the effect of the words on the audience which heard those words.

183 In my opinion, an ordinary member of a group which adheres to a faith is more likely to be incited to serious contempt for, revulsion or severe ridicule of a person or class of persons on the ground of their religious beliefs, than is an ordinary reasonable reader who does not have strong views about the rights and wrongs of particular religious beliefs. If I am correct in that view, the application of the correct test would not have led to a different outcome, in the circumstances of this case. It is, however, unnecessary for me to decide this question, because I have found that the Tribunal erred in its construction of the words "on the ground of" in s.8.

Did the Tribunal err in its use of the evidence of Mr Thomas, Mr Eades and Ms Jackson?

184 The Tribunal heard evidence from three Muslims who attended the seminar presented by Pastor Scot. Mr Thomas, Mr Eades and Ms Jackson testified about Pastor Scot's manner of delivery and the way in which the audience reacted to what they heard. The purpose for which the Tribunal used that evidence was explained in his Honour's reasons¹¹¹ and is quoted at [68] of Nettle, J.A.'s judgment.

¹¹⁰ *John Fairfax Publications Pty Ltd v. Kazak* [2002] NSWADTP 35 at [12], [19].

¹¹¹ At [77] of the Tribunal's Reasons for Decision.

185 I agree with Nettle, J.A. that such evidence may be relevant in determining whether the statements made by Pastor Scot incited or were likely to incite hatred or other relevant emotion among the audience which heard the statement.¹¹² As Nettle, J.A. points out, however, his Honour's reference to *Jones v. Scully*¹¹³ suggests that the Tribunal may have relied on these statements for the purpose of deciding whether the statements were likely to offend Muslims, which is the issue which must be decided for the purposes of s 18C of the *Racial Discrimination Act*, but not the test which must be applied under s.8 of the *Racial and Religious Tolerance Act*.

186 In my view however, the reference to *Jones v. Scully* would not, standing alone, be sufficient to vitiate the Tribunal's decision. In the next paragraph of his Reasons the learned Vice President said that

"The newspaper and the article were such as to lead to a wider audience. In fact, I believe that is the reason why the legislature both in this State and in other jurisdictions, have made it clear it is an objective test to be applied. It is the concept of the reasonable person possessing particular attributes by which the test is applied, not particular individuals whose sensitivities, be they well held or otherwise may be subjected to."

187 While expressed somewhat ambiguously, in my view this statement indicates that his Honour was considering the reaction of the audience at the seminar, rather than the reaction of the persons about whom the statements were made, as is required under s.18C of the *Racial Discrimination Act*.

188 Nettle, J.A. is also of the opinion that the Tribunal's statement that

"I find the evidence of the three lay witnesses is probative of the fact, that what was said amounted to an incitement"

shows that the Tribunal might have reached a different conclusion, if it had not used the evidence of the three witnesses for an irrelevant purpose. In my view the Tribunal's reference to incitement in that passage shows that it used the evidence for

¹¹² The Tribunal also accepted that in assessing the reliability of the evidence it was necessary to take account of the fact that these witnesses were upset by hearing statements attacking their religious beliefs.

¹¹³ (2002) 120 F.C.R. 243.

the correct purpose of deciding whether s.8 was breached, rather than for the purpose of deciding whether the relevant witnesses were offended or humiliated by what they heard, as would have been required under the Commonwealth *Racial Discrimination Act*.

Were the findings of the Tribunal contrary to the weight of evidence?

189 Although the conclusion I have reached above makes it unnecessary for me to deal with this ground of appeal, it is appropriate to broadly express my views on the nineteen findings made by the Tribunal about statements which Pastor Scot was said to have made at the seminar, which are discussed in [38]-[62] of Nettle, J.A.'s judgment.

190 Before doing so, I make four general comments. First, s.8 is not confined to statements likely to incite hatred, but also covers statements likely to incite serious contempt for, or revulsion or severe ridicule of a person or class of persons on the grounds of their religious belief. Highly critical statements which make fun of or demean a religion may have the capacity to incite responses such as severe ridicule of or contempt for people holding that particular religious belief, even if they do not provoke hatred of them. This places some limits on the extent to which religious leaders can attack other religions, by requiring the alleged inciter to bring him or herself within s.11 to escape the operation of s.8. Section 11 is discussed by Nettle, J.A. at [82]-[98] of his judgment. As I explain in [197] I broadly agree with his views on its operation.

191 Secondly it is important to note that the statements at the seminar were made orally, rather than being read by the audience. It was appropriate for the Tribunal to take account of the fact that the audience was likely to be affected by the overall impression created by Pastor Scot's oral presentation, rather than having the opportunity to undertake a detailed textual analysis of his words.

192 Thirdly, while particular statements read alone may not have been likely to incite hatred or other relevant emotion against Muslims, they must be read in the

context of other statements made during the same presentation. The Tribunal was not required to parse the words which were used as if they were in a statute or legal document, the contents of which can be carefully read and weighed.

193 Fourthly, if it were not for the errors of law discussed above, it would be necessary to show that the findings of fact made by the Tribunal were not open on the evidence¹¹⁴ or were unreasonable¹¹⁵ or perverse.¹¹⁶

194 In Nettle, J.A.'s view some of the Tribunal's findings were not reasonably open on the facts. With the above qualifications, I agree with Nettle, J.A.'s view at [38] and [44]-[45] that the first, sixth and seventh findings made by the Tribunal can not be justified. On the other hand, I regard the second, third, fourth, fifth, eighth, ninth, tenth, eleventh and eighteenth findings which are referred to in paragraphs [40]-[43], [46]-[49] and [60] of Nettle J.A.'s judgment, as open to the interpretation which the Tribunal placed upon them. Standing alone I do not regard the statements which were the subject of the twelfth to nineteenth findings, that are quoted in [52]-[61] of Nettle, J.A.'s judgment, as likely to incite hatred or other relevant emotion against Muslims as opposed to inciting hatred or other emotion against the religious belief of Islam. In the context of the seminar as a whole, however I would regard them as capable of inciting serious ridicule or contempt of Muslims, because of their religious belief.

195 Finally, it is important to consider the effect of statements made at the seminar which exhorted participants to love and "witness" to Muslims. As Nettle, J.A. points out at [77] many of these were not referred to at all by the Tribunal. While other statements to this effect were mentioned in his Honour's reasons they were mainly taken into account for the purpose of determining whether Pastor Scot's presentation was balanced, rather than as bearing on the question of whether they ameliorated the

¹¹⁴ *S v. Crimes Compensation Tribunal* [1998] 1 V.R. 83 at 89; *Lucas v. Transport Accident Commission* [2003] VSC 97 at [6].

¹¹⁵ *Richards v. VCAT* [2000] VSC 148 at [17].

¹¹⁶ *Bulasa Pty Ltd v. Baytown Properties Pty Ltd* [2003] VSC 248 at 40.

effect of other statements made in the Seminar.

196 I agree that these statements must be taken into account in deciding whether s.8 was breached. I should make it clear however that I do not regard the invocation to love Muslims, while attacking their beliefs, as necessarily inconsistent with a breach of s.8. To do so would encourage those who incite hatred or other relevant emotion to combine egregious statements about a particular racial or religious group, with expressions of feigned concern for the targeted group. It cannot be overlooked that historically words inciting hatred or contempt of members of a racial or religious group have often been accompanied by expressions of real or assumed concern about the persons against hatred or other relevant emotion is incited.

Did the Tribunal err in its application of s.11?

197 Like Nettle, J.A., I am not satisfied that the Tribunal erred in the way it applied s.11. I agree with his view as to the process a court or tribunal should follow in deciding whether the requirements of s.11 are satisfied.¹¹⁷ I also agree with him that the question whether words or conduct is engaged in reasonably for a religious purpose must be judged by the standards of reasonable persons who are members of an open and just multicultural society.¹¹⁸ The *Racial and Religious Tolerance Act* reflects the policy judgment that those who derive benefits from living in a society in which they can express their own views about religion must also accept some limits on that freedom. Fixing the standard by reference to the standards of reasonable members of an open and just multicultural society protects the freedom of minorities to express religious views which may be regarded by the majority as foolish or abhorrent, but it also imposes limits on that freedom, in order to foster the tolerance which is necessary to prevent the undermining of the values on which the society is based. As the Canadian Supreme Court has commented in the context of anti-Semitic vilification in *R. v. Keegstra*, such racist or religious propaganda “...can undermine the very values

¹¹⁷ At [89]–[93].

¹¹⁸ At [94].

which free speech is said to protect.”¹¹⁹

Does s.8 breach the freedom of political communication implied in the Commonwealth Constitution?

198 The appellants also submit that s.8 of the *Racial and Religious Tolerance Act* infringes the implied freedom of political communication afforded by the federal Constitution. They submit that s.8 substantially restricts communications including political communications, that many of the statements that were the subject of the complaints against the appellants fell into this category and that because s.11 only excepted communications which were “balanced’ or “not one-sided” it substantially restricts freedom of political communication. The Attorney General for the State of Victoria intervened,¹²⁰ in support of the constitutional validity of the Act, and the respondents have adopted the submissions of the Attorney-General insofar as they are relevant to this question.

199 The freedom of communication on political and governmental matters was first recognised in *Australian Capital Television v. Commonwealth*¹²¹ and *Nationwide News v. Wills*.¹²² Its origin and scope was clarified in *Lange v. Australian Broadcasting Corporation*.¹²³ In *Lange*, the High Court made it clear that the implied freedom could be inferred from the provisions of the Constitution which provide for the institutions of representative and responsible government.¹²⁴

200 In consequence, the extent to which communication on political and governmental matters will be protected from legislative intervention is

¹¹⁹ *R. v. Keegstra* [1990] 3 SCR 697 at 49.

¹²⁰ Pursuant to section 78A of the *Judiciary Act* 1903 (Cth).

¹²¹ (1992) 177 C.L.R. 106.

¹²² (1992) 177 C.L.R. 1, see also *Theophanous v. Herald and Weekly Times* (1994) 182 C.L.R. 104 at 208, 209.

¹²³ (1997) 189 C.L.R. 520.

¹²⁴ Specific mention was made of ss.1, 4, 6, 7, 18, 13, 24, 28, 30, 49.62.64, 83, 128.

“limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the constitution.”¹²⁵

201 In *APLA Ltd v. Legal Services Commissioner (New South Wales)*¹²⁶ it was held that two questions arise in considering whether a law infringes the implied freedom. For the appellants to succeed, they must show¹²⁷ that

- section 8 of the Act effectively burdens the freedom of political communication, in its terms, operation or effect.¹²⁸ If it does not restrict political speech, then the appellant’s challenge on this ground will fail.
- If it does burden political communication in this way, the question is whether s.8 is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.¹²⁹

202 If s.8 does to burden political communication and is not reasonably appropriate and adapted to a legitimate end, then the implied freedom would operate “as a restriction on legislative power”¹³⁰ and the section would be invalid to that extent.¹³¹

203 In my view s.8 does not restrict communications about government or political matters. Even if it does so, I consider that it satisfies the second limb of the test, for the reasons discussed below.

¹²⁵ Ibid at 561. This was accepted in the appellant’s outline of submissions [94], Submissions of the Attorney General at [2(1)], and the submissions of the ICV, insofar as they adopt the submissions of the Attorney General on this point.

¹²⁶ (2005) 79 A.L.J.R. 1620, at [58]. See also *Coleman v. Power* (2004) 220 C.L.R. 1.

¹²⁷ The burden lies with the communicator, see *APLA Ltd v. Legal Services Commission* (2005) 79 A.L.J.R. 1620 at 1637 [69].

¹²⁸ *Lange* at 567, approved of in *APLA Ltd v. Legal Services Commissioner (New South Wales)*.

¹²⁹ *APLA Ltd v. Legal Services Commissioner (New South Wales)* (2005) 79 A.L.J.R. 1620, at [58].

¹³⁰ *Lange* at 561.

¹³¹ Refer for example to *Cunliffe v. The Commonwealth* (1994) 182 C.L.R. 272 at 327, where the Court stated: “The implication is negative in nature: it invalidates laws and consequently creates an area of immunity from legal control, particularly from legislative control.” This statement was cited with approval in *Lange* at 560.

Does s.8 burden political communication?

204 In answering this question, it is necessary to determine in what respect s.8 of the Act impairs the implied freedom¹³². This issue has been considered in a number of recent cases.¹³³ Perhaps the case that has provided more clarity as to the content of the implied freedom is that of *Lange v. Australian Broadcasting Corporation*,¹³⁴ a case in which the former Prime Minister of New Zealand claimed damages for defamation from the ABC, which had broadcast a program alleging corruption and bribery. The High Court said that

“freedom of communication of matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates that the members of the House of Representatives and the Senate shall be ‘directly chosen by the people’ of the Commonwealth and States respectively.”¹³⁵

205 The freedom to communicate on political and governmental matters between electors and elected representatives, between the electors and the candidates for election and between the electors themselves is central to this system of representative government.

206 The matters covered by the implied freedom cover communications which concern the functioning of government;¹³⁶ policies of political parties and candidates for election;¹³⁷ voting in a referendum;¹³⁸ the conduct of the executive branch of government,¹³⁹ including ministers and the public service;¹⁴⁰ the conduct of statutory

¹³² Refer to *Cunliffe* at 379.

¹³³ See for example *APLA Ltd v. Legal Services Commissioner (New South Wales)* (2005) 79 A.L.J.R. 1620; *Lange v. Australian Broadcasting Corporation* (1997) 189 C.L.R. 520; *Herald & Weekly Times Ltd v. Popovic* (2003) 9 V.R. 1.

¹³⁴ (1997) 189 C.L.R. 520.

¹³⁵ At 559.

¹³⁶ [1997] 189 C.L.R. 520 at 560.

¹³⁷ *Ibid* at 560.

¹³⁸ *Ibid* at 561.

¹³⁹ *Ibid*.

¹⁴⁰ *Ibid*.

authorities and public utilities obliged to report to the Legislature or to a Minister;¹⁴¹ discussion by electors of political matters;¹⁴² and information concerning matters relating to the exercise of public functions and powers vested in public representatives and officials.

207 In *Herald & Weekly Times Ltd v. Popovic*¹⁴³ it was held that the implied freedom of political communication did not cover a communication which libelled the Deputy Chief Magistrate, by implying that that she had prejudged a hearing, bullied a prosecutor and misconducted herself to the extent that her removal from office was warranted. Winneke, A.C.J. held that a journalist's criticism of a magistrate's performance in handling particular proceedings, even to the point of inferring that he or she was unfit to hold office, was not a discussion of government or political matters which would attract constitutional protection.¹⁴⁴ He acknowledged however that in some circumstances discussion of the judiciary could so affect the executive government that it could come within the implied freedom.¹⁴⁵ He noted that

“It is, of course, not possible to construct a formula for more narrowly defining the limits of what is, and what is not, the type of discussion which will attract the freedom which the constitution protects. The concept is cast, designedly, at such an abstract level as to preclude that.”¹⁴⁶

208 The implied freedom of political communication is derived from the need to protect the institutions of responsible and representative government. The mere fact that legislation is capable of restricting communications which contain some political material is not sufficient to invalidate it. As was made clear in *Cunliffe*, the question of invalidity is not answered “merely by fastening on to particular instances unless they are of such a nature as to impugn [the legislation] in its entirety or to require the

¹⁴¹ Ibid.

¹⁴² Ibid at 568.

¹⁴³ (2003) 9 V.R. 1.

¹⁴⁴ Ibid at [6].

¹⁴⁵ Ibid at [10]. Examples could include discussion of the appointment of judges or the exercise of powers of removal.

¹⁴⁶ Ibid at [6] See also Warren, A.J.A. at [503] to [507].

reading down of the legislation or severance of any part".¹⁴⁷ In my view s.8 does not infringe the implied freedom.

Is the restriction reasonably appropriate and adapted to serve a legitimate end?

209 Legislation which infringes the implied freedom is nevertheless valid if it is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of a system of representative and responsible government.¹⁴⁸ In *Cunliffe v. The Commonwealth*,¹⁴⁹ the High Court was asked to consider whether laws preventing unregistered persons from providing immigration assistance breached the constitutionally implied freedom of communication. It was argued that restricting the provision of advice in this way burdened the freedom of political communication. Mason, C.J. and Deane, J. were in the minority in finding that these provisions burdened the implied freedom of political communication.¹⁵⁰ Deane, J. noted however that

“the Constitution’s implication of freedom of political communication and discussion is not an implication of an absolute or uncontrolled licence to say or write anything at all in the course of communication or discussion of political matters. It is an implication of freedom under the law of an ordered society.”¹⁵¹

210 Even if s.8 does burden political communications (which in my view it does not), it is compatible with the requirements of a representative democracy to place reasonable limits on the freedom to communicate views which incite hatred or other

¹⁴⁷ See n. 132 above at 384.

¹⁴⁸ *APLA Ltd v. Legal Services Commissioner (New South Wales)* (2005) 79 A.L.J.R. 1620, at [58], see also *Cunliffe v. Cth* (1994) 182 C.L.R. 272 at 388 per Gaudron, J.

¹⁴⁹ (1994) 182 C.L.R. 272.

¹⁵⁰ *Ibid* per Mason, J. at 298-299, Deane, J. at 341. Brennan, J. at 328-9 and Dawson, J. at 365 held that these restrictions were not inconsistent with the maintenance of a system of representative government. McHugh, J. at 395 rejected the view that the freedom of political communication is impliedly protected by the Constitution. Toohey J considered that the plaintiffs had not demonstrated that the provision unduly limited freedom of communication.

¹⁵¹ *Ibid* at 337. Deane, J. held that restrictions on the provision of voluntary immigration assistance could not be justified. Gaudron, J. agreed with this view at 390.

relevant emotions against people because of their religious beliefs.¹⁵²

Were the orders made by the Tribunal within power?

211 I agree with Nettle, J.A. that s.136(a)(iii) empowers the Tribunal to order corrective advertising or an apology.¹⁵³ I also agree that, if Orders are made against the appellants following a re-hearing, such Orders should identify the parts of the various statements which offend the section and prohibit republication of identical statements or statements made in similar terms.¹⁵⁴

¹⁵² In *R. v. Keegstra* [1990] 3 SCR 697 it was held that the importance of preventing the harm caused by hate propaganda was of sufficient importance to warranted overriding a constitutional freedom of expression.

¹⁵³ At [102].

¹⁵⁴ At [104]-[110].

ANNEXURE

This statement is made pursuant to an order of the Victorian Civil and Administrative Tribunal ("VCAT"). In November 2002 the Equal Opportunity Commission of Victoria referred a complaint by the Islamic Council of Victoria against Catch The Fire Ministers Inc, Pastor Daniel Nalliah and Pastor Daniel Scot to VCAT. On 17 December 2004, VCAT found the complaint was proven and that each of the respondents had breached s.8 of the Victorian *Racial and Religious Tolerance Act 2001*, and further that none of the defences under the Act had been made out. The complaint concerned statements made by Pastor Daniel Scot in a seminar organised by Catch The Fire Ministries and held on 9 March 2002 in Surrey Hills, articles written by Pastor Daniel Nalliah in the Newsletters of Catch The Fire Ministries Inc and an article written by an American called Richard Braidich published on Catch The Fire's website in 2001. VCAT found the seminar was not a balanced discussion, that Pastor Scot presented the seminar in a way that was essentially hostile, demeaning and derogatory of all Muslim people, their God, their prophet Mohammed and in general Muslim beliefs and practices, that Pastor Scot was not a credible witness and that he did not act reasonably and in good faith. VCAT found the statements by Pastor Nalliah in the newsletter were likely to incite hatred towards Muslims and sought to create fear against Muslims, that Pastor Nalliah was not a credible witness and did not act reasonably and in good faith. Finally, VCAT found that the statement by Mr Braidich made no attempt to distinguish between mainstream and extremist Muslims, and incited hatred and contempt towards people who are Muslims, that Pastor Nalliah performed an act inciting hatred and contempt against Muslims by placing this article on the website and that Pastor Nalliah did not act reasonably and in good faith in doing so. Each of the respondents acknowledges the findings of VCAT that the statements breached the *Racial and Religious Tolerance Act 2001* (Vic) and will in future refrain from making, publishing or distributing (including on the internet) any statements, suggestions or implications to the same or similar effect.

This statement is issued by Catch The Fire Ministries Inc, Pastor Daniel Nalliah and Pastor Daniel Scot.