



*Human Rights and
Equal Opportunity
Commission*

Federal Discrimination Law
2004

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Foreword

I am pleased to present the Commission's publication entitled '*Federal Discrimination Law 2004*'.



Federal discrimination law has had some time to evolve. It is now close to three decades since the commencement of the first piece of federal discrimination legislation (the *Racial Discrimination Act 1975* (Cth)). The field has expanded considerably since that time, with the passage of the *Sex Discrimination Act 1984* (Cth) and the *Disability Discrimination Act 1992* (Cth).

More recently, there has been significant procedural change with the transfer of the function of hearing discrimination matters from the Human Rights and Equal Opportunity Commission to the Federal Court and Federal Magistrates Service. The body of federal discrimination jurisprudence has continued to develop apace under those arrangements.

We may be about to witness further expansion of the field, as the Commonwealth Parliament currently has before it the Age Discrimination Bill 2003 (Cth).

Quite apart from the challenges involved in keeping abreast of such developments, I think it is fair to say that the interpretation and application of discrimination legislation remains one of the more complex areas of Australian law. In my view, it is also one of the most important, as it deals with fundamental human rights.

I hope that this publication will go some way to ensuring that legal practitioners and other interested members of the public continue to understand and contribute to this exciting and sometimes difficult area of law.

A handwritten signature in black ink, which appears to read 'John von Doussa'. The signature is fluid and cursive, with a large initial 'J'.

The Hon. John von Doussa
President

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Chapter 1

Introduction

1.1 Nature and scope of this publication

This publication provides an overview of key issues in federal discrimination law. It examines the jurisprudence that has been developed by courts and tribunals in unlawful discrimination matters brought under the *Racial Discrimination Act 1975* (Cth) ('RDA'), *Sex Discrimination Act 1984* (Cth) ('SDA') and the *Disability Discrimination Act 1992* (Cth) ('DDA'). It considers the manner in which interlocutory applications, procedural and evidentiary matters and awards of costs have been dealt with in the Federal Court and Federal Magistrates Service ('FMS') since the function of hearing federal unlawful discrimination matters was transferred from the Human Rights and Equal Opportunity Commission ('HREOC') to those courts on 13 April 2000. It also considers the principles which have been applied to damages awards in cases where breaches of the RDA, SDA and DDA have been found and gives an overview of damages awards made since the transfer of the hearing function.

The publication has been prepared pursuant to:

- HREOC's functions of promoting an understanding and acceptance of and compliance with the RDA, SDA and DDA;¹ and
- HREOC's education functions.²

HREOC's earlier publication, *Change and Continuity: Review of the Federal Unlawful Discrimination Jurisdiction, September 2000 – September 2002*³ ('*Change and Continuity*') provided a review of the first two years of the federal unlawful discrimination jurisdiction following its transfer from HREOC to the Federal Court and the FMS.⁴ *Change and Continuity* assessed the impact of the changed administration of the jurisdiction on jurisprudence and procedure. While the present publication builds on and updates the material presented in *Change and Continuity*, it takes a broader focus and is

¹ See SDA s 48(1)(d); DDA s 67(1)(g); RDA s 20(1)(b).

² See SDA s 48(1)(e); DDA s 67(1)(h); RDA s 20(1)(c). See also s 11(1)(h) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

³ Human Rights and Equal Opportunity Commission, *Change and Continuity: Review of the Federal Unlawful Discrimination Jurisdiction, September 2000 – September 2002* (2003). This publication can be downloaded from the Commission's website <www.humanrights.gov.au>.

⁴ Following the commencement, on 13 April 2000, of the *Human Rights Legislation Amendment Act No 1 1999* (Cth) ('HRLA Act'). The first decision in the new jurisdiction was handed down on 13 September 2000. Readers interested in a comparison of the pre and post transfer procedures may wish to consult chapter 1 of *Change and Continuity*.

not limited to a comparative discussion of the periods before and after the transfer of the jurisdiction to the Federal Court and FMS.

It should be noted that this publication does not aim to be a textbook, or a comprehensive guide to discrimination law in Australia. Most notably, it does not consider State or Territory jurisdictions. Rather, it is intended as a guide to some of the important issues that have arisen in unlawful discrimination cases brought under the RDA, SDA and DDA, including matters of practice and procedure, and the manner in which those issues have been resolved in significant case law.⁵ It includes some discussion of selected significant cases in other jurisdictions which have informed jurisprudence developed under the RDA, SDA and DDA. Its contents are current to 31 December 2003.

1.2 Content and Structure

Chapters 2-4 of this publication analyse the jurisprudence that has developed in relation to the RDA, SDA and DDA respectively and highlight key issues and areas of interest under each of these Acts.

Chapter 5 considers the principles which have been applied by the Federal Court and FMS in relation to damages awards under the RDA, SDA and DDA and provides recent examples of awards under each Act.

Chapter 6 examines the manner in which the Federal Court and FMS have dealt with evidentiary and procedural matters such as the standard of proof in discrimination cases and applications for interim injunctions, summary dismissal, extensions of time and suppression orders in federal discrimination matters.

Finally, Chapter 7 considers the issue of costs and examines the principles which have been applied by the Federal Court and FMS to costs awards in the jurisdiction.

For ease of reference, citations for unreported cases are those used in electronic versions available at www.austlii.edu.au. The exception to this practice is unreported HREOC decisions. These decisions are available electronically at www.austlii.edu.au, but the electronic versions of these decisions do not have paragraph or page numbers to enable pinpoint referencing. Accordingly, the original HREOC citation is given.

⁵ Readers should also note that this publication is not intended to be (and should not be) relied upon in any way as legal advice. Readers should obtain their own advice from a qualified legal practitioner.

Chapter 2

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Chapter 2

The Racial Discrimination Act

2.1 Grounds of Discrimination: Race, Colour, Descent or National or Ethnic Origin

The RDA makes unlawful direct¹ and indirect² discrimination ‘based on race, colour, descent or national or ethnic origin’.³ None of these terms are defined in the RDA, although the case law has provided some guidance.

2.1.1 Race

Courts have generally taken the view that ‘race’ as described in anti-discrimination legislation is a broad term and is to be understood in the popular sense rather than as a term of art.⁴ In *King-Ansell v Police*⁵ (*King-Ansell*) the New Zealand Court of Appeal rejected a biological test of race which distinguished people in terms of genetic inheritance and stated as follows:

The ultimate genetic ancestry of any New Zealander is not susceptible to legal proof. Race is clearly used in its popular meaning. So are the other words. The real test is whether the individuals or the group regard themselves and are regarded by others in the community as having a particular historical identity in terms of their colour or their racial, national or ethnic origins. That must be based on a belief shared by members of the group.⁶

The meaning of ‘race’ was considered in the context of disputes between Aboriginal people in *Williams v Tandanya Cultural Centre*.⁷ Driver FM held:

The word ‘race’ is a broad term. Also, in addition to race, the RDA proscribes discrimination based upon national or ethnic origins or descent.

It will be apparent to anyone with even a rudimentary understanding of Aboriginal culture and history that the Australian Aborigines are not a single people but a great number of peoples who are collectively referred to as Aborigines. This is clear from language and other cultural distinctions between Aboriginal peoples. It is, in my view, clear that the RDA provides

¹ See 2.2 below.

² See 2.3 below.

³ In those sections of the RDA that proscribe discrimination in specific areas of public life, the grounds of unlawful discrimination are ‘race, colour or national or ethnic origin’, omitting the ground of ‘descent’: see ss 10, 11, 12, 13, 14, 15 and 18C of the RDA.

⁴ *Ealing London Borough Council v Race Relations Board* [1972] AC 342, 362 (Lord Simon).

⁵ [1979] 2 NZLR 531.

⁶ *Ibid* 542 (Richardson J).

⁷ (2001) 163 FLR 203.

relief, not simply against discrimination against ‘Aboriginals’ but also discrimination against particular Aboriginal peoples. There is no dispute that the applicant is an Aboriginal person. There was some dispute within the Kaurua community as to the applicant’s links to that community. The alleged acts of discrimination by the first, second, fifth (and, possibly third) respondents are all related in one way or another to that dispute and the alleged exclusion and lack of consultation are all linked by the applicant to his particular cultural associations within the Aboriginal community. In principle, I am satisfied that these acts, if found to be discriminatory, could constitute discrimination against either s 9 or s 13 of the RDA.⁸

In *Carr v Boree Aboriginal Corp.*,⁹ Raphael FM found that the first respondent had unlawfully discriminated against the applicant in her employment and had dismissed her for reasons ‘which were to do with her race or non Aboriginality’,¹⁰ and stated that ‘the provisions of the RDA apply to all Australians.’¹¹

2.1.2 Ethnic Origin

‘Ethnic origin’ has also been interpreted broadly in a number of jurisdictions. The Court in *King-Ansell* held that Jewish people in New Zealand formed a group with common ethnic origins within the meaning of the *Race Relations Act 1971* (NZ). Richardson J stated that:

a group is identifiable in terms of ethnic origins if it is a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from what in biological terms is a common racial stock. It is that combination which gives them an historically determined social identity in their own eyes and in the eyes of those outside the group. They have a distinct social identity based not simply on group cohesion and solidarity but also on their belief as to their historical antecedents.¹²

Similarly, the House of Lords held in *Mandla v Dowell Lee*¹³ that for a group (here, Sikh people) to constitute an ethnic group for the purposes of the legislation in question, it had to regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics.

⁸ Ibid 209 [21].

⁹ [2003] FMCA 408.

¹⁰ Ibid [9]. The decision does not disclose what the race of the applicant is, other than being ‘non-Aboriginal’.

¹¹ Ibid [14]. Note, however the discussion at 2.7.2 below of the decision in *McLeod v Power* (2003) 173 FLR 31 in the context of the racial hatred provisions in which Brown FM stated that the term ‘white’ did not itself encompass a specific race or national or ethnic group, being too wide a term, 43 [55]. His Honour did, however, find that the word ‘white’ was used in that case because of the ‘race, colour or national or ethnic origins’ of the applicant, 44 [62].

¹² [1979] 2 NZLR 531, 543.

¹³ [1983] 2 AC 548.

Their Lordships indicated that the following characteristics are essential:

- a shared history, of which the group was conscious as distinguishing it from other groups, and the memory of which it keeps alive; and
- a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance.

Their Lordships further held that the following characteristics will be relevant, but not essential:

- a common geographical origin or descent from a small number of common ancestors;
- a common language, not necessarily peculiar to the group;
- a common literature peculiar to the group;
- a common religion different from that of neighbouring groups or the general community surrounding it; and
- being a minority or an oppressed or a dominant group within a larger community.¹⁴

In *Miller v Wertheim*,¹⁵ the Full Federal Court dismissed a claim of discrimination under the RDA in relation to a speech made by the respondent (himself Jewish) which had criticised members of the Orthodox Jewish community for allegedly divisive activities. The Full Court stated that it could be ‘readily accepted that Jewish people in Australia can comprise a group of people with an ‘ethnic origin’’¹⁶ for the purposes of the RDA, and cited with approval *King-Ansell*. However, in the present case, the members of the group:

were criticised in the speech because of their allegedly divisive and destructive activities, not because the group or its members were of the Jewish race, of Jewish ethnicity or because they were persons who adhered to the practices and beliefs of orthodox Judaism.¹⁷

The Court did not discuss further whether or not persons ‘adhering to the practices and beliefs of orthodox Judaism’ were a recognisable group for the purposes of the RDA.

There has been no Australian jurisprudence concerning whether or not Muslim people constitute a group with a common ‘ethnic origin’ under the RDA. It is noted, however, that the Explanatory Memorandum to the Racial Hatred Bill 1994 (Cth) (which became the *Racial Hatred Act 1995* (Cth) and amended the RDA by introducing Part IIA which prohibits offensive

¹⁴ Ibid 1067.

¹⁵ [2002] FCAFC 156.

¹⁶ Ibid [14]. See also *Jones v Scully* (2002) 120 FCR 243, 271-73 [110]-[113]; *Jones v Toben* [2002] FCA 1150, [101] in relation to complaints made under pt IIA of the RDA.

¹⁷ [2002] FCAFC 156, [13].

behaviour based on racial hatred) suggests that Muslims are included in the expressions ‘race’ and/or ‘ethnic origin’. It states:

The term ‘ethnic origin’ has been broadly interpreted in comparable overseas common law jurisdictions (cf *King-Ansell v Police* [1979] 2 NZLR per Richardson J at p.531 and *Mandla v Dowell Lee* [1983] 2 AC 548 (HL) per Lord Fraser at p.562). It is intended that Australian courts would follow the prevailing definition of ‘ethnic origin’ as set out in *King-Ansell*. The definition of an ethnic group formulated by the Court in *King-Ansell* involves consideration of one or more of characteristics such as a shared history, separate cultural tradition, common geographical origin or descent from common ancestors, a common language (not necessarily peculiar to the group), a common literature peculiar to the group, or a religion different from that of neighbouring groups or the general community surrounding the group. This would provide the broadest basis for protection of peoples such as Sikhs, Jews and Muslims.

The term ‘race’ would include ideas of ethnicity so ensuring that many people of, for example, Jewish origin would be covered. While that term connotes the idea of a common descent, it is not necessarily limited to one nationality and would therefore extend also to other groups of people such as Muslims.¹⁸

Cases that have considered this issue in other jurisdictions have found that Muslims do not come within the meaning of ethnic group because while Muslims professed a common belief system, the Muslim faith was widespread covering many nations, colours and languages.¹⁹

2.1.3 National Origin

The meaning of ‘national origin’ was considered by Sackville J in *Australian Medical Council v Wilson*²⁰ (*‘Siddiqui’*), and it was held that it ‘does not simply mean citizenship’.²¹ His Honour cited with approval Lord Cross in *Ealing London Borough Council v Race Relations Board*,²² a case which had considered the materially similar *Race Relations Act 1968* (UK):

There is no definition of ‘national origins’ in the Act and one must interpret the phrase as best one can. To me it suggests a connection subsisting at the time of birth between an individual and one or more groups of people who can be described as ‘a nation’ – whether or not they also constitute a sovereign state.

¹⁸ Explanatory Memorandum, Racial Hatred Bill 1994 (Cth), 2-3.

¹⁹ See, for example, the UK decisions of *Tariq v Young* (Employment Appeals Tribunal 24773/88, unreported) and *Nyazi v Rymans Limited* (Employment Appeals Tribunal 6/88, unreported). See also a discussion of the term ‘ethno-religious’ (a ground of discrimination in the *Anti-Discrimination Act 1977* (NSW)) and the Muslim faith in *Khan v Commissioner, Department of Corrective Services* [2002] NSWADT 131.

²⁰ (1996) 68 FCR 46.

²¹ *Ibid* 75. Note that Black CJ and Heerey J did not specifically consider the meaning of ‘national origin’.

²² [1972] AC 342.

The connection will normally arise because the parents or one of the parents of the individual in question are or is identified by descent with the nation in question, but it may also sometimes arise because the parents have made their home among the people in question.

... Of course, in most cases a man has only a single 'national origin' which coincides with his nationality at birth in the legal sense and again in most cases his nationality remains unchanged throughout his life. But 'national origins' and 'nationality' in the legal sense are two quite different conceptions and they may well not coincide or continue to coincide.²³

Sackville J stated that this view was powerfully supported by art 1(2) of the *International Convention on the Elimination of all Forms of Racial Discrimination* ('CERD'), which specifically provides that it is not to apply to distinctions, exclusions, restrictions or preferences made by a State Party between citizens and non-citizens.²⁴

The Full Federal Court in *Macabenta v Minister of State for Immigration and Multicultural Affairs*²⁵ ('*Macabenta*') followed *Siddiqui* and rejected the submission that 'national origin' could be equated with 'nationality' for the purposes of ss 9 and 10 of the RDA.²⁶ The Full Court held that the phrase 'race, colour or national or ethnic origin' in s 10 of the RDA should bear the same meaning in the RDA as it bears in CERD, under which the 'core concern is racial discrimination'. The words 'colour, or national or ethnic origin' were intended to give 'added content and meaning to the word 'race'' and 'capture the somewhat elusive concept of race'.²⁷

The Court continued:

In our opinion, the description 'ethnic origin' lends itself readily to factual inquiries of the type described by Lord Fraser in *Mandla v Lee* [at 562]. For example, is there a long shared history? Is there either a common geographical origin or descent?, is there a common language?, is there a common literature?, is there a common religion or a depressed minority? One can easily appreciate that the question of ethnic origin is a matter to be resolved by those types of factual assessments. Ethnic origins may once have been identifiable by reference to national borders, but that time ended hundreds or perhaps thousands of years ago. To some extent the same can be said of national origins as human mobility gained pace. It may well also be appropriate, given the purpose of the Convention, to embark on a factual

²³ Ibid 365 (Lord Cross) cited in *Australian Medical Council v Wilson* (1996) 68 FCR 46, 75.

²⁴ (1996) 68 FCR 46, 75.

²⁵ (1998) 90 FCR 202.

²⁶ Ibid 210-11. See also *Ebber v Human Rights and Equal Opportunity Commission* (1995) 129 ALR 455.

²⁷ (1998) 90 FCR 202, 209-10. A similar approach was taken to the word 'colour' in s 18C of the RDA by Brown FM in *McLeod v Power* (2003) 173 FLR 31, although this Honour did not mention the decision in *Macabenta v Minister of State for Immigration and Multicultural Affairs* (1998) 90 FCR 202: 'The meaning of the word "colour" in section 18C is to be derived from its statutory context: *Project Blue Sky v ABA* (1998) 194 CLR 355, 368, 381. In my view it is to be interpreted in the context of the words that surround it in section 18C and the whole of the RDA itself', 43 [56].

enquiry when assessing whether the indicia of a law include national origin as a discrimen. Ethnic origins may have become blurred over time while national origins may still be relatively clear. That further reference point of national origin may be needed in order to identify a racially-discriminatory law. National origin may in some cases be resolved by a person's place of birth. In other cases it may be necessary to have regard to the national origin of a parent or each parent or other ancestors either in conjunction with the person's place of birth or disregarding that factor. If by reference to matters of national origin one can expose a racially-discriminatory law, then the Convention will have served its purpose. However, no Convention purpose is in any manner frustrated by drawing a distinction between national origin and nationality, the latter being a purely legal status (and a transient one at that).²⁸

In *Commonwealth of Australia v McEvoy*,²⁹ von Doussa J applied *Macabenta* in finding that the meaning of 'national origin' should be confined to characteristics determined at the time of birth – 'either by the place of birth or by the national origin of a parent or parents, or a combination of some of those factors'.³⁰ In that case, Mr Stamatov, who was of Bulgarian nationality and had lived and worked in Bulgaria, was required to satisfy security checks for a position with the Department of Defence. Bulgaria was a country where security checks could not be meaningfully conducted, with the result that Mr Stamatov was found to be 'uncheckable'. His Honour held:

The evidence ... was clear that the elements of checkability which caused Mr Stamatov's background to be uncheckable concerned checks with security authorities in the place where the applicant resided. The checks were concerned with the activities of the applicant and were unrelated to the national origins within the meaning of that expression as construed in *Macabenta*. The fact that Mr Stamatov had been born in Bulgaria of Bulgarian parents was an irrelevant coincidence. A person of any other national origin that had lived his or her adult life in Bulgaria, and had followed the educational and employment pursuits of Mr Stamatov would also have a background that was uncheckable.³¹

The same approach was taken by Merkel J in *De Silva v Minister for Immigration*:³²

Although there are obvious difficulties in any precise definition of 'national origin' as that term is used in the [RDA], in my view it does not mean current nationality or nationality at a particular date which has no connection with the national *origin* of the persons concerned.³³

²⁸ (1998) 90 FCR 202, 209-11.

²⁹ (1999) 94 FCR 341.

³⁰ *Ibid* 352 [34].

³¹ *Ibid* 352 [35].

³² [1998] 95 FCA.

³³ *Ibid* 18.

Merkel J's decision was upheld on appeal³⁴ and followed by Raphael FM in *AB v New South Wales Minister for Education*.³⁵ In that case, an interim injunction was sought against a decision to deny enrolment in a NSW Government school to a child who was not a permanent resident of Australia. One ground upon which Raphael FM rejected the application was that the argument of discrimination was unlikely to succeed on the basis of the authorities that established the distinction between 'national origin' and 'nationality'.³⁶

2.2 Direct Discrimination under the RDA

2.2.1 Structure of the RDA

The RDA was the first piece of federal anti-discrimination legislation and is different in a number of ways from the subsequently introduced SDA and DDA. This is because it is based to a large extent on, and takes important parts of its statutory language from, CERD.³⁷

Unlike the SDA and DDA,³⁸ the RDA does not provide a discrete definition of discrimination³⁹ and then seek to set out specific areas of public life in which that discrimination is made unlawful.⁴⁰

Section 9(1) contains the central proscription of what is generally referred to as 'direct' race discrimination:

It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

It can be seen that this section makes unlawful a wide range of acts ('any act involving a relevant distinction etc which has a relevant purpose or effect) in a wide range of situations ('the political, economic, social, cultural or any other field of public life'). Section 9(2) further broadens the coverage of the RDA, providing:

³⁴ *De Silva v Minister for Immigration* (1998) 89 FCR 502.

³⁵ [2003] FMCA 16.

³⁶ *Ibid* [13]-[14].

³⁷ Opened for signature 21 December 1965, 660 UNTS 195 (entered into force generally 4 January 1969 and in Australia 30 September 1975).

³⁸ As well as state and territory anti-discrimination legislation.

³⁹ For example, ss 5-7A of the SDA, ss 5-9 of the DDA.

⁴⁰ For example, pt II of the SDA and pt 2 of the DDA.

A reference in this section to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes any right of a kind referred to in Article 5 of the Convention.⁴¹

The RDA also includes specific prohibitions on discrimination in certain areas of public life: access to places and facilities;⁴² land, housing and other accommodation;⁴³ provision of goods and services;⁴⁴ right to join trade unions;⁴⁵ and employment.⁴⁶ Discrimination for the purposes of these specific prohibitions is generally made unlawful when a person is treated less favourably than another ‘by reason of the first person’s race, colour or national or ethnic origin’.

Complaints alleging race discrimination are sometimes considered under both s 9(1) and one of the specific prohibitions.⁴⁷

2.2.2 Causation and Intention to Discriminate

Unlawful discrimination as defined by s 9(1) of the RDA requires that a ‘distinction, exclusion, restriction or preference’ be ‘based on’ race or other of the related grounds. Those sections prohibiting discrimination in certain areas of public life provide that unlawful discrimination occurs when a relevant act is ‘by reason of’ race or other of the related grounds.⁴⁸ The extent to which these expressions require an intention or motive to discriminate and the possible differences between such expressions has been subject to varying judicial interpretations.

In *Australian Medical Council v Wilson*,⁴⁹ Sackville J reviewed Australian authorities in relation to other anti-discrimination statutes⁵⁰ and concluded that ‘the preponderance of opinion favours the view that s 9(1) [of the RDA] does not require an intention or motive to engage in what can be described as discriminatory conduct’.⁵¹

⁴¹ This issue is discussed in further detail at 2.4 below.

⁴² Section 11.

⁴³ Section 12.

⁴⁴ Section 13.

⁴⁵ Section 14.

⁴⁶ Section 15.

⁴⁷ See, for example, *Carr v Boree Aboriginal Corp* [2003] FMCA 408.

⁴⁸ See ss 11-15. Note also that in relation to the racial hatred provisions contained in the RDA, s 18C provides that the relevant act must be done ‘because of’ race or other grounds: see 2.7.3 below.

⁴⁹ (1996) 68 FCR 46.

⁵⁰ *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165, considering the *Anti-Discrimination Act 1977* (NSW); *Waters v Public Transport Corporation* (1991) 173 CLR 349, considering the *Equal Opportunity Act 1984* (Vic).

⁵¹ (1996) 68 FCR 46, 74.

In *Macedonian Teachers' Association of Victoria Inc v Human Rights and Equal Opportunities Commission*⁵² ('*Macedonian Teachers*'), Weinberg J also considered the meaning of the words 'based on' in s 9(1) of the RDA. His Honour suggested that the expression 'based on' could be distinguished from other expressions used in anti-discrimination legislation such as 'by reason of' or 'on the ground of' which had been interpreted elsewhere to require some sort of causal connection.⁵³

After extensively considering Australian and international authorities,⁵⁴ Weinberg J found that the relevant test imputed by the words 'based on' was one of 'sufficient connection' rather than 'causal nexus'.⁵⁵ His Honour held that while there must be a 'close relationship between the designated characteristic and the impugned conduct', to require a relationship of cause and effect 'would be likely to significantly diminish the scope for protection which is afforded by that subsection'.⁵⁶ His Honour noted further that proof of a motive to discriminate is not necessary.⁵⁷

The High Court in *Purvis v New South Wales (Department of Education and Training)*⁵⁸ considered the expression 'because of' in the DDA.⁵⁹ It would seem settled as a result of that decision that the appropriate approach to expressions such as 'by reason of', 'on the ground of' and 'because of' is to question the 'true basis' or 'real reason' for the act of the alleged discriminator.⁶⁰

This appears to be consistent with the approach of Weinberg J in *Macedonian Teachers* to those expressions. However, it remains to be seen whether the distinction drawn by his Honour between the expression 'based on' and the other formulations appearing in the RDA, SDA and DDA will be ascribed significance in future cases.

⁵² (1998) 91 FCR 8.

⁵³ *Ibid* 29.

⁵⁴ *Ibid* 24-41.

⁵⁵ *Ibid* 33.

⁵⁶ *Ibid*. The Full Federal Court on appeal indicated their agreement with Weinberg J's construction of s 9(1): *Victoria v Macedonian Teachers' Association of Victoria Inc* (1999) 91 FCR 47. So too did Drummond J in *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615. His Honour there stated that although s 9(1) 'does not require proof of a subjective intention to discriminate on the grounds of race (although that would suffice), there must be some connection between the act and considerations of race', [39].

⁵⁷ (1998) 91 FCR 8, 34, 40-1.

⁵⁸ (2003) 202 ALR 133.

⁵⁹ See section 4.2 on the DDA.

⁶⁰ (2003) 202 ALR 133, 138-39 [14] (Gleeson CJ), 171-72 [166] (McHugh and Kirby JJ), 187 [236] (Gummow, Hayne and Heydon JJ), 197 [273] (Callinan J).

2.3 Indirect Discrimination under the RDA

The RDA was amended in 1990⁶¹ to include, amongst other things, s 9(1A). Section 9(1A) states:

Where:

- (a) a person requires another person to comply with a term, condition or requirement which is not reasonable having regard to the circumstances of the case; and
- (b) the other person does not or cannot comply with the term, condition or requirement; and
- (c) the requirement to comply has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life;

the act of requiring such compliance is to be treated, for the purposes of this Part, as an act involving a distinction based on, or an act done by reason of, the other person's race, colour, descent or national or ethnic origin.

Prior to the insertion of s 9(1A) into the RDA, a body of opinion suggested that the language of s 9(1) and the specific prohibitions in the RDA were wide enough to cover indirect racial discrimination and it has been suggested that the section was inserted to remove doubt that s 9(1) and the succeeding provisions might not cover indirect discrimination, rather than because its terms were not general enough to do so.⁶²

Nevertheless, in *Australian Medical Council v Wilson*⁶³ ('*Siddiqui*'), the Full Court of the Federal Court held that ss 9(1) and (1A) of the RDA should be construed as being mutually exclusive. Heerey J stated that such an approach was 'consistent with the language of the provisions, their legislative history and the preponderance of authority'.⁶⁴

The four key elements required to establish indirect discrimination are:

1. a term, condition or requirement is imposed on a complainant;
2. the term, condition or requirement is not reasonable;
3. the complainant does not or cannot comply with that term, condition or requirement; and

⁶¹ By the *Law and Justice Legislation Amendment Act 1990* (Cth) which came into effect on 22 December 1990.

⁶² See Race Discrimination Commissioner, *Racial Discrimination Act 1975: A Review: Community Consultation Guide* (1995), 61.

⁶³ (1996) 68 FCR 46.

⁶⁴ *Ibid* 55. Black CJ agreed with his Honour's reasoning in this regard, 47. Sackville J expressed the same view, 74.

4. the requirement has the effect of interfering with the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the complainant of any relevant human right or fundamental freedom.

The onus is on the applicant to make out each of these elements.⁶⁵

Very few cases have considered issues of indirect discrimination under the RDA. However, some general principles from cases which have considered indirect discrimination provisions in other pieces of anti-discrimination legislation are set out to assist in the interpretation of the terms of s 9(1A). Further detail on how these principles have been developed in the context of the SDA and DDA can be found in chapters 3 and 4.⁶⁶

2.3.1 Term, Condition or Requirement

The words ‘term, condition or requirement’⁶⁷ are to be given a broad meaning. It is still necessary, however, to specifically identify a particular action or practice which is said to constitute the relevant requirement. In considering the expression ‘requirement or condition’ in the context of the sex discrimination provisions of the *Anti-Discrimination Act 1977* (NSW), Dawson J stated:

Upon principle and having regard to the objects of the Act, it is clear that the words "requirement or condition" should be construed broadly so as to cover any form of qualification or prerequisite ... Nevertheless, it is necessary in each particular instance to formulate the actual requirement or condition with some precision.⁶⁸

A requirement need not be explicit but rather can be implicit. For example, a service which is provided in a certain manner may, in effect, impose a requirement that the service be accessed in that manner.⁶⁹

2.3.2 Reasonableness

In *Siddiqui*, Dr Siddiqui sought unrestricted registration to practice medicine in Victoria. To obtain such registration, a person was required to be a graduate of a university, college or other body accredited by the Australian Medical Council (‘AMC’), or hold a certificate from the AMC certifying that the

⁶⁵ *Australian Medical Council v Wilson* (1996) 68 FCR 46, 62 (Heerey J with whom Black CJ agreed on this issue, 47), 79 (Sackville J).

⁶⁶ See sections 3.6 and 4.3 respectively.

⁶⁷ The term ‘requirement’ will be used as shorthand for the expression ‘term, condition or requirement’.

⁶⁸ *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165, 168. Similarly, in the context of the DDA, see *Waters v Public Transport Corporation* (1991) 173 CLR 349, 393 (Dawson and Toohey JJ), 406-7 (McHugh J); *Daghlian v Australian Postal Corporation* [2003] FCA 759, [110] (Conti J).

⁶⁹ See *Waters v Public Transport Corporation* (1991) 173 CLR 349, 360 (Mason CJ and Gaudron J), 407 (McHugh J).

person was qualified to be registered as a medical practitioner. To obtain the necessary certificate so as to fall within this second category, it was necessary (amongst other things) to sit a written multiple choice question ('MCQ') exam and achieve a result which ranked the candidate within a quota set by the AMC.

Dr Siddiqui was not a graduate of an accredited institution. He sat the required exam on a number of occasions and, although passing, was not placed within the first 200 candidates, which was the quota set by the AMC at the time (based on a recommendation of the Australian Health Ministers' Conference).

Dr Siddiqui complained, amongst other things,⁷⁰ that the requirement to sit an exam and pass with a score which placed him within the quota constituted indirect racial discrimination.

HREOC, at first instance, considered whether or not the requirement was reasonable. It held that the setting of a quota was reasonable, but the manner in which it was applied to Dr Siddiqui was unreasonable. HREOC stated:

We are not persuaded that the Health Ministers acted unreasonably in determining that a quota was necessary nor in fixing it at 200 each year. But we are persuaded that the AMC acted unreasonably in using it to screen the number of those doctors who, having successfully met the minimum requirements of the MCQ, should be permitted to advance to the clinical examination. It was unreasonable to require the complainant to sit again for the MCQ within a year or so of his having satisfied the minimum requirements. If those minimum standards were intended by the AMC to ensure that measure of medical knowledge considered to be requisite for practice in Australia, then it was unreasonable to introduce an exclusionary principle based on comparative performance in the MCQ examination. The evidence has left us with the conclusion that it should have been possible for the AMC to implement the direction of the Health Ministers' Conference in such a way as to minimise the trauma associated with repeated success in the MCQ followed by repeated failure to be included in the quota. We heard no convincing explanation as to why the quota should not or could not have been imposed in order to limit the number of those admitted to sit for the MCQ. Of course, the quota in that circumstance would be assessed at a higher figure to allow for the expected failure rate in both the MCQ and the clinical examination. Alternatively, we heard no convincing explanation as to why a person who satisfied the minimum standards prescribed for the MCQ but failed to secure a place in the quota should not remain credited, for a reasonable time, with a pass in the MCQ. This would have the result, if the comparative performance test were abandoned in favour of a 'first come, first

⁷⁰ Dr Siddiqui's complaint of direct discrimination was dismissed by HREOC at first instance on the basis that the relevant distinction drawn by the AMC was not based on race, but rather whether or not a person trained in an accredited medical school: *ibid* 56. See *Siddiqui v Australian Medical Council* (Unreported, HREOC, Sir Ronald Wilson, Commissioner Hastings, Commissioner Morgan, 7 August 1995), 13.

served' principle, that such a person would maintain a place in the queue for the quota the next time around.⁷¹

On review under the *Administrative Decision (Judicial Review) Act 1977* (Cth), the Full Court of the Federal Court found that HREOC had erred in a number of respects in relation to its findings in relation to reasonableness.

First, it was held that HREOC had incorrectly reversed the onus of proof:

It approached its task by identifying alternative means of applying the quota (which would have resulted in Dr Siddiqui's acceptance) and then finding that the AMC provided 'no convincing explanation' why such alternatives could not be utilised. However, the onus remained on Dr Siddiqui to show that the term, condition or requirement in fact applied was not reasonable, in the sense of being not rational, logical and understandable.⁷²

Second it was held that HREOC had erred in its approach to reasonableness and its conclusion that the application of the quota to Dr Siddiqui was unreasonable.⁷³ The Court approved of the following test of 'reasonableness',⁷⁴ articulated by Bowen CJ and Gummow J in *Secretary, Department of Foreign Affairs and Trade v Styles*:⁷⁵

The test of reasonableness is less demanding than one of necessity, but more demanding than one of convenience ... The criterion is an objective one, which requires the court to weigh the nature and extent of the discriminatory effect, on the one hand, against the reason advanced in favour of the requirement or condition on the other. All the circumstances of the case must be taken into account.⁷⁶

Heerey J observed that the relevant 'circumstances of the case' included, but were not limited to, the personal impact of the requirement on Dr Siddiqui. Also relevant were the reasons for which the AMC had imposed the requirement.⁷⁷ In assessing whether or not a requirement is 'reasonable', the focus is on 'reason and rationality' rather than whether the requirement is 'one with which all people or even most people agree'.⁷⁸

The Court held that once it was accepted, as HREOC had done, that a quota of 200 could lawfully be imposed, it was 'impossible to say that it [was] not a

⁷¹ *Siddiqui v Australian Medical Council* (Unreported, HREOC, Sir Ronald Wilson, Commissioner Hastings, Commissioner Morgan, 7 August 1995), 16.

⁷² (1996) 68 FCR 46, 62 (Heerey J, with whom Black CJ generally agreed, 47, and with whom Sackville J agreed on the issue of reasonableness, 79).

⁷³ *Ibid* 62.

⁷⁴ *Ibid* 60 (Heerey J, with whom Black CJ generally agreed, 47, and with whom Sackville J agreed on the issue of reasonableness, 79).

⁷⁵ (1989) 23 FCR 251.

⁷⁶ *Ibid* 263.

⁷⁷ (1996) 68 FCR 46, 60.

⁷⁸ *Ibid* 61.

rational application of that quota to select the first 200 candidates in order of merit’:

The practice of medicine requires the possession of a large body of complex knowledge. One way – albeit not necessarily a perfect way or the only way – of selecting the best 200 applicants from a larger number... seeking registration, is to take those who have demonstrated the most familiarity with that knowledge. More fundamentally, the selection of the 200 by criteria which are merit-based cannot in my view be regarded as other than logical and understandable.⁷⁹

In *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission*,⁸⁰ Sackville J confirmed (in the context of the SDA) that in assessing reasonableness, ‘the question is not simply whether the alleged discriminator could have made a “better” or more informed decision’. However, he cautioned against an over reliance on ‘logic’ in assessing reasonableness:

The fact that a distinction has a ‘logical and understandable basis’ will not always be sufficient to ensure that a condition or requirement is objectively reasonable. The presence of a logical and understandable basis is a factor – perhaps a very important factor – in determining the reasonableness or otherwise of a particular condition or requirement. But it is still necessary to take account of both the nature and extent of the discriminatory effect of the condition or requirement ... and the reasons advanced in its favour. A decision may be logical and understandable by reference to the assumptions upon which it is based. But those assumptions may overlook or discount the discriminatory impact of the decision.⁸¹

In *Aboriginal Students’ Support and Parents Awareness Committee, Alice Springs v Minister for Education, Northern Territory*,⁸² HREOC considered the closing of a primary school in Alice Springs which catered almost solely to Aboriginal students and was said to be unique in its curriculum and services. The relevant requirement was said to be that the children attend school at another Alice Springs Primary School which were not similarly equipped to meet the needs of Aboriginal students.

Commissioner Carter noted that the onus is on a complainant to prove the requirement is not reasonable. The Commissioner noted the competing opinions in the evidence before him as to the education that the children would receive in the different schools. While the Commissioner noted that he

⁷⁹ Ibid 62 (Heerey J, with whom Black CJ generally agreed, 47, and with whom Sackville J agreed on the issue of reasonableness, 79).

⁸⁰ (1997) 80 FCR 78.

⁸¹ Ibid 112-13.

⁸² (1992) EOC 92-415.

‘shared some of the concerns’ of the complainants, he was not adequately persuaded that the requirement was ‘not reasonable’.⁸³

In the context of other anti-discrimination statutes, it has been held that factors relevant to assessing reasonableness will include:

- whether or not the purpose for which the requirement is imposed could be achieved without the imposition of a requirement that is discriminatory, or by the imposition of a requirement that is less discriminatory in its impact;⁸⁴
- issues of effectiveness, efficiency and convenience in performing an activity or completing a transaction and the cost of not imposing the discriminatory requirement or substituting another requirement;⁸⁵
- the maintenance of good industrial relations;⁸⁶
- relevant policy objectives;⁸⁷ and
- the observance of health and safety requirements and the existence of competitors.⁸⁸

2.3.3 Compliance with the Term, Condition or Requirement

It is necessary that an affected individual or group ‘does not or cannot comply’ with the relevant requirement.

As outlined above, the complainant in *Siddiqui* had failed on a number of occasions to meet a requirement set by the Australian Medical Council (‘AMC’) by way of an exam. The Full Federal Court held that it was correct to find in those circumstances that the complainant ‘does not’ comply with the relevant requirement. It was not necessary for a complainant to demonstrate that it was impossible for them ever to comply with the requirement because of some ‘immutable characteristic’. Sackville J suggested:

It seems to me that the primary purpose underlying s 9(1A)(b) is to ensure that the complainant (or someone on whose behalf a complainant acts) has sustained some disadvantage by reason of the requirement or condition or requirement under scrutiny. That purpose is satisfied if the relevant individual in fact does not comply with the condition or requirement, regardless of whether the non-compliance flows from some immutable characteristic or from a different cause. Certainly it should not be enough to exclude the operation of s 9(1A) that a complainant might ultimately be able to comply

⁸³ Ibid, 78, 968-69. See also discussion by Drummond J in *Ebber v Human Rights & Equal Opportunity Commission* (1995) 129 ALR 455.

⁸⁴ *Waters v Public Transport Corporation* (1991) 173 CLR 349, 363-64 (Mason and Gaudron JJ), 378 (Brennan J), 395 (Dawson and Toohey JJ).

⁸⁵ Ibid 378 (Brennan J).

⁸⁶ Ibid 395 (Dawson and Toohey JJ); *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251, 263-64 (Bowen CJ and Gummow J).

⁸⁷ *Waters v Public Transport Corporation* (1991) 173 CLR 349, 410 (McHugh J).

⁸⁸ Ibid 395 (Dawson and Toohey JJ).

with a condition or requirement which discriminates against members of the group to which the complainant belongs.⁸⁹

In assessing whether or not a person ‘cannot comply’ with a requirement, it is a person’s ‘practical’ (as opposed to theoretical or technical) ability to comply that is most relevant.

This issue was considered by the House of Lords in *Mandla v Dowell Lee*⁹⁰ (‘*Mandla*’), which concerned the ability of Sikh men to comply with a dress code:

It is obvious that Sikhs, like anyone else, ‘can’ refrain from wearing a turban, if ‘can’ is construed literally. But if the broad cultural/historic meaning of ethnic is the appropriate meaning of the word in the Act of 1976, then a literal reading of the word ‘can’ would deprive Sikhs and members of other groups defined by reference to their ethnic origins of much of the protection which Parliament evidently intended the Act to afford to them. They ‘can’ comply with almost any requirement or condition if they are willing to give up their distinctive customs and cultural rules.⁹¹

In obiter comments in *Siddiqui*, Sackville J cited, with apparent approval, the analysis in *Mandla* as authority for the proposition that ‘can comply’ should be understood to mean ‘can in practice’ or ‘can consistently with the customs and cultural conditions of the racial group’.⁹²

2.3.4 Interference with the Recognition, Enjoyment or Exercise of Human Rights or Fundamental Freedoms on an Equal Footing

Section 9(1A)(c) requires that the relevant requirement must have the effect of impairing the recognition, enjoyment or exercise, on an equal footing, by people of the same race of any relevant human right or fundamental freedom.

For a consideration of judicial interpretations of the expression ‘human rights or fundamental freedoms’ (which also appears in s 9(1) of the RDA), see 2.4 below.

The key issue that the section has raised has been the nature of the comparison that is required by the expression ‘on an equal footing’.

In *Siddiqui*, the Full Federal Court considered this question. As outlined above, the case concerned the requirement that overseas trained doctors

⁸⁹ (1996) 68 FCR 46, 80. See also Heerey J, 62, with whom Black CJ agreed, 47.

⁹⁰ [1983] 2 AC 548.

⁹¹ Ibid 565.

⁹² (1996) 68 FCR 46, 80.

submit to an examination as a requirement of registration to practice medicine in Australia.

The case was argued on the basis that the appropriate comparison in determining the question of whether or not rights were being enjoyed on ‘an equal footing’ was between the group to which Dr Siddiqui belonged (either defined as ‘overseas trained doctors’ or ‘overseas trained doctors of Indian national origin’) and applicants from accredited medical schools who were not required to sit the examination.⁹³

Black CJ⁹⁴ and Sackville J⁹⁵ (Heerey J dissenting)⁹⁶ held that it was not necessary for the groups to be compared to have been subject to the same requirement.⁹⁷ Sackville J stated:

In my opinion, the language used in s 9(1A)(c) is satisfied if the effect of a requirement to comply with a particular condition is to impair the exercise of a human right by persons of the same group as the complainant, on an equal footing with members of other groups, regardless of whether or not those other groups are required to comply with the same condition. Of course, the usual case of alleged discrimination involves the disparate impact of a particular requirement or condition upon two or more groups, each of which is identified by reference to race, colour, descent or national or ethnic origin. But there may well be cases in which members of a group are impaired in the exercise of a human right precisely because they must comply with a condition to which members of other groups are not subject.⁹⁸

Black CJ and Sackville J were, however, of the view (expressed in obiter comments) that the examination and quota requirements applied in that case did not have the proscribed effect on human rights and fundamental freedoms. Sackville J stated that the evidence did not establish that persons of Indian origin were denied relevant opportunities, or disadvantaged by the requirements for registration.⁹⁹

2.4 Human Rights and Fundamental Freedoms

Sections 9 and 9(1A) of the RDA provide protection for a person’s human rights and fundamental freedoms ‘on an equal footing’ with persons of other

⁹³ Ibid 63.

⁹⁴ Ibid 47.

⁹⁵ Ibid 80-2.

⁹⁶ Ibid 63. His Honour stated that the ‘two groups compared have to be subject to the *same* term, condition or requirement’.

⁹⁷ Note that the terms of s 9(1A) of the RDA differ to the terms of other anti-discrimination legislation which requires a comparison of the ability of different groups to comply with the relevant requirement or condition: see for example s 6 of the DDA.

⁹⁸ (1996) 68 FCR 46, 81.

⁹⁹ Ibid 82-3 (Sackville J), 48 (Black CJ).

racess. Section 10 provides for the equal enjoyment of rights by people of different races.¹⁰⁰ In applying these provisions, the courts have considered closely the meaning of the terms ‘human rights’ and ‘fundamental freedoms’.

In *Gerhardy v Brown*,¹⁰¹ Mason J noted that the rights protected under s 10(1) (and s 9(1)) are not confined to rights of the kind referred to in art 5 of CERD. His Honour held:

The expression ‘human rights’ is commonly used to denote the claim of each and every person to the enjoyment of rights and freedoms generally acknowledged as fundamental to his or her existence as a human being and as a free individual in society ... As a concept, human rights and fundamental freedoms are fundamentally different from specific or special rights in our domestic law which are enforceable by action in the courts against other individuals or against the State, the content of which is more precisely defined and understood.¹⁰²

Similarly, Brennan J stated:

The term connotes the rights and freedoms which must be recognized and observed, and which a person must be able to enjoy and exercise, if he is to live as he was born - ‘free and equal in dignity and rights’, as the Universal Declaration of Human Rights proclaims ... The conception of human rights and fundamental freedoms in the Convention definition of racial discrimination describes that complex of rights and freedoms the enjoyment of which permits each member of a society equally with all other members of that society to live in full dignity, to engage freely in any public activity and to enjoy the public benefits of that society.¹⁰³

The High Court also considered the expression ‘right’ in *Mabo v Queensland (No. 1)*,¹⁰⁴ Deane J stating:

The word ‘right’ is used in s 10(1) in the same broad sense in which it is used in the International Convention, that is to say, as a moral entitlement to be treated in accordance with standards dictated by the fundamental notions of human dignity and essential equality which underlie the international recognition of human rights: cf. the preamble to the International Convention.¹⁰⁵

¹⁰⁰ It is noted that there is no equivalent to s 10 in other state or federal pieces of anti-discrimination legislation. It is also relevant to note that s 10 does not proscribe discrimination and a complaint cannot be made to HREOC alleging unlawful discrimination under that section. Rather, it is ‘concerned with the operation and effect of laws, rather than with the activities or conduct of individuals’ *Mabo v Queensland* (1989) 166 CLR 186, 230. For this reason, a detailed consideration of s 10 is beyond the scope of this publication. However, other cases that have considered s 10 include *Gerhardy v Brown* (1985) 159 CLR 70; *Mabo v Queensland (No.2)* (1992) 175 CLR 1; *Western Australia v Commonwealth* (1995) 183 CLR 373; *Macabenta v Minister for Immigration and Multicultural Affairs* (1998) 154 ALR 591; *Sahak v Minister for Immigration and Multicultural Affairs* (2002) 123 FCR 514.

¹⁰¹ (1985) 159 CLR 70.

¹⁰² *Ibid* 101, 102.

¹⁰³ *Ibid* 125-26.

¹⁰⁴ (1988) 166 CLR 186.

¹⁰⁵ *Ibid* 229.

The specific content of a range of human rights and fundamental freedoms has been considered in the case law.

In *Secretary, Department of Veteran's Affairs v P*,¹⁰⁶ the Federal Court considered whether entitlement to a war veteran's benefit (namely a government-subsidised housing loan) was a right or freedom protected by ss 9(1) or 10 of the Act. Drummond J held:

Although it is well-established ... that neither s 9(1) nor s 10(1) of the [RDA] is confined to the rights actually mentioned in Article 5 of the Convention, those sections are nevertheless concerned only with rights fundamental to the individual's existence as a human being. In *Ebber v Human Rights and Equal Opportunity Commission* (1995) 129 ALR 455, I reviewed relevant High Court authority and said, at 475:

Section 9(1) [of the RDA] can only apply where a discriminatory act based on national origin also affects 'any human right or fundamental freedom'. The Act focuses on protecting from impairment by acts of racial discrimination certain fundamental rights which each individual has; it does not purport to aim at achieving equality of treatment in every respect of individuals of disparate racial and national backgrounds ...

I concluded, at 476-477:

*... the rights and freedoms protected by ss 9(1) and 10(1) [the RDA] do not encompass every right which a person has under the municipal law of the country that has authority over him or every other right which he may claim; rather are those sections limited to protecting those particular rights and freedoms with which the Convention is concerned and those other rights and freedoms which, like those specifically referred to in the Convention, are fundamental to the individual's existence as a human being.*¹⁰⁷

Drummond J held that the right to the war veteran's benefit in question 'cannot be characterised as a right of the kind which is the concern of s 9 and s 10' of the RDA as the benefit, being 'confined to those persons who have served the interests of one nation against the interests of other nations, stands outside the range of universal human rights'.¹⁰⁸ Further, the benefit 'cannot be regarded as falling within the kind of right to social security and social services mentioned in para (e)(iv) of Article 5' of CERD as para (e)(iv) 'deals only with State-provided assistance to alleviate need in the general community and with benefits provided to advance the well-being of the

¹⁰⁶ (1998) 79 FCR 594.

¹⁰⁷ Ibid 426. In *Ebber v Human Rights and Equal Opportunity Commission* (1995) 129 ALR 455, to which his Honour refers, Drummond J held that the applicants' claim that their German educational qualifications (in architecture) should be accepted as sufficient for the purposes of registration under Queensland law was not of itself a claim to a human right or fundamental freedom of the type protected by ss 9 and 10.

¹⁰⁸ (1998) 79 FCR 594, 426.

entire community of the kind that many national states now make available to their citizens'.¹⁰⁹

In *Macabenta v Minister of State for Immigration and Multicultural Affairs*¹¹⁰ ('*Macabenta*'), Tamberlin J held:

Although Article 5 of the Convention is cast in wide terms in respect of the right to residence, it does not follow that every non-citizen who lawfully enters Australia has any claim by way of a right to permanently reside here. The equality envisaged in the enjoyment of the enumerated rights does not encompass circumstances where a government, on compassionate grounds, has declined to return a group of persons from certain states to their national states. Therefore, the law does not unequally affect persons from other countries who do not have a similar history and who are differently affected because of that history.¹¹¹

In *Australian Medical Council v Wilson*,¹¹² Heerey J expressed doubt that there existed a right to practise medicine on an unrestricted basis.¹¹³

In *Hagan v Trustees of the Toowoomba Sports Ground Trust*,¹¹⁴ Drummond J considered a complaint of racial discrimination brought in relation to the maintenance of a sign saying 'The ES "Nigger Brown" Stand' at an athletic oval. His Honour held, citing *Ebber v Human Rights and Equal Opportunities Commission*:¹¹⁵

[Section 9(1)] is not directed to protecting the personal sensitivities of individuals. It makes unlawful acts which are detrimental to individuals, but only where those acts involve treating the individual differently and less advantageously to other persons who do not share membership of the complainant's racial, national or ethnic group and then only where that differential treatment has the effect or purpose of impairing the recognition etc of every human being's entitlement to all the human rights and fundamental freedoms listed in Article 5 of [CERD] or basic human rights similar to those listed in Article 5.

...

It can be accepted that s 9(1) protects the basic human right of every person who is a member of a particular racial group to go about his recreational and other ordinary activities without being treated by others less favourably than persons who do not belong to that racial group...¹¹⁶

¹⁰⁹ *Ibid.*

¹¹⁰ (1998) 154 ALR 591.

¹¹¹ *Ibid* 600.

¹¹² (1996) 68 FCR 46.

¹¹³ *Ibid* 59-60, citing *Jamorksi v Attorney-General (Ontario)* (1988) 49 DLR (4th) 426.

¹¹⁴ [2000] FCA 1615.

¹¹⁵ (1995) 129 ALR 455.

¹¹⁶ [2000] FCA 1615, [38]. Drummond J's approach was upheld on appeal: *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2000) 105 FCR 56, 61 [28].

Drummond J ultimately held that the maintenance of the sign did not,

even if based on race, [involve] any distinction etc having either the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom of the kind referred to in s 9. Only Mr Hagan's personal feelings were affected by the act. Because there was no distinction etc produced by the act capable of affecting detrimentally in any way any human rights and fundamental freedoms, there was no racial discrimination involved in the act.¹¹⁷

2.5 Drawing Inferences of Racial Discrimination

The existence of systemic racism has been routinely acknowledged by decision-makers considering allegations of race discrimination. The extent to which this enables inferences to be drawn as to the basis for a decision, particularly in the context of decisions about hiring or promotion in employment, has been the subject of some consideration. The cases highlight the difficulties faced by complainants in proving racial discrimination in the absence of direct evidence.¹¹⁸

In *Murray v Forward*,¹¹⁹ HREOC was asked to draw inferences of racial discrimination from conduct of the respondent that was said to be based on an acceptance of racial stereotypes. In particular it was complained that views had been formed as to the inadequate literacy of the complainant which could only be explained by an acceptance of stereotypes relating to the literacy of Aboriginal people generally. Sir Ronald Wilson stated:

I have not found the resolution of this issue an easy one. Counsel acknowledges that to accept his submission on behalf of the complainant I must exclude all other inferences that might reasonably be open. I am sensitive to the possible presence of systemic racism, when persons in a bureaucratic context can unconsciously be guided by racist assumptions that may underlie the system. But in such a case there must be some evidence of the system and the latent or patent racist attitudes that infect it. Here there is no such evidence. Consequently there is no evidence to establish the weight to be accorded to the alleged stereotype.¹²⁰

In *Sharma v Legal Aid Queensland*¹²¹ ('*Sharma*'), Kiefel J held that a court should be wary of presuming the existence of racism in particular circumstances:

¹¹⁷ [2000] FCA 1615, [42].

¹¹⁸ See Jonathon Hunyor, 'Skin-deep: Proof and Inferences in Racial Discrimination in Employment' (2003) 25 *Sydney Law Review* 537. See also *Batzialas v Tony Davies Motors Pty Ltd* [2002] FMCA 243; *Chau v Oreanda Pty Ltd* [2001] FMCA 114.

¹¹⁹ Unreported, HREOC, Sir Ronald Wilson, 10 September 1993.

¹²⁰ *Ibid* 4.

¹²¹ [2001] FCA 1699.

Counsel for the applicant submitted that an inference could be drawn because of the known existence of racism combined with the fact that the decision in question was one to be made between people of different races. It would seem to me that the two factors identified, considered individually or collectively, raise no more than a possibility that race might operate as a factor in the decision-making.¹²²

In *Sharma*, the Federal Court in dealing with allegations of discrimination in recruitment for senior legal positions, was referred to the small number of people employed by the respondent coming from non-English speaking backgrounds, particularly at the level of professional staff and the fact that nobody holding the position for which they applied in any of the respondent's offices was from a non-English speaking background. The applicant argued that inferences could be drawn from this as to the racially discriminatory conduct of the respondent. Kiefel J stated:

In such cases statistical evidence may be able to convey something about the likelihood of people not being advanced because of factors such as race or gender. The case referred to in submissions: *West Midlands Passenger Transport Executive v Jaquant Singh* [1988] [2 All ER 873, 877] is one in point. There it was observed that a high rate of failure to achieve promotion by members of a particular racial group may indicate that the real reason for refusal is a conscious or unconscious racial attitude which involves stereotypical assumptions about members of the group. It will be a question of fact in each case. Here however all that can be said is that a small number of the workforce of the respondent comes from non-English speaking backgrounds.¹²³

The Full Federal Court upheld her Honour's decision on appeal¹²⁴ and agreed that in appropriate cases, inferences of discrimination might be drawn:

It may be accepted that it is unusual to find direct evidence of racial discrimination, and the outcome of a case will usually depend on what inferences it is proper to draw from the primary facts found: *Glasgow City Council v Zafar* [1998] 2 All ER 953, 958. There may be cases in which the motivation may be subconscious. There may be cases in which the proper inference to be drawn from the evidence is that, whether or not the employer realised it at the time or not, race was the reason it acted as it did: *Nagarajan v London Regional Transport* [[2000] 1 AC 501, 510].¹²⁵

The Court went on to indicate a view that the standard of proof for breaches of the RDA is the 'higher standard' referred to in *Briginshaw v Briginshaw*¹²⁶

¹²² Ibid [63].

¹²³ Ibid [60].

¹²⁴ *Sharma v Legal Aid Queensland* [2002] FCAFC 196.

¹²⁵ Ibid [40].

¹²⁶ (1938) 60 CLR 336.

and that racial discrimination was ‘not lightly to be inferred’.¹²⁷ The Court continued:

In a case depending on circumstantial evidence, it is well established that the trier of fact must consider ‘the weight which is to be given to the united force of all of the circumstances put together’. One should not put a piece of circumstantial evidence out of consideration merely because an inference does not arise from it alone: *Chamberlain v The Queen [No 2]* (1983 – 1984) 153 CLR 521 at 535. It is the cumulative effect of the circumstances which is important provided, of course, that the circumstances relied upon are established as facts.¹²⁸

The issue was also considered in *Tadawan v South Australia*,¹²⁹ a case in which the applicant, a Filipino-born teacher of English as a second language, alleged victimisation by her employer on the basis of having made a previous complaint of racial discrimination. It was argued that victimisation could be inferred in the decision not to re-employ the applicant on the basis of the following factors: the applicant’s superior qualifications and experience; that the applicant was ‘first reserve’ for a previous position but was not given any work; that new employees were taken on in preference to providing work for the applicant; and the lack of cogent reasons for the preference of new employees. Raphael FM commented:

In the absence of direct proof an inference may be drawn from the circumstantial evidence. The High Court has said that ‘where direct proof is not available it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference; they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture ... But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then though the conclusion may fall short of certainty it is not to be regarded as a mere conjecture or surmise...’ (*Bradshaw v McEwans Pty Ltd* (1951), unreported, applied in *TNT Management Pty Ltd v Brooks* (1979) 23 ALR 345).¹³⁰

Raphael FM found that he was unable to infer that the applicant was subject to victimisation as the decision not to re-employ her was made before she lodged her complaint.¹³¹

¹²⁷ For further discussion on the application of the principle in *Briginshaw v Briginshaw* (1938) 60 CLR 336, see section 6.1.

¹²⁸ [2002] FCAFC 196, [41].

¹²⁹ [2001] FMCA 25. See also *Oberoi v Human Rights and Equal Opportunity Commission* [2001] FMCA 34, [23]; *Maghiar v Western Australia* [2001] FMCA 98, [15] and on appeal *Maghiar v Western Australia* [2002] FCA 262, [24]-[25].

¹³⁰ [2001] FMCA 25, [52].

¹³¹ *Ibid* [52]-[59].

2.6 Exceptions in the RDA

Unlike the SDA and DDA which contain a wide range of permanent exceptions¹³² and the mechanism for a person to apply for a temporary exemption,¹³³ the RDA contains very limited exceptions to the operation of the Act.¹³⁴ The exception relating to special measures in s 8(1) of the RDA has received the most attention in the case law. This provides as follows:

This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relation to which sub-section 10(1) applies by virtue of sub-section 10(3).

CERD provides for special measures in two contexts – in art 1(4) as an exception to the definition of discrimination, and in art 2(2) as a positive obligation on States to take action to ensure that minority racial groups are guaranteed the enjoyment of human rights and fundamental freedoms.

Article 1(4) of CERD, with which s 8(1) is concerned, provides as follows:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.¹³⁵

The High Court first considered the meaning of this section in its decision in *Gerhardy v Brown*.¹³⁶ The case concerned an alleged inconsistency between South Australian land rights legislation and the RDA. The *Pitjantjatjara Land Rights Act 1981* (SA) ('the SA Act') vested the title to a large area of land in the north-west of South Australia in the Anangu Pitjantjatjaraku, a body corporate of which all persons defined by the SA Act to be Pitjantjatjara's were members. The Act provided unrestricted access to the lands for all members, while it was made an offence for non-Pitjantjatjara people to enter the lands without a permit. Robert Brown, who was not Pitjantjatjara, was

¹³² See pt II, div 4, SDA; pt 2, div 5 DDA.

¹³³ See s 44 SDA; s 55 DDA.

¹³⁴ See ss 8(1) (special measures); 8(2) (instrument conferring charitable benefits); 9(3) and 15(4) (employment on a ship or aircraft if engaged outside Australia); 12(3) and 15(5) (accommodation and employment in private dwelling house or flat).

¹³⁵ Article 2(2) of CERD provides: States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

¹³⁶ (1985) 159 CLR 70.

charged with an offence after entering the lands without a permit, and claimed that restricting his access to the lands was a breach of the RDA and, by reason of s 109 of the *Constitution*, that part of the SA Act was invalid.

The High Court held that whilst the SA Act discriminated on the basis of race, it was saved as a special measure within the meaning of s 8(1) of the RDA. Brennan J identified five characteristics to be satisfied in order for a measure to come within s 8(1):

1. the special measure must confer a benefit on some or all members of a class;
2. membership of this class must be based on race, colour, descent, or national or ethnic origin;
3. the special measure must be for the sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and fundamental freedoms;
4. the protection given to the beneficiaries by the special measure must be necessary in order that they may enjoy and exercise equally with others human rights and fundamental freedoms; and
5. the special measure must not have achieved its objectives.¹³⁷

The majority of the Court held that the permit provisions of the SA Act satisfied these criteria and therefore qualified as a special measure.¹³⁸

In *Bruch v Commonwealth of Australia*,¹³⁹ a non-indigenous Australian student claimed that the Commonwealth had unlawfully discriminated against him in contravention of ss 9 and 13 of the RDA by virtue of his ineligibility for ABSTUDY rental assistance benefits. McInnis FM held that the ABSTUDY rental assistance scheme did not cause the Commonwealth to contravene the RDA because it constituted a ‘special measure’ for the benefit of Indigenous people within the meaning of s 8(1) of the RDA.¹⁴⁰ In doing so, he found that the five indicia identified by Brennan J were satisfied as follows:

- the ABSTUDY rental assistance scheme confers a benefit on a clearly defined class of natural persons made up of Aboriginal and Torres Strait Islander people;
- that class is based on race;

¹³⁷ Ibid 133, 140.

¹³⁸ Subsequent cases have also considered whether legislation that provides for the recognition of land rights or native title amounts to a special measure within s 8(1). See, for example, *Pareroultja v Tickner* (1993) 42 FCR 32; *Western Australia v Commonwealth* (1995) 183 CLR 373.

¹³⁹ [2002] FMCA 29.

¹⁴⁰ Ibid [51].

- the sole purpose of the ABSTUDY rental assistance scheme was to ensure the equal enjoyment of the human rights of that class with respect to education;
- the rental assistance component of the ABSTUDY scheme was necessary to ensure that the class improved its rate of participation in education and, in particular, tertiary education; and
- the objectives for which the ABSTUDY rental assistance scheme was introduced had not yet been achieved.¹⁴¹

2.7 Racial Hatred (s 18C)

Racial vilification provisions were introduced into the RDA in 1995¹⁴² and have in recent years been the basis of the majority of cases decided under that Act.

Section 18C of the RDA provides:

Offensive behaviour because of race, colour or national or ethnic origin

- (1) 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.

Note: Subsection (1) makes certain acts unlawful. Section 46P of the *Human Rights and Equal Opportunity Commission Act 1986* allows people to make complaints to the Human Rights and Equal Opportunity Commission about unlawful acts. However, an unlawful act is not necessarily a criminal offence. Section 26 says that this Act does not make it an offence to do an act that is unlawful because of this Part, unless Part IV expressly says that the act is an offence.

- (2) For the purposes of subsection (1), an act is taken not to be done in private if it:
 - (a) causes words, sounds, images or writing to be communicated to the public; or
 - (b) is done in a public place; or
 - (c) is done in the sight or hearing of people who are in a public place.

¹⁴¹ *Ibid* [54].

¹⁴² *Racial Hatred Act 1995* (Cth), commenced 13 October 1995.

(3) In this section:

public place includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

2.7.1 Significance of Term ‘Racial Hatred’

Although the term ‘racial hatred’ appears in the heading in Part IIA of the RDA, the term is not present in any of the provisions under this heading. As long as the behaviour falls within the provisions of s 18C, there is no requirement for a complainant to prove that ‘racial hatred’ has occurred in order to establish a breach of Part IIA.¹⁴³

2.7.2 Persons to Whom the Provisions Apply

Section 18C(1) of the RDA operates to protect a person or group who possess a particular ‘race, colour or national or ethnic origin’.¹⁴⁴

It is not necessary to establish that all people in the relevant group may be offended by the acts complained of. It will be sufficient to show that a subset of the broader group may reasonably be affected by the conduct. For example:

- in *McGlade v Lightfoot*,¹⁴⁵ the relevant group was defined as ‘an Aboriginal person or a group of Aboriginal persons who attach importance to their Aboriginal culture’;¹⁴⁶
- in *Creek v Cairns Post Pty Ltd*,¹⁴⁷ the group was defined by Kiefel J as ‘an Aboriginal mother, or carer of children, residing in the applicant’s town’;¹⁴⁸ and
- in *Jones v Toben*,¹⁴⁹ the subset of people was defined as ‘members of the Australian Jewish community vulnerable to attacks on their pride and self-respect by reason of youth, inexperience or psychological vulnerability’.¹⁵⁰

In *McLeod v Power*,¹⁵¹ the applicant, a Caucasian prison officer, complained that the respondent, an Aboriginal woman, had abused him in terms including ‘you fucking white piece of shit’ and ‘fuck you whites, you’re all fucking shit’. Brown FM stated that the term ‘white’ did not itself encompass a

¹⁴³ *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352; *Toben v Jones* (2003) 199 ALR 1.

¹⁴⁴ See 2.1 above in relation to the interpretation of these terms.

¹⁴⁵ (2002) 124 FCR 106.

¹⁴⁶ *Ibid* [46].

¹⁴⁷ (2001) 112 FCR 352.

¹⁴⁸ *Ibid* [13].

¹⁴⁹ [2002] FCA 1150.

¹⁵⁰ *Ibid* [95]-[96].

¹⁵¹ (2003) 173 FLR 31.

specific race or national or ethnic group, being too wide a term.¹⁵² Brown FM also found that the term ‘white’ was not itself a term of abuse and noted that white people are the dominant people historically and culturally within Australia and not in any sense an oppressed group, whose political and civil rights are under threat.¹⁵³ His Honour suggested that it would be ‘drawing a long bow’ to include ‘whites’ as a group protected under the RDA.¹⁵⁴

2.7.3 Causation and Intention to Offend

Section 18C(1)(b) requires that the offending act must be done ‘because of’ the race, colour or national or ethnic origin of the complainant or some or all of the people in the relevant group. This wording differs from that in s 9(1) which uses the expression ‘based on’ and the terminology contained in the sections which prohibit discrimination, namely ‘by reason of’.¹⁵⁵

Section 18B provides that the complainant’s race, colour or national or ethnic origin need not be the dominant or substantial reason for the act.

Drummond J held in *Hagan v Trustees of the Toowoomba Sports Ground Trust*¹⁵⁶ that s 18C(1)(b) implies that there must be a causal relationship between the reason for doing the act and the race of the ‘target’ person or group.¹⁵⁷ His Honour also held that s 18C(1)(b) should not be interpreted mechanically, but rather, should be applied in light of the purpose and statutory context of s 18C – namely, as a prohibition of behaviour based on racial hatred.¹⁵⁸ Drummond J concluded, after examining the Second Reading Speech of the RDA, that ‘it would give s 18C an impermissibly wide reach to interpret it as applying to acts done specifically in circumstances where the actor has been careful to avoid giving offence to a racial group who might be offended’.¹⁵⁹

Kiefel J held similarly in *Creek v Cairns Post Pty Ltd*¹⁶⁰ that s 18C(1)(b) requires a consideration of the reason for the relevant act. However, her Honour held that the reference in the heading of Part IIA to ‘behaviour based on racial hatred’ does not create a separate test requiring the behaviour to

¹⁵² Ibid [55].

¹⁵³ Ibid [59].

¹⁵⁴ Ibid [62]. See, however, *Carr v Boree Aboriginal Corporation* [2003] FMCA 408, in which Raphael FM found that the first respondent had unlawfully discriminated against the applicant in her employment and had dismissed her for reasons ‘which were to do with her race or non-Aboriginality’, [9]. Raphael FM stated that ‘the provisions of the RDA apply to all Australians’, [14]. See also *Bryant v Queensland Newspapers Pty Ltd* (Unreported, HREOC, Sir Ronald Wilson, 15 May 1997).

¹⁵⁵ See ss 11-15. The issue of causation generally under the RDA is discussed at 2.2.2 above.

¹⁵⁶ [2000] FCA 1615.

¹⁵⁷ Ibid [16].

¹⁵⁸ Ibid [34].

¹⁵⁹ Ibid [36].

¹⁶⁰ (2001) 112 FCR 352.

have its basis in actual hatred of race. Sections 18B and 18C establish that the prohibition will be breached if the basis for the act was the race, colour, national or ethnic origin of the other person or group. Whilst the reason for the behaviour may be a matter for enquiry, the intensity of feeling of the person committing the act need not be considered (although it may explain otherwise inexplicable behaviour).¹⁶¹ The key question is whether ‘anything suggests race as a factor’ in the relevant act.¹⁶²

In *Jones v Toben*¹⁶³ Branson J adopted the approach of Kiefel J in *Creek v Cairns Post Pty Ltd*¹⁶⁴ to the words ‘because of’ in s 18C(1)(b).¹⁶⁵ Branson J found, in relation to the material before her which, amongst other things, conveyed the imputation that there was serious doubt that the Holocaust occurred, that it was ‘abundantly clear that race was a factor in the respondent’s decision to publish the material’:

The material includes many references to Jews and events and people characterised as Jewish. It is particularly concerned with the Holocaust and with the conduct of German forces during World War II, matters of particular importance to Jewish people. It is, in my view, plainly calculated to convey a message about Jewish people (see *Jones v Scully* per Hely J at [116] - [117])¹⁶⁶

In *Miller v Wertheim*,¹⁶⁷ the Full Court of the Federal Court of Australia held that a speech made by the first respondent may have been reasonably likely, in all the circumstances, to offend a small part of the Orthodox Jewish community. However, this did not, in itself, satisfy the requisite causal relationship of s 18C because:

The group and its members were criticised in the speech because of their allegedly divisive and destructive activities, and not because the group or its members were of the Jewish race, of Jewish ethnicity or because they were persons who adhered to the practices and beliefs of orthodox Judaism.¹⁶⁸

In *McGlade v Lightfoot*¹⁶⁹ an interview was reported in a newspaper in which the respondent made comments that were claimed to breach the racial hatred provisions. Carr J did not refer to any authority on the issue of causation, but found that ‘the evidence establishes that the respondent’s act was done because of the fact that the persons about whom the respondent was talking were of the Australian Aboriginal race or ethnic origin ... there could be no

¹⁶¹ Ibid 357 [18].

¹⁶² Ibid 359 [28].

¹⁶³ [2002] FCA 1150

¹⁶⁴ (2001) 112 FCR 352.

¹⁶⁵ See also Hely J in *Jones v Scully* (2002) 120 FCR 243, 273 [114].

¹⁶⁶ [2002] FCA 1150, [99]. Her Honour’s approach was approved on appeal in *Toben v Jones* (2003) 199 ALR 1.

¹⁶⁷ [2002] FCAFC 156.

¹⁶⁸ Ibid [12]-[13].

¹⁶⁹ (2002) 124 FCR 106.

other reason for the respondent's statements than the race or ethnic origin of the relevant group of people'.¹⁷⁰

2.7.4 Reasonably Likely to Offend, Insult, Humiliate or Intimidate

(a) Objective standard

The words 'reasonably likely' in s 18C(1) establish an objective standard.¹⁷¹ Hely J in *Jones v Scully*¹⁷² held that 'as the test is an objective one it is not necessary for an applicant to prove that any person was actually offended, insulted, humiliated or intimidated by the conduct in question'.¹⁷³

In *Creek v Cairns Post Pty Ltd*,¹⁷⁴ the respondent had published an article concerning the decision by the Queensland Department of Family Services, Youth and Community Care to place a young Aboriginal girl in the custody of the applicant, a relative of the child's deceased mother and guardian of the child's two brothers. The child had previously been in the foster care of a non-Aboriginal family. The focus of the article was whether the Department's decision was a reaction to the 'Stolen Generation' report,¹⁷⁵ which had been published earlier that year and had spoken of Aboriginal people having in the past suffered because of their removal from their families.

The basis for the complaint was the photographs which accompanied the story. The photograph of the non-Aboriginal couple presented them in their living room with a comfortable chair, photographs and books behind them while the photograph of the applicant showed her in a bush camp with an open fire and a shed or lean-to in which young children could be seen. The photograph was obtained by the respondent from a photographic library, and had been taken on an earlier occasion, with the consent of the applicant, in connection with a different story.

The applicant complained that the photograph portrayed her as a primitive bush Aboriginal and implied that this was her usual lifestyle, one in which the child would have to live. In reality the applicant at all relevant times lived in a comfortable, four-bedroom brick home with the usual amenities. The bush camp was four hours drive from the residence of the applicant and was used by her and her family principally for recreational purposes.

¹⁷⁰ Ibid 121 [66].

¹⁷¹ *Bryant v Queensland Newspapers Pty Ltd* (Unreported, HREOC, Sir Ronald Wilson, 15 May 1997).

¹⁷² (2002) 120 FCR 243.

¹⁷³ Ibid 269 [99].

¹⁷⁴ (2001) 112 FCR 352.

¹⁷⁵ Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997).

Kiefel J held that the act in question must have ‘profound and serious effects, not to be likened to mere slights’.¹⁷⁶ Her Honour noted that the nature or quality of the act in question is tested by the *effect* which it is reasonably likely to have on another person of the applicant’s racial or other group. Kiefel J stated that the question to be determined is whether the act in question can, ‘in the circumstances be regarded as reasonably likely to offend or humiliate a person in the applicant’s position’.¹⁷⁷

Although rejecting the application on the basis that the publication was not ‘motivated by considerations of race’, Kiefel J held that a reasonable person in the position of the applicant would:

feel offended, insulted or humiliated if they were portrayed as living in rough bush conditions in the context of a report which is about a child’s welfare. In that context it is implied that that person would be taking the child into less desirable conditions. The offence comes not just from the fact that it is wrong, but from the comparison which is invited by the photographs.¹⁷⁸

In relation to the comments made by Kiefel J that the act in question must have ‘profound and serious effects, not to be likened to mere slights’, Branson J in *Jones v Toben* stated that she did not understand Kiefel J to have intended that a ‘gloss’ be placed on the ordinary meaning of the words in s 18C:

Rather, I understand her Honour to have found in the context provided by s 18C of the RDA a legislative intent to render unlawful only acts which fall squarely within the terms of the section and not to reach to ‘*mere slights*’ in the sense of acts which, for example, are reasonably likely to cause technical, but not real, offence or insult (see also *Jones v Scully* per Hely J at [102]). It would be wrong, in my view, to place a gloss on the words used in s 18C of the RDA.¹⁷⁹

(b) Subjective effect on applicant

The test of whether a respondent’s act was ‘reasonably likely in all the circumstances to offend, insult, humiliate or intimidate another person or a group of people’ is an objective one.¹⁸⁰

Evidence of the subjective effect on the applicants of the act in question may be relevant and is admissible, but is ‘not determinative in answering the question’.¹⁸¹

¹⁷⁶ (2001) 112 FCR 352, 356-57 [16].

¹⁷⁷ Ibid 355 [12].

¹⁷⁸ Ibid 356 [13].

¹⁷⁹ [2002] FCA 1150, [92].

¹⁸⁰ *McGlade v Lightfoot* (2002) 124 FCR 106, 116-17 [43]; *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615; *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 355 [12]; *Jones v Scully* (2002) 120 FCR 243, 268-69 [98]-[100]; *Jones v Toben* [2002] FCA 1150, [84].

¹⁸¹ *McGlade v Lightfoot* (2002) 124 FCR 106, 117 [44]; *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615, [28]; *Jones v Scully* (2002) 120 FCR 243, 269 [99] – [100].

In *Horman v Distribution Group Limited*¹⁸² (*'Horman'*), the applicant submitted that the use of the word 'wog' in relation to the applicant and others was offensive and discriminatory to the applicant. There was evidence that the applicant used the word herself with respect to another employee. This did not, however, disqualify the applicant from the protection of s 18C. Raphael FM stated:

the very words used indicated that when she used them she intended to insult [the other employee]. It follows from this that she believed that the word 'wog' could be used in an insulting manner, and I am prepared to find that in the instances in which I have accepted that it was used, that it was used in that way with respect to the applicant.¹⁸³

(c) Reasonable victim test

In *McLeod v Power*,¹⁸⁴ Brown FM described the objective test as one of the 'reasonable victim',¹⁸⁵ adopting the analysis of Commissioner Innes in *Corunna v West Australian Newspapers Ltd*.¹⁸⁶ In that case, the applicant, a Caucasian prison officer, complained that the respondent, an Aboriginal woman, had abused him in terms including 'you fucking white piece of shit' and 'fuck you whites, you're all fucking shit' upon being refused entry to the prison for a visit. Brown FM found as follows:

The abuse, although unpleasant and offensive, was not significantly transformed by the addition of the words 'white' or 'whites'. These words are not of themselves offensive words or terms of racial vilification. This is particularly so because white or pale skinned people form the majority of the population in Australia... I believe that a reasonable prison officer would have found the words offensive but not specifically offensive because of the racial implication that Mr McLeod says he found in them.¹⁸⁷

(d) Context

Context is an important consideration in determining whether a particular act breaches s 18C and absent any clear indication to the contrary, words spoken should be interpreted as having their obvious meanings.

In *Hagan v Trustees of the Toowoomba Sports Ground Trust*,¹⁸⁸ Drummond J considered whether or not the use of the word 'nigger' was offensive to indigenous people in the naming of the 'ES "Nigger" Brown Stand'.¹⁸⁹

¹⁸² [2001] FMCA 52.

¹⁸³ *Ibid* [55].

¹⁸⁴ (2003) 173 FLR 31.

¹⁸⁵ (2003) 173 FLR 31, 45 [65].

¹⁸⁶ (2001) EOC 93-146, 75,465.

¹⁸⁷ (2003) 173 FLR 31, 46-7 [69].

¹⁸⁸ [2000] FCA 1615.

¹⁸⁹ *Ibid* [15].

Relevant to the context in which the expression was used was the fact that ‘nigger’ was the accepted nickname of ES Brown who was being honoured in the naming of the stand. In this context, the word had ceased to have any racist connotation.¹⁹⁰

(e) Truth or falsity of statement not determinative of offensiveness

The truth or falsity of a statement is not determinative of whether the relevant conduct is rendered unlawful by s 18C of the RDA. A true statement can nevertheless be offensive in the relevant sense.¹⁹¹

2.7.5 Otherwise than in Private

The RDA requires that the statement in question be made otherwise than in private. It is clear that the focus in s 18C is on the nature of the act, rather than its physical location per se: an act does not need to have occurred in a ‘public place’ for it to satisfy the requirement that the act has occurred ‘otherwise than in private’. Commissioner Innes made this observation in *Korczak v Commonwealth of Australia (Department of Defence)*¹⁹² (‘*Korczak*’) and stated that, reading the RDA as a whole, the phrase ‘otherwise than in private’ should be read consistently with the broad concept of ‘public life’ that appears in s 9 of the RDA and art 5 of CERD.¹⁹³

Examples of this requirement being satisfied are leaflets being distributed to people in a certain area, including placement of material in their letterboxes¹⁹⁴ and the publication of material on a non-password protected Internet site.¹⁹⁵

Driver FM held in *Gibbs v Wanganeen*¹⁹⁶ (‘*Gibbs*’) that the applicant bears the onus of establishing that the relevant act was done otherwise than in private.

¹⁹⁰ Ibid [27]. His Honour also noted evidence from witnesses of Aboriginal descent that neither they, nor members of the broader Toowoomba Aboriginal community, were, in fact, offended by the use of the word in this context. Drummond J further took into account the fact that the allegedly offensive word had been displayed for 40 years and there had never been any objection to it prior to the relevant complaint, [28]-[29].

¹⁹¹ *Jones v Toben* [2002] FCA 1150, [89]; *Jones v Scully* (2002) 120 FCR 243, 270 [104]; *Creek v Cairns Post* (2001) 112 FCR 352, 355 [6].

¹⁹² Unreported, HREOC, Commissioner Innes, 16 December 1999. Extract at (2000) EOC 93-056.

¹⁹³ Ibid 74, 176.

¹⁹⁴ *Hobart Hebrew Congregation v Scully* (Unreported, HREOC, Commissioner Cavanough QC, 21 September 2000). Extract at (2000) EOC 93-109.

¹⁹⁵ *Jones v Toben* (Unreported, HREOC, Commissioner McEvoy, 5 October 2000). Extract at (2000) EOC 93-110.

¹⁹⁶ (2001) 162 FLR 333, 335 [7].

In both *McMahon v Bowman*¹⁹⁷ and in *Gibbs*, the FMS cited with approval the decision of Commissioner Innes in *Korczak* for the proposition that the act must be done otherwise than in private, but need not be done ‘in public’.

Driver FM in *Gibbs* applied the reasoning of Commissioner Innes, stating that s 18C(2) of the RDA ‘is inclusive but not exhaustive of the circumstances in which an act is to be taken as not being done in private’.¹⁹⁸ Driver FM took a broad interpretive approach to the provision, stating that ‘[t]he legislation is remedial and its operation should not be unduly confined’.¹⁹⁹ His Honour suggested that it was ‘not possible for Parliament to stipulate all circumstances where a relevant act is to be taken as not being done in private’.²⁰⁰

Driver FM found that certain comments made in a prison were ‘in private’.²⁰¹ His Honour considered the Victorian case of *McIvor v Garlick*²⁰² which addressed the meaning of a public place under the *Summary Offences Act 1966* (Vic). He noted that the case was a material guide to the meaning of the words ‘public place’ at common law.²⁰³

In deciding whether a prison is a public place, Driver FM noted that a prison is a closed community to which access and egress are strictly regulated.²⁰⁴ His Honour suggested that because prisoners live there, it has some of the attributes of a private home²⁰⁵ and he concluded that it is not in general a public place, although some parts may be a public place depending on the circumstances. Furthermore, it is possible that an act done within a prison may be done otherwise than in private, depending upon the circumstances, even if done in a place that is not a public place.²⁰⁶ His Honour reasoned that an act may take place there otherwise than in private if members of the public, meaning ‘persons other than prisoners or correctional staff’ were actually present in the area at the place where the act occurred, when it occurred, or at least within earshot.²⁰⁷ Driver FM also referred to the ‘quality of the conversation’. His Honour noted that ‘the exchange was intended by the respondent to be a private one’ and concluded that the statements were not made ‘otherwise than in private’.²⁰⁸

¹⁹⁷ [2000] FMCA 3.

¹⁹⁸ (2001) 162 FLR 333, 336 [11].

¹⁹⁹ *Ibid* 336-37 [12].

²⁰⁰ *Ibid*.

²⁰¹ *Ibid* 337-38 [18].

²⁰² [1972] VR 129.

²⁰³ (2001) 162 FLR 333, 337 [13].

²⁰⁴ *Ibid* 337 [14].

²⁰⁵ *Ibid* 337 [15].

²⁰⁶ *Ibid* 337 [14].

²⁰⁷ *Ibid* 337 [17].

²⁰⁸ *Ibid* 337-38 [18].

In *McMahon v Bowman*,²⁰⁹ words shouted across a laneway between one house and another were taken to be in the sight or hearing of people in a public place for the purpose of s 18C(2)(c) as it would be ‘reasonable to conclude that they were spoken in such a way that they were capable of being heard by some person in the street if that person was attending to what was taking place’.²¹⁰ It was not necessary to prove that the people who were present in the street at the time of the incident heard what occurred.²¹¹ In *Chambers v Darley*²¹² Baumann FM referred approvingly to this analysis.

In *McGlade v Lightfoot*,²¹³ Carr J held, in dismissing an application by the respondent for summary dismissal, that it was ‘reasonably arguable’ that the act of a politician giving an interview to a journalist and ‘using the words complained of was an act which caused the same words to be communicated to the public’.²¹⁴ Moreover, Carr J held that ‘[t]he same applies, in my view, to the subsequent ‘picking up’ by a local newspaper of the original article published in a national newspaper’.²¹⁵

In the substantive hearing in that matter,²¹⁶ Carr J found that the respondent had, in giving an ‘on the record’ interview with a journalist, ‘deliberately and intentionally engaged in conduct, the natural consequence of which was the publication of his words’ and accordingly that the comments were made ‘otherwise than in private’.²¹⁷

In *Jones v Toben*,²¹⁸ Branson J held that the ‘placing of material on a website which is not password protected is an act which, for the purposes of the RDA, is taken not to be done in private’.²¹⁹ In that case the respondent had placed material on the internet which was found to be anti-Semitic. Her Honour stated that her conclusion as to the public nature of the relevant act was supported by the fact that a search of the World Wide Web using terms such as ‘Jew’, ‘Holocaust’ and ‘Talmud’, which were likely to be used by a member of the Jewish community interested in Jewish affairs, lead the searcher to one or more of the websites containing the material the subject of the complaint.²²⁰

²⁰⁹ [2000] FMCA 3.

²¹⁰ *Ibid* [26].

²¹¹ Raphael FM based this view on other cases dealing with ‘public place’ in a summary offences context: *R v James Webb* [1848] 2 C & K 933 as applied in *Purves v Inglis* [1915] 34 NZLR 1051.

²¹² [2002] FMCA 3, [10].

²¹³ [2002] FCA 752.

²¹⁴ *Ibid* [26].

²¹⁵ *Ibid* [34]. Note, however, that these views were expressed as being provisional and subject to re-consideration at the final hearing of this matter, [37].

²¹⁶ *McGlade v Lightfoot* (2002) 124 FCR 106.

²¹⁷ *Ibid* 116 [38]-[40].

²¹⁸ [2002] FCA 1150.

²¹⁹ *Ibid* [74].

²²⁰ *Ibid*. Her Honour’s findings on this point were not challenged on appeal: *Toben v Jones* (2003) 199 ALR 1.

In *McLeod v Power*²²¹ Brown FM cited with approval the decision of Driver FM in *Gibbs v Wanganeen*²²² and the analysis of Commissioner Innes in *Korczak v Commonwealth of Australia (Department of Defence)*²²³ in drawing a distinction between the nature of an act and where it takes place.²²⁴ He held that, depending upon the circumstances, an act can occur in a public place but nevertheless be in a context such that it is not ‘otherwise than in private’. In that case, abuse delivered by the respondent in a public place (outside a prison in an area where other visitors may have been present) was found not to be covered by s 18C. Relevant to his Honour’s decision was the fact that the respondent was not ‘playing to the grandstand’ and had intended the conversation to be a private one.²²⁵

Note, however, that Brown FM’s decision on this point appears to be inconsistent with the terms of s 18C(2)(b) which provides that ‘an act is taken not to be done in private if it ... is done in a public place’. For acts done in a public place, therefore, the intentions of the actor are arguably not relevant. His Honour’s reasoning is still relevant, however, in the converse situation, where the issue is whether or not an act which was *not* committed in the public place could nevertheless be considered to be ‘otherwise than in private’.

2.7.6 Exemptions

Section 18D of the RDA provides for the following exemptions from the prohibition on racial hatred in s 18C:

18D Exemptions

Section 18C does not render unlawful anything said or done reasonably and in good faith:

- (a) in the performance, exhibition or distribution of an artistic work; or
- (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
- (c) in making or publishing:
 - i) a fair and accurate report of any event or matter of public interest; or
 - ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

²²¹ (2003) 173 FLR 31.

²²² (2001) 162 FLR 333, 335 [7].

²²³ Unreported, HREOC, Commissioner Innes, 16 December 1999. Extract at (2000) EOC 93-056.

²²⁴ (2003) 173 FLR 31, 45 [65], 47-8 [72]-[73].

²²⁵ *Ibid* 47-8 [70]-[73].

(a) Onus of proof

The respondent bears the onus proving the elements of s 18D.²²⁶

(b) A broad or narrow interpretation?

The question of whether the exemptions to racial hatred in s 18D should be broadly or narrowly construed was most recently considered in *Bropho v Human Rights & Equal Opportunity Commission*.²²⁷ The facts of that case arose from an allegation, made by the Nyungah Circle of Elders, that a cartoon published in the West Australian newspaper breached s 18C. At first instance, Commissioner Innes found that the cartoon fell within the exemptions for artistic works in s 18D(a).²²⁸ This was upheld on appeal by Nicholson J, who held that s 18D should be broadly interpreted.²²⁹

There is ... nothing in either the explanatory memorandum or second reading speech reference to which is permissible within the provisions of s 15AB of the *Acts Interpretation Act 1901* (Cth) to suggest that the exemption provisions in s 18D should be read other than in a way which gives full force and effect to them.²³⁰

An alternative construction has been advanced by many Australian commentators who have argued that the breadth of the exemptions undermines the protection afforded by the racial hatred provisions and that a broad interpretation of the exemptions is contrary to the presumption that exemptions in beneficial legislation should be construed narrowly rather than broadly.²³¹

(c) Reasonably and in good faith**(i) Objective and Subjective Elements**

In *Toben v Jones*,²³² the Full Federal Court adopted the approach that 'reasonableness' and 'good faith' are separate elements.²³³ Whether an act is

²²⁶ *Jones v Scully* (2002) 120 FCR 243, 276 [127], [128]; *McGlade v Lightfoot* (2002) 124 FCR 106, 121 [68]-[70]; *Jones v Toben* [2002] FCA 1150, [101]; this point was not challenged on appeal: *Toben v Jones* (2003) 199 ALR 1, 13 [41] (Carr J).

²²⁷ [2002] FCA 1510. This case was an appeal to the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) of the decision in *Corunna v West Australian Newspapers Ltd* (2001) EOC 93-146.

²²⁸ *Corunna v West Australian Newspapers Ltd* (2001) EOC 93-146.

²²⁹ [2002] FCA 1510.

²³⁰ *Ibid* [31]. See also the discussion of this issue in *Bryl v Nowra* (Unreported, HREOC, Commissioner Johnston, 21 June 1999), 15-6. Extract at (1999) EOC 93-022.

²³¹ See for example, Akmeemana and Jones, *Fighting Racial Hatred in Racial Discrimination Act 1975: A Review* (1995); Eastman, 'Drafting Racial Vilification Laws: Legal and Policy Issues' (1995) *Australian Journal of Human Rights* 285; Solomon, 'Problems in Drafting Legislation Against Racist Activities' (1995) 1 *Australian Journal of Human Rights* 265.

²³² (2003) 199 ALR 1.

done ‘reasonably’ will be answered by reference to the objective circumstances of the act, whereas ‘good faith’ requires a consideration of the intention of the respondent.

The Full Court, weighing up whether the actions of the appellant (the respondent at first instance), in publishing material claiming the Holocaust had been ‘mythologised’, considered the objective actions of a ‘reasonable person’ as well as the subjective intention of the appellant and found that his actions were ‘deliberately provocative’ and intended to offend. As such, the Court found that the appellant was unable to show that the actions were done in good faith and could not establish an exemption under s 18D.

Allsop J stated that evidence that an insult or offence was deliberately made will strongly suggest an absence of good faith.²³⁴ In that case Allsop J asked whether or not there was ‘an honest attempt to put forward a contribution embodying a genuine purpose, or genuine purpose in the public interest, or a fair comment by way of a genuine belief’.²³⁵

In *Bryl v Nowra*,²³⁶ Commissioner Johnston stated that good faith was a subjective element and that the absence of good faith required:

conduct that smacks of dishonesty or fraud; in other words something approaching a deliberate intent to mislead or, if it is reasonably foreseeable that a particular racial or national group will be humiliated or denigrated by publication, at least a culpably reckless and callous indifference in that regard. Mere indifference about, or careless lack of concern to ascertain whether the matters dealt with in the artistic work reflect the true situation, is not capable of grounding an adverse finding of bad faith for the purposes of section 18D.²³⁷

This approach is contrary to that taken more recently by Nicholson J in *Bropho v Human Rights & Equal Opportunity Commission*.²³⁸ His Honour held that there was no subjective element which required that the respondent acted in good faith:

I do not consider that a commissioner applying s 18D is required to inquire into the actual state of mind of the person concerned. That is not to say evidence of such state of mind may not be relevant. It is to say that the focus of inquiry dictated by the words involves an objective consideration of all the

²³³ Ibid 13 [44]-[46] (Carr J), 19 [78] (Kiefel J, agreeing with Carr J), 38-9 [161]-[164] (Allsop J), 13 [46] (Carr J).

²³⁴ Ibid 38-9 [161]-[163] (Allsop J).

²³⁵ Ibid 39 [162] (Allsop J).

²³⁶ Unreported, HREOC, Commissioner Johnston, 21 June 1999. Extract at (1999) EOC 93-022.

²³⁷ Ibid 13.

²³⁸ [2002] FCA 1510. This case was an appeal to the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) of the decision in *Corunna v West Australian Newspapers Ltd* (2001) EOC 93-146.

evidence and not solely a focus on the subjective state of mind of the person doing the act or making the statement in question.

....

The characterisation of the use of the good faith requirement in conjunction with the reasonableness requirement as requiring the objective approach precludes the possibility of the application of the requirement for a respondent to a complaint to positively establish its state of mind in that respect as a necessary part of the evidence.²³⁹

(ii) Context and Artistic Works

The nature of the artistic work and the context of the impugned act within it may also be relevant to an assessment of its reasonableness.

In *Bryl v Nowra*,²⁴⁰ Commissioner Johnston stated that in drawing a line between what is reasonable, and what is not, when publishing and performing a play a judge 'should exercise a margin of tolerance and not find the threshold of what is unreasonable conduct too readily crossed.' The conflict between artistic licence, as a form of freedom of expression, and political censorship requires that a judge take:

a fairly tolerant view in determining what is reasonable or not. Topics like the Holocaust can be the subject of comedy, as in the film "Life is Beautiful", even if offensive to some Jewish survivors of concentration camps who see it as trivialising the horror of that situation. In many instances marked differences of opinion may be engendered, as in the case of the painting by Andres Serrano "Piss Christ" (as to which see *Pell v Council of Trustees of the National Gallery of Victoria* [1997] 2 VR 391).²⁴¹

Moral and ethical considerations, expressive of community standards, are relevant in determining what is reasonable.²⁴²

²³⁹ [2002] FCA 1510, [33], [36]. Note also the contrary approach taken by the NSW Administrative Decisions Tribunal in *Western Aboriginal Legal Service v Jones* (2000) NSWADT 102, considering s 20C(2)(c) of the *Anti-Discrimination Act 1977* (NSW), which includes the words 'done reasonably and in good faith'. The Tribunal held that 'good faith' implies a state of mind absent of spite, ill-will or other improper motive, [122]. Note that this decision was set aside by appeal on procedural issues relating to the identity of the complainant: *Jones v Western Aboriginal Legal Service Limited* (EOD) [2000] NSWADTAP 28.

²⁴⁰ Unreported, HREOC, Commissioner Johnston, 21 June 1999. Extract at (1999) EOC 93-022.

²⁴¹ Unreported, HREOC, Commissioner Johnston, 21 June 1999, 12.

²⁴² *Ibid* 13.

(d) Section 18D(b): Statement, publication, debate or discussion made or held for any genuine academic, artistic, scientific purpose or other genuine purpose in the public interest

This exemption was considered in *Walsh v Hanson*.²⁴³ In that case complaints were brought against Ms Pauline Hanson and Mr David Etteridge, of the One Nation Party, in relation to an allegedly racist book. Commissioner Nader dismissed the complaints, partly on the basis that the statements in the book were not made because of the race, colour or national or ethnic origin of the complainants, but rather because of a perception that the Aboriginal community as a whole was being unfairly favoured by governments and courts. By way of obiter comments, Commissioner Nader added:

If I happen to be wrong on that score, it is clear from what I have said that section 18D would operate to exempt the respondents. I have said enough to indicate that, being part of a genuine political debate, whether valid or not, the statements of the respondents must be regarded as done reasonably and in good faith for a genuine purpose in the public interest, namely in the course of a political debate concerning the fairness of the distribution of social welfare payments in the Australian community.²⁴⁴

(e) Section 18D(c): Fair and accurate reports in the public interest and fair comment on matter of public interest where comment is a genuinely held belief

What will constitute a 'fair and accurate report' for the purposes of s 18D was considered by Kiefel J in *Creek v Cairns Post Pty Ltd*.²⁴⁵ Her Honour suggested, in obiter, that defamation law was a useful guide in applying s 18D(c):

[s 18D], by the Explanatory Memoranda, is said to balance the right to free speech and the protection of individuals. The section has borrowed words found in defamation law. I do not think the notion of whether something is in the public interest is to be regarded as in any way different and here it is made out. For a comment to be "fair" in defamation law it would need to be based upon true facts and I take that to be the meaning subscribed to in the section. What is saved from a requirement of accuracy is the comment, which is tested according to whether a fair-minded person could hold that view and that it is genuinely held. Subpar (c)(i), upon which the respondent would rely, incorporates both the concepts of fairness and accuracy. It is the latter requirement that the photographs cannot fulfil if they are taken as a "report" on the living conditions pertaining to the applicant.²⁴⁶

²⁴³ Unreported, HREOC, Commissioner Nader, 2 March 2000.

²⁴⁴ *Ibid* 28.

²⁴⁵ (2001) 112 FCR 352.

²⁴⁶ *Ibid* [32].

2.7.7 Constitutional Issues

Commissioner Cavanough in *Hobart Hebrew Congregation v Scully*²⁴⁷ considered whether the law infringed upon the constitutional implication of freedom of political communication. He referred to *Lange v Australian Broadcasting Corporation*²⁴⁸ and *Levy v Victoria*.²⁴⁹ He found that while the restrictions imposed by s 18C(1) of the RDA might, in certain circumstances, burden freedom of communication about government and political matters, bearing in mind the exemptions available, Part IIA of the RDA was ‘reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of government prescribed under the Constitution’.²⁵⁰ The legitimate end included the fulfilment of Australia’s international obligations under CERD, in particular art 4.

Commissioner Cavanough indicated that in construing and applying Part IIA it was necessary to take into account the value given by the common law to freedom of expression as well as the will of Parliament which had balanced this with other values in formulating the provisions of Part IIA.

In *Toben v Jones*,²⁵¹ the appellant argued that to interpret s 18C of the RDA as extending beyond the expression of racial hatred would lead to that section being outside the scope of the external affairs power in s 51(xxix) of the Constitution, as art 4 of CERD specifically refers to discrimination because of ‘racial hatred’.

The Full Federal Court held that s 18C of the RDA was constitutionally valid (and did not need to be read down), as it was reasonably capable of being considered appropriate and adapted to implement the obligations under CERD. The failure to fully implement CERD (which also requires making racial hatred a criminal offence) did not render Part IIA substantially inconsistent with that convention. It was noted that Part IIA of the RDA was directed not only at art 4 of CERD but also at the other provisions of CERD and the *International Covenant on Civil and Political Rights*, which dealt with the elimination of racial discrimination in all its forms.²⁵²

²⁴⁷ Unreported, HREOC, Commissioner Cavanough QC, 21 September 2000. Extract at (2000) EOC 93-109.

²⁴⁸ (1997) 189 CLR 520.

²⁴⁹ (1997) 189 CLR 579.

²⁵⁰ Unreported HREOC, Commissioner Cavanough QC, 21 September 2000, 12-14. Extract at (2000) EOC 93-109.

²⁵¹ (2003) 199 ALR 1.

²⁵² (2003) 199 ALR 1, 9-10 [17]-[21] (Carr J), 14 [50] (Kiefel J), 20 [83]-[144] (Allsop J).

Chapter 3

The Sex Discrimination Act

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Chapter 3

The Sex Discrimination Act

3.1 Scope of the SDA

The SDA covers discrimination on the ground of:

- sex (defined in s 5);
- marital status (defined in s 6);
- pregnancy or potential pregnancy (defined in s 7); and
- family responsibilities (defined in s 7A).

The definitions of discrimination include both direct and indirect discrimination, with the exception of the definition of discrimination on the ground of family responsibilities, which is limited to direct discrimination.

The SDA makes it is unlawful to discriminate on the ground of sex, marital status, and pregnancy or potential pregnancy in many areas of public life, including:¹

- employment and superannuation;²
- education;³
- the provision of goods, services or facilities;⁴
- accommodation and housing;⁵
- buying or selling land;⁶ and
- Commonwealth laws and programs.⁷

Discrimination on the ground of family responsibility is made unlawful only in dismissal from employment.⁸

Sexual harassment is also covered by the SDA.⁹ Sexual harassment is any unwelcome sexual behaviour which makes a person feel offended or humiliated where that reaction is reasonable in the circumstances.

¹ See pt II, divs 1 and 2 of the SDA.

² Section 14 SDA.

³ Section 21 SDA.

⁴ Section 22 SDA.

⁵ Section 23 SDA.

⁶ Section 24 SDA.

⁷ Section 26 SDA.

⁸ Section 14(3A) SDA.

⁹ See pt II, div 3 of the SDA.

Like discrimination on the ground of sex, marital status and pregnancy or potential pregnancy, sexual harassment is unlawful in a broad range of areas of public life.¹⁰

3.2 Causation, Intention and Motive under the SDA

Section 5(1) of the SDA provides the definition of ‘direct’ sex discrimination:

- (1) For the purposes of this Act, a person (in this subsection referred to as the discriminator) discriminates against another person (in this subsection referred to as the aggrieved person) on the ground of the sex of the aggrieved person if, by reason of:
 - (a) the sex of the aggrieved person;
 - (b) a characteristic that appertains generally to persons of the sex of the aggrieved person; or
 - (c) a characteristic that is generally imputed to persons of the sex of the aggrieved person;

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex.

The definitions of direct discrimination on the ground of marital status (s 6(1) – see 3.3 below), pregnancy or potential pregnancy (s 7 – see 3.4 below) and family responsibilities (s 7A – see 3.5 below) are in similar terms, although the definition of pregnancy or potential pregnancy uses the term ‘because of’ rather than ‘by reason of’.

The words ‘by reason of the sex of the aggrieved person’ in s 5(1) of the SDA require a causal connection between the sex of the aggrieved person and any less favourable treatment accorded to them. They do not, however, require an intention or motive to discriminate.

It would appear from the cases discussed below that the appropriate approach to the issue of causation is to consider, in light of all of the circumstances surrounding alleged discriminatory treatment, what was the ‘real reason’ or ‘true basis’ for that treatment. A respondent’s intention or motive may be relevant to that inquiry.

In *Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd*¹¹ (‘*Mt Isa Mines*’), Lockhart J considered the meaning of ‘by reason of’, and discussed various tests to determine if a defendant’s conduct was discriminatory.

¹⁰ See sections 28B–28L of the SDA.

¹¹ (1993) 46 FCR 301.

His Honour stated:

In my opinion the phrase ‘by reason of’ in s 5(1) of the [SDA] should be interpreted as meaning ‘because of’, ‘due to’, ‘based on’ or words of similar import which bring something about or cause it to occur. The phrase implies a relationship of cause and effect between the sex (or characteristic of the kind mentioned in s 5(1)(b) or (c)) of the aggrieved person and the less favourable treatment by the discriminator of that person.¹²

Lockhart J continued:

In my view the Act requires that when an inquiry is being held into alleged discrimination prohibited by s 14(2) on the ground of the sex of an employee, all the relevant circumstances surrounding the alleged discriminatory conduct should be examined. The intention of the defendant is not necessarily irrelevant. The purpose and motive of the defendant may also be relevant.

....

... in some cases intention may be critical; but in other cases it may be of little, if any, significance. The objects of the [SDA] would be frustrated, however, if sections were to be interpreted as requiring in every case intention, motive or purpose of the alleged discriminator: see *Waters*^[13] per Mason CJ and Gaudron J (at 359).

The search for the proper test to determine if a defendant’s conduct is discriminatory is not advanced by the formulation of tests of objective or causative on the one hand and subjective on the other as if they were irreconcilable or postulated diametrically opposed concepts. The inquiry necessarily assumes causation because the question is whether the alleged discrimination occurs because of the conduct of the alleged discriminator; and the inquiry is objective because its aim is to determine on an examination of all the relevant facts of the case whether discrimination occurred. This task may involve the consideration of subjective material such as the intention or even motive, purpose or reason of the alleged discriminator; but its significance will vary from case to case ...

....

I am not attracted by the proposition (which appears to have been favoured by the majority of the House in *Eastleigh*)^[14] that the correct test involves simply asking the question what would the position have been *but for* the sex ... of the complainant ... Provided the ‘but for’ test is understood as not excluding subjective considerations (for example, the motive and intent of the alleged discriminator) it may be useful in many cases; but I prefer to regard it as a useful checking exercise to be engaged in after inquiring whether in all the relevant circumstances there has been discriminatory conduct.¹⁵

¹² Ibid 321-22.

¹³ *Waters v Public Transport Corporation* (1991) 173 CLR 349.

¹⁴ *James v Eastleigh Borough Council* [1990] 2 AC 751.

¹⁵ (1993) 46 FCR 301, 324-26. Applied in *Commonwealth v Human Rights and Equal Opportunity Commission* (1997) 77 FCR 371, 390-92 (Sackville J); *Thomson v Orica Australia Pty Ltd* [2002] FCA 939, [159]-[161].

The issue of causation was considered by the High Court in *Purvis v New South Wales (Department of Education and Training)*¹⁶ ('*Purvis*'), a matter involving a complaint under the DDA.¹⁷ The approach taken by the Court in relation to the issue generally confirms the analysis of Lockhart J in *Mt Isa Mines*.

3.3 Direct Marital Status Discrimination

Section 6(1) of the SDA defines direct discrimination on the ground of marital status as follows:

- (1) For the purposes of this Act, a person (in this subsection referred to as the *discriminator*) discriminates against another person (in this subsection referred to as the *aggrieved person*) on the ground of the marital status of the aggrieved person if, by reason of:
 - (a) the marital status of the aggrieved person; or
 - (b) a characteristic that appertains generally to persons of the marital status of the aggrieved person; or
 - (c) a characteristic that is generally imputed to persons of the marital status of the aggrieved person;the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of a different marital status.

Section 6 of the SDA was considered by HREOC, the Federal Court and the Full Federal Court in what is known as the *Dopking* litigation.¹⁸ In that matter, complaints were made to HREOC by single members of the Defence Force (one of whom was Mr Dopking). The complainants had been posted by the RAAF to Townsville. They sought to receive certain allowances to cover costs associated with their posting. These allowances were only available to a 'member with a family' which was defined to mean a member normally residing with: (a) the spouse of the member; (b) a child; (c) where the member is widowed, unmarried or permanently separated, or where the member's spouse is invalided – a person acting as a guardian or housekeeper to a child; (d) any other person approved by an approving authority. The complainants' applications for the allowances were rejected on the ground that they were members without family.

¹⁶ (2003) 202 ALR 133.

¹⁷ See discussion in section 4.2 on the DDA.

¹⁸ *Sullivan v Department of Defence* (1991) EOC 92-366; *Commonwealth v Human Rights and Equal Opportunity Commission* (1991) 32 FCR 468; *Sullivan v Department of Defence* (1992) EOC 92-421; *Commonwealth v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 191; *Dopking v Department of Defence* (Unreported, HREOC, Sir Ronald Wilson, 24 October 1994), extract at (1995) EOC 92-669; *Commonwealth v Human Rights and Equal Opportunity Commission* (1995) 63 FCR 74.

HREOC found that this amounted to direct discrimination on the ground of marital status.¹⁹ The respondent argued that the allowance was denied not because of the complainants' marital status, but because they were not part of a household including a person within the definition of 'family'.²⁰ This argument was rejected by Sir Ronald Wilson, who held:

In my opinion [the respondent's argument] neglects to mark the significance of paragraphs (b) and (c) of section 6(1). It is not only 'marital status' to which regard must not be had, but also 'a characteristic that appertains generally to or is generally imputed to persons of the marital status' of the complainant. Not being part of a 'household' is a characteristic that pertains generally to persons of single status, thereby as a matter of generality rendering single persons ineligible to receive the allowance. In the present case, that characteristic of not being part of a household attached to Mr Dopking, thereby rendering him ineligible to receive the allowance.²¹

On review by the Full Court of the Federal Court,²² it was held by Lockhart and Wilcox JJ (Black CJ dissenting) that the approach taken by HREOC was incorrect. Lockhart J stated:

In this case s 6(1) requires the comparison to be made between Mr Dopking as a person with the characteristic mentioned in para (b) or (c) of subs (1) and a person of a different marital status. There is no extension of that other person's marital status for the purposes of the section. In other words, the comparison is not made with a person having a characteristic that appertains generally to or is generally imputed to persons of another marital status; it is made with a person of a different marital status – for example a married person.

....

The reason why a member of the Defence Force is... treated more favourably than others is because the member is accompanied by a person who normally resides with him or her and falls within the extended definition of 'family'. It is not the marital status of the person ... that determines the more favourable treatment, but the fact that, whatever that person's marital status is, he or she has one or more 'family' members normally residing with him or her who in fact accompanies the member to the new posting.²³

Wilcox J also favoured a 'narrow' view of s 6(1), requiring a comparison between:

the treatment of an aggrieved person having a particular marital status (or characteristic which appertains generally, or is perceived to appertain generally, to persons of a particular marital status) and the treatment accorded to persons having a different marital status, without reference to the

¹⁹ *Sullivan v Department of Defence* (1992) EOC 92-421.

²⁰ *Ibid* 79,005.

²¹ *Ibid*.

²² *Commonwealth v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 191.

²³ *Ibid* 204-05 (Lockhart J). The matter was remitted to HREOC for consideration of whether or not there was indirect discrimination under the SDA.

characteristics that generally appertain, or are imputed, to that marital status.²⁴

In *MW v Royal Women's Hospital*,²⁵ HREOC considered a refusal to provide in vitro fertilization treatment to unmarried women. The fertilization procedure was regulated by the *Infertility (Medical Procedures) Act 1984* (Vic) which provided that the procedure may only be carried out if the woman is married. The complainants were not married but each was in a long term stable de facto relationship. They satisfied all the requirements for the program but were not permitted to continue on the program because they were not married.

The Commissioner found that as the hospitals that had refused treatment were in the business of providing health care, they were subject to s 22 of the SDA (which proscribes discrimination in the provision of goods, services and facilities). The refusal to provide the IVF services to the complainants because they were not married constituted unlawful discrimination on the ground of their marital status.²⁶ The Commissioner stated that compliance with a State law is not a defence under the SDA,²⁷ and the complainants were awarded damages.²⁸

The same issue arose in *McBain v Victoria*,²⁹ and the Federal Court reached the same conclusion as to the discriminatory nature of s 8 of the *Infertility Treatment Act 1995* (Vic). That section and a number of other provisions were declared by Sundberg J to be inconsistent with the SDA and, under s 109 of the *Constitution*, inoperative to the extent of the inconsistency.

There have only been two recent cases in which the Federal Court and FMS have considered claims of unlawful discrimination on the ground of marital status.³⁰ In each matter, the claims were dismissed without significant discussion of the relevant provisions of the SDA.

²⁴ Ibid 211. The existence of s 6(2) relating to indirect discrimination was regarded as significant by his Honour, 211-12. Although the provisions considered by his Honour were subsequently amended in 1995 (see 3.6 below), his Honour's reasoning on this issue would still appear to be relevant.

²⁵ (1997) EOC 92-886.

²⁶ Ibid 77,191.

²⁷ Ibid 77,192.

²⁸ Ibid 77,194. Note that the Commissioner declined to make a declaration of invalidity under s 109 of the *Constitution* on the basis that HREOC was not a court and did not have the power to make a declaration of invalidity, 77,193.

²⁹ (2000) 99 FCR 116. Note that proceedings challenging this decision were brought in the High Court, however, they were dismissed without consideration of the merits: *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372.

³⁰ *Dranichnikov v Department of Immigration and Multicultural Affairs* [2002] FMCA 23; *Song v Ainsworth Game Technology Pty Ltd* [2002] FMCA 31.

3.4 Direct Pregnancy Discrimination

3.4.1 Direct Pregnancy Discrimination

Section 7(1) of the SDA defines direct discrimination on the ground of pregnancy or potential pregnancy as follows:

- (1) For the purposes of this Act, a person (the *discriminator*) discriminates against a woman (the *aggrieved woman*) on the ground of the aggrieved woman's pregnancy or potential pregnancy if, because of:
 - (a) the aggrieved woman's pregnancy or potential pregnancy; or
 - (b) a characteristic that appertains generally to women who are pregnant or potentially pregnant; or
 - (c) a characteristic that is generally imputed to women who are pregnant or potentially pregnant;

the discriminator treats the aggrieved woman less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat someone who is not pregnant or potentially pregnant.

In the case of *Thomson v Orica Australia Pty Ltd*³¹ ('*Thomson*'), the applicant had been employed for nine years before taking 12 months maternity leave, pursuant to the respondent's family leave policy. A few days before she was due to return to work, the applicant was advised that she would not be returning to her pre-maternity leave position and that she would be performing new duties. The applicant alleged that the changes to her job amounted to a demotion and that the respondent's actions amounted to a constructive dismissal.

Allsop J considered the applicant's duties, tasks and responsibilities at the time of taking maternity leave and those of the position she was offered on her return. His Honour found that the job offered to the applicant on her return was 'of significantly reduced importance and status, of a character amounting to a demotion (although not in official status or salary)'.³² Allsop J considered that the appropriate comparator, for the purposes of s 7(1) of the SDA, was a similarly graded account manager with the applicant's experience who, with the employer's consent, took 12 months leave and who had a right to return to the same or similar position. His Honour decided that the complainant had been treated less favourably for the purposes of s 7(1)(b) than another employee in equivalent circumstances who was not pregnant.³³

³¹ [2002] FCA 939.

³² *Ibid* [53].

³³ *Ibid* [138].

The Court also considered the issue of constructive dismissal and formed the view that the actions of the employer constituted a serious breach of the implied term of the contract of employment that an employer will not, without reasonable cause, conduct itself in a manner likely to damage or destroy the relationship of confidence and trust between the parties,³⁴ and that the applicant was entitled to treat herself as constructively dismissed at common law.³⁵

Allsop J concluded that discrimination had occurred contrary to s 14(2) of the SDA, which provides that it is unlawful for an employer to discriminate against an employee on the ground of the employee's pregnancy by subjecting them to a range of conduct including dismissal and 'any other detriment'.

Thomson was cited with approval by Driver FM in the FMS in *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd*³⁶ ('*Rispoli*'). The applicant in that matter was employed in the position of Manager, Technology Support in the respondent company's finance and administrative group. She claimed that upon her return from maternity leave her position no longer existed, due to a restructure, and she was persuaded to take a role in 'special projects' which was graded two levels lower. However, she was remunerated according to her original position and invited to participate in an important new project. The applicant complained that, by effectively demoting her, the employer had breached ss 5(1), 7(1) and 14(1) of the SDA and an implied term of her contract of employment which guaranteed that she would be provided with a comparable position upon returning from maternity leave. She further complained that she was constructively dismissed.

Driver FM accepted, citing *Thomson*, that by placing the applicant in a position which was inferior in status, she had been treated 'less favourably than a comparable employee would have been who was not pregnant and who was returning after nine months leave and with the rights of the kind reflected in the maternity leave policy.'³⁷ As such, the employer had engaged in discrimination as defined in s 7(1)(b) of the SDA and was in breach of s 14(2)(a) of the SDA. His Honour went on to find that, although the opportunity to be involved with the new project provided Ms Rispoli with the potential for future career advancement, this was insufficient to 'remedy the breach' of the SDA.³⁸

In relation to the alleged breach of contract, Driver FM held that the employer's parental leave policy formed part of the contract for employment

³⁴ Applying *Burazin v Blacktown City Guardian* (1996) 142 ALR 144, 151.

³⁵ [2002] FCA 939, [148].

³⁶ [2003] FMCA 160.

³⁷ *Ibid* [82].

³⁸ *Ibid* [86].

which gave the applicant the right to return to a comparable position.³⁹ However, Driver FM held that by remaining in her position as Business Improvement Facilitator and accepting the offer to work on the new project, Ms Rispoli ‘forgave’ the employer’s breach of contract. Her conduct was therefore inconsistent with her acceptance of a repudiation of the contract by the employer, even if that conduct had amounted to a fundamental breach.⁴⁰ Driver FM declined to make a finding of constructive dismissal, finding instead that the applicant’s resignation was of her own accord and that the confrontation with her supervisor which triggered it was unrelated to the earlier discrimination.⁴¹

In *Mayer v Australian Nuclear Science and Technology Organisation*,⁴² the applicant occupied a professional position with the respondent as a Business Development Manager. She informed her employer that she wanted to take 12 months maternity leave. Her three-year contract was due to expire during that leave. She sought a two-year extension to her contract but it was extended for a period of only one year. Ms Mayer claimed the one year extension was discriminatory on the ground of her pregnancy because at that time other professional officers on fixed term contracts were offered contract extensions of two years or more.

Driver FM found that there had been discrimination as defined by s 7(1) and made unlawful by s 14(2)(a).⁴³ His Honour held that the proper comparison to be made was between the applicant and other fixed term contract employees of the respondent who had had their contracts extended. Driver FM found that most (if not all) of these other employees were granted a contract extension of an equal or greater period than the original term of their employment. His Honour noted that, whilst there was no uniform approach to the renewal of fixed term contracts, the respondent’s practice gave rise to a reasonable expectation that, provided that performance was satisfactory, the contract would be renewed for a period no shorter than the initial contract period. Driver FM therefore held that the applicant was treated less favourably than comparable employees.⁴⁴

His Honour was further satisfied that Ms Mayer’s pregnancy was a factor in the decision to grant her a one-year extension. The respondent asserted that the dominant factor in consideration about the extension was the doubt about a business case for Ms Mayer’s position. His Honour found that a factor in that uncertainty was doubt in the respondent’s mind whether, and if so on

³⁹ Ibid [81].

⁴⁰ Ibid [86].

⁴¹ Ibid [88].

⁴² [2003] FMCA 209.

⁴³ Ibid [60].

⁴⁴ Ibid [61].

what basis, Ms Mayer would be returning from maternity leave. His Honour stated that by offering the one-year extension the employer was ‘minimising the risk that Ms Mayer might not return or might want to return on an inconvenient basis after completing her maternity leave’.⁴⁵

3.4.2 Relationship with Direct Sex Discrimination

Complaints alleging direct discrimination in relation to return to work after a period of maternity leave have often been argued on the basis that the taking of a period of maternity leave is a characteristic that appertains generally to women (s 5(1)(b)) as well as being a characteristic that appertains generally to women who are pregnant (s 7(1)(b)).

In *Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd*⁴⁶ (‘*Mt Isa Mines*’), Lockhart J held that s 7 of the SDA operates exclusively of s 5. He stated:

What is the relationship between ss 5, 6 and 7 of the SD Act? Section 5 relates to sex discrimination, s 6 to discrimination on the ground of marital status and s 7 to discrimination on the ground of pregnancy. Section 7 assumes that the aggrieved person is pregnant or has a characteristic that appertains generally to or is generally imputed to persons who are pregnant. If the facts of a particular case concern an aggrieved person who is pregnant or who has a characteristic that appertains generally to or is generally imputed to pregnant women, in my opinion s 7 operates exclusively of s 5. But s 7 would not cover the case of discrimination against a woman on the ground, for example, that it is a characteristic of women that they may become pregnant or bear children. If an employer refused to employ a woman on that ground, his conduct would not be discriminatory on the ground of pregnancy under s 7 because the woman is not in fact pregnant. But it would be discriminatory on the ground of sex under s 5 as it is a characteristic appertaining generally to women that they have the capacity to become pregnant. In that case the extended definition of sex provided by paragraph (b) (also (c)) of sub-s. (1) of s 5 applies.⁴⁷

In *Thomson*, Allsop J held that the taking of maternity leave is a characteristic that appertains generally to women, and accordingly, less favourable treatment on the ground that a woman has taken maternity leave can amount to discrimination on the basis of sex, as well as pregnancy.⁴⁸ However, his Honour considered that he should follow the decision of Lockhart J in *Mt Isa Mines* in relation to the exclusive operation of s 7 and s 5.⁴⁹

⁴⁵ Ibid [62].

⁴⁶ (1993) 46 FCR 301.

⁴⁷ Ibid 327-28. While his Honour’s reasoning remains relevant, note that s 7 of the SDA was amended in 1995 so as to make discrimination because of potential pregnancy unlawful.

⁴⁸ [2002] FCA 939 [168].

⁴⁹ Ibid [170]. Allsop J noted that the SDA had been amended since *Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd* (1993) 46 FCR 301, to insert the ground of ‘potential

Allsop J therefore concluded that, although he was satisfied the facts of the case would have supported a conclusion of unlawful sex discrimination under s 5(1)(b) and (c) and s 14(2), relief would be limited to that based on the claim of pregnancy discrimination under ss 7(1) and 14(2).

3.5 Discrimination on the Ground of Family Responsibilities

The definition of discrimination on the ground of family responsibilities appears in s 7A of the SDA. Unlike the other grounds in the SDA, the definition is restricted to direct discrimination. In addition, discrimination on the ground of family responsibilities is made unlawful only where an employee is dismissed (s 14(3A)) – although constructive dismissal will suffice.⁵⁰

Section 7A of the SDA provides:

For the purposes of this Act, an employer discriminates against an employee on the ground of the employee's family responsibilities if:

- (a) the employer treats the employee less favourably than the employer treats, or would treat, a person without family responsibilities in circumstances that are the same or not materially different; and
- (b) the less favourable treatment is by reason of:
 - i) the family responsibilities of the employee; or
 - ii) a characteristic that appertains generally to persons with family responsibilities; or
 - iii) a characteristic that is generally imputed to persons with family responsibilities.

Section 14(3A) of the SDA provides:

It is unlawful for an employer to discriminate against an employee on the ground of the employee's family responsibilities by dismissing the employee.

In *Song v Ainsworth Game Technology Pty Ltd*⁵¹ ('*Song*'), the applicant sought to continue an informal practice she had maintained for nearly one year, of leaving the workplace for approximately twenty minutes (from 2.55pm to 3.15pm) each afternoon to transfer her child from kindergarten to another carer.

pregnancy' into s 7, but this does not appear to have been relevant to, or an influence on, his analysis on this point.

⁵⁰ *Song v Ainsworth Game Technology Pty Ltd* [2002] FMCA 31; *Evans v National Crime Authority* [2003] FMCA 375. See also *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209, [74].

⁵¹ [2002] FMCA 31.

The respondent sought to impose upon the applicant the condition that she attend work from 9am until 5pm with a half hour for lunch between 12pm and 1pm. The respondent then unilaterally changed the applicant's condition of employment from full-time to part-time employment when this condition was not accepted, purportedly to allow the applicant to meet her family responsibilities.

Raphael FM found that the applicant was treated less favourably than a person without family responsibilities who would have expected flexibility in starting and finishing times and in the time of taking meal breaks.⁵² His Honour further found that unilateral change to part-time employment constituted constructive dismissal of the applicant, and that one of the grounds for that dismissal was the applicant's family responsibilities in breach of s 14(3A) of the SDA.⁵³

In *Escobar v Rainbow Printing Pty Ltd (No.2)*,⁵⁴ Driver FM suggested that the case before him involved a factual situation effectively the reverse of that in *Song*. Rather than a case where the employer essentially compelled the employee to work part-time, Driver FM found that prior to the applicant's return from maternity leave, she sought to reach an agreement with the respondent that she return to work on a part-time basis.⁵⁵ Following that conversation, but prior to the applicant's return to work, the respondent employed another person to fill the applicant's full-time position. On the day that the applicant returned to work, the respondent told her that there was no part-time work available and terminated the applicant's employment.

Driver FM found that on the facts of the case the breach of s 14(3A) was clear:

There is no doubt in my mind that the applicant was dismissed by the respondent when she presented herself for work on 1 August 2000. The employment relationship between the parties had continued to that point and the applicant was clearly sent away from the workplace on the understanding that the employment relationship was then severed. The reason for the dismissal is also clear. The reason was that Mr Meoushy was unwilling to countenance at that time the possibility of the applicant working part time and had filled her full time position, rendering that position also unavailable. Mr Meoushy had taken that action because he had formed a view (I think correctly) that the applicant was unwilling to work full time because of her family responsibilities. I am left in no doubt that the applicant was dismissed from her employment on 1 August 2000 because of her family responsibilities.⁵⁶

⁵² Ibid [72].

⁵³ Ibid [83].

⁵⁴ [2002] FMCA 122.

⁵⁵ Ibid [33].

⁵⁶ Ibid [36].

In *Evans v National Crime Authority*⁵⁷ the applicant, a single parent, was employed on contract as an intelligence analyst by the National Crime Authority ('NCA'). The applicant left her employment before the end of her contract after being informed that her contract would not be renewed. Prior to this, the applicant had a series of discussions with, principally, the manager of investigations responsible for her team ('the manager'), in which concerns were expressed about her attendance record and taking of personal leave (comprising carer's leave and sick leave – all within her leave entitlements).

Raphael FM found that the manager was unhappy with the concept of carer's leave,⁵⁸ and that the manager considered non attendance for reasons of carer's leave to be damaging to that person's employment prospects within the NCA.⁵⁹ His Honour was further satisfied that the manager's grading of the applicant at her performance review was influenced by his views as to her taking of personal leave.⁶⁰ This in turn affected the renewal of the contract.⁶¹

Raphael FM concluded that the applicant had been constructively dismissed on the basis of her family responsibilities, contrary to s 14(3A).⁶² In finding that there was 'less favourable treatment' for the purposes of s 7A, his Honour stated that the proper comparator was an employee without family responsibilities who took personal leave within his or her entitlements.⁶³

A number of cases involving issues relating to family responsibilities and requests for flexible working arrangements have included claims of indirect sex discrimination (s 5(2)). This is considered at 3.6.1 below.

In *Song*, Raphael FM considered whether or not it was necessary, in making out unlawful discrimination on the basis of family responsibilities under s 14(3A), to also find that the conduct amounted to sex discrimination as defined by s 5(2). His Honour found that this was not necessary and stated that it would add an unnecessary 'twist and complication': 'The effect of paragraph 14(3A) is to add a specific form of discrimination, that is dismissal on the grounds of family responsibilities'.⁶⁴

⁵⁷ [2003] FMCA 375.

⁵⁸ Ibid [88].

⁵⁹ Ibid [89].

⁶⁰ Ibid [88].

⁶¹ Ibid [93]. His Honour also considered an argument of direct sex discrimination and found that the applicant was treated less favourably than a male intelligence analyst who took leave within his entitlements, [101]-[105].

⁶² Ibid [106].

⁶³ Ibid [108].

⁶⁴ [2002] FMCA 31, [66]. In *Escobar v Rainbow Printing Pty Ltd (No.2)* [2002] FMCA 122, Driver FM noted the views of Raphael FM in *Song v Ainsworth Game Technology Pty Ltd*, but found it unnecessary to express any view of his own on this potential aspect of the relationship between the two sections, [33].

3.6 Indirect Discrimination under the SDA

Section 5(2) of the SDA provides:

For the purposes of this Act, a person (the *discriminator*) discriminates against another person (the *aggrieved person*) on the ground of the sex of the aggrieved person if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person.

The definitions of indirect discrimination on the grounds of marital status (s 6(2)) and pregnancy or potential pregnancy (s 7(2)) are set out in similar terms.

These provisions all apply subject to s 7B which provides:⁶⁵

- (1) A person does not discriminate against another person by imposing, or proposing to impose, a condition, requirement or practice that has, or is likely to have, the disadvantaging effect mentioned in subsection 5(2), 6(2) or 7(2) if the condition, requirement or practice is reasonable in the circumstances.
- (2) The matters to be taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances include:
 - (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and
 - (b) the feasibility of overcoming or mitigating the disadvantage; and
 - (c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.

Section 7C deals with the burden of proof. It provides:

In a proceeding under this Act, the burden of proving that an act does not constitute discrimination because of section 7B lies on the person who did the act.

Note that the current provisions relating to indirect discrimination were inserted by the *Sex Discrimination Amendment Act 1995* (Cth). Prior to the commencement of that amending Act, the indirect discrimination provisions of the SDA were in similar terms to those currently in the DDA. This section considers the jurisprudence developed prior to 1995 only where it is relevant to the interpretation of the present provisions.

In *Mayer v Australian Nuclear Science and Technology Organisation*⁶⁶ ('*Mayer*'), Driver FM referred to the second reading speech of the

⁶⁵ The sections are also subject to s 7D which relates to special measures: see 3.9.4 below.

⁶⁶ [2003] FMCA 209.

Sex Discrimination Amendment Bill 1995, in which the then Attorney-General stated:

The bill sets out a simpler definition of indirect discrimination. It provides that a person discriminates against another person if the discriminator imposes or proposes to impose a condition, requirement or practice that has or is likely to have the effect of disadvantaging the person discriminated against because of, for example, his or her sex. The focus is on broad patterns of behaviour which adversely affect people who are members of a particular group.⁶⁷

The following issues are considered in this section:

- indirect sex discrimination: family responsibilities and part-time work;
- reasonableness; and
- the relationship between ‘direct’ and ‘indirect’ discrimination.

3.6.1 Indirect Sex Discrimination: Family Responsibilities and Part-Time Work

In a number of cases, issues surrounding family responsibilities and requests for part-time work have been considered within the context of the definition of indirect sex discrimination. This is potentially significant because, as noted above, s 14(3A) of the SDA only makes direct discrimination on the basis of family responsibilities unlawful in cases of dismissal from employment. In contrast, discrimination on the basis of sex is unlawful in the employment context more generally, and in many other areas of public life.⁶⁸

In *Escobar v Rainbow Printing Pty Ltd (No.2)*⁶⁹ (*‘Escobar’*), discussed in 3.5 above, a female employee sought to return from maternity leave on a part-time basis. Her request was denied and her employment later terminated. Driver FM found this amounted to direct discrimination on the ground of family responsibilities, but that in the event that he was wrong in relation to this finding, further found that the respondent’s conduct constituted indirect discrimination on the basis of sex.⁷⁰ His Honour held that the refusal to countenance part-time work involved the imposition of an unreasonable condition that was likely to disadvantage women because of their disproportionate responsibility for the care of children.⁷¹ Driver FM cited with approval⁷² the decision of HREOC in *Hickie v Hunt & Hunt*⁷³ (*‘Hickie’*), in which Commissioner Evatt had stated:

⁶⁷ Ibid [72].

⁶⁸ See pt II, divs 1 and 2 of the SDA.

⁶⁹ [2002] FMCA 122.

⁷⁰ Ibid [37].

⁷¹ Ibid. See 3.6.2 below on the issue of ‘reasonableness’.

⁷² Ibid [33].

⁷³ Unreported, HREOC, Commissioner Evatt, 7 March 1998. Extract at (1998) EOC 92-910.

Although no statistical data was produced at the hearing, the records produced by Hunt and Hunt suggest that it is predominantly women who seek the opportunity for part time work and that a substantial number of women in the firm have been working on a part time basis. I also infer from general knowledge that women are far more likely than men to require at least some periods of part time work during their careers, and in particular a period of part time work after maternity leave, in order to meet family responsibilities. In these circumstances I find that the condition or requirement that Ms Hickie work full time to maintain her position was a condition or requirement likely to disadvantage women.⁷⁴

In *Hickie*, the complainant had taken maternity leave shortly after having been made a contract partner at the respondent law firm. She complained of a range of less-favourable treatment during the period of her maternity leave and following her return to work on a part-time basis. Relevantly for present purposes, an area of her practice was removed from her on the basis that it could not be managed working part-time.

In contrast to Driver FM's finding in *Escobar*, Commissioner Evatt found that the respondent's conduct did not amount to direct discrimination on the ground of family responsibilities. However, the Commissioner did find that the respondent's conduct constituted indirect sex discrimination:

The removal of Ms Hickie's practice occurred partly because she intended to work part time on her return and could not manage such a large practice without supporting staff. Removing her practice, rather than finding other alternatives to maintain it in whole, or in part, may have appeared the most convenient option to the firm, and ... more convenient than dividing her plaintiff work, leaving it temporarily with [another partner], or perhaps assigning another member of staff to work with [that partner] until her return to take over. However, if part of the motivation was her intention to work part-time, the removal of her practice can be regarded as the consequence of her inability to meet a requirement that she work full time or manage staff while absent as a condition of maintaining her plaintiff practice. What the firm was saying in effect was that because she was not intending to return to full time work for some time, they would not make an effort to find other alternatives to support her in maintaining all or part of her plaintiff practice, but would remove all of it. Her intention to work part-time after her maternity leave was seen as a basis for stripping her completely of work she had built up over several years.

The requirement to work full time is, in my view, a requirement with which a substantially higher proportion of men comply or are able to comply. In making this conclusion, I rely on the evidence of the respondent about the substantial number of women in their firm who had periods of maternity leave and part-time work as well as my general knowledge and experience of employment in the legal profession. It is a requirement with which the complainant could not comply, due to her family responsibilities.⁷⁵

⁷⁴ Unreported, HREOC, Commissioner Evatt, 7 March 1998, [6.17.10].

⁷⁵ *Ibid* [4.5.28]-[4.5.29].

In *Mayer*, the applicant similarly wanted to work part-time following a period of maternity leave. Driver FM found that the respondent's insistence that the applicant work full-time in accordance with her contract was, on the evidence, a business decision not related to the applicant's family responsibilities. The respondent did not therefore treat the applicant any less favourably than a person without family responsibilities would have been treated in the same or similar circumstances.⁷⁶ There was accordingly no discrimination as defined by s 7A.

Driver FM found, however, that the respondent's requirement that the applicant work full-time, when part-time work was available within the organisation, constituted indirect discrimination in terms of s 5(2).⁷⁷ His Honour stated:

I need no evidence to establish that women per se are disadvantaged by a requirement that they work full-time. As I observed in *Escobar v Rainbow Printing* and as Commissioner Evatt found in *Hickie v Hunt & Hunt* women are more likely than men to require at least some periods of part-time work during their careers, and in particular a period of part-time work after maternity leave, in order to meet family responsibilities.⁷⁸

Driver FM held that the applicant had been constructively dismissed and, accordingly, the respondent had breached s 14(2)(c).⁷⁹

In *Kelly v TPG Internet Pty Ltd*⁸⁰ ('*Kelly*'), the applicant complained that, amongst other things,⁸¹ the refusal by her employer to make available part-time work upon her return from maternity leave amounted to indirect sex discrimination. Raphael FM discussed, in particular, the decisions in *Hickie* and *Mayer*, and distinguished them from the case before him. His Honour noted that in both of those cases the applicants had been refused benefits that had either been made available to them (as in *Hickie*) or that were generally available (as in *Mayer*). In the present case, there were no part-time employees in managerial positions employed with the respondent. His Honour stated:

Section 5(2) makes it unlawful for a discriminator to impose or propose to impose a condition requirement or practice but that condition requirement or practice must surely relate to the existing situation between the parties when it is imposed or sought to be imposed. The existing situation between the parties in this case is one of full time employment. No additional requirement

⁷⁶ [2003] FMCA 209, [68].

⁷⁷ *Ibid* [69]. On the issue of the reasonableness of the requirement that the applicant work full-time, see 3.6.2 below.

⁷⁸ *Ibid* [70]. Note, however, the doubt cast upon the application of this passage without evidence relating to the particular workplace, expressed (in obiter comments) by Raphael FM in *Kelly v TPG Internet* [2003] FMCA 584, [82].

⁷⁹ [2003] FMCA 209, [74]. See also 3.6.2 below on reasonableness.

⁸⁰ [2003] FMCA 584.

⁸¹ Note that the applicant's claim of direct pregnancy discrimination was upheld, *ibid* [56]-[57].

was being placed upon Ms Kelly. She was being asked to carry out her contract in accordance with its terms.⁸²

In those circumstances, his Honour held that the behaviour of the respondent constituted a refusal to provide the applicant with a benefit, rather than the imposition of a condition or requirement that was a detriment: 'there was in reality no requirement to work full-time only a refusal to allow a variation of the contract to permit it'.⁸³

Note in addition that Driver FM in *Mayer* and Raphael FM in *Kelly* expressed somewhat different views regarding the issue of constructive dismissal in the context of claims under the SDA. In *Mayer*, Driver FM stated:

The respondent's conduct breached s 14(2)(c) because the applicant was constructively dismissed by reason of her sex...The respondent required Ms Mayer to adhere to the full time employment term of her contract, which Ms Mayer was unwilling to do. Ms Mayer abandoned her employment under duress. I see no material distinction between a resignation made under duress and the abandonment of employment under duress. This constitutes constructive dismissal: *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* (1995) 62 IR 200; *Allison v Bega Valley Council* (1995) NSWIR Com 175. It is not necessary in my view, for me to find a breach of contract in order to find a constructive dismissal. It is sufficient that the respondent forced the applicant to abandon her employment by its refusal to vary the contract.⁸⁴

In *Kelly*, Raphael FM expressed doubts about the correctness of that statement, saying:

With respect to His Honour Driver FM I am not in entire agreement with his suggestion that it is not necessary to find a breach of contract in order to find a constructive dismissal.⁸⁵

However, Raphael FM went on to observe:

The point may be moot in relation to this type of case because if an employer wrongfully discriminates against an employee then that very discrimination constitutes a repudiation of the contract which the employee is entitled to accept. This would constitute constructive dismissal.⁸⁶

3.6.2 Reasonableness

Section 7B(2) identifies matters that are to be taken into account in determining reasonableness. It can be noted that it is not an exhaustive definition. It is clear from the authorities in relation to 'reasonableness' that all of the circumstances of a case should be taken into account.

⁸² Ibid [79].

⁸³ Ibid [83].

⁸⁴ [2003] FMCA 209, [74].

⁸⁵ [2003] FMCA 584, [60].

⁸⁶ Ibid [62].

What has been described as the ‘starting point’⁸⁷ in determining reasonableness is the following passage from the decision of Bowen CJ and Gummow J in *Secretary, Department of Foreign Affairs and Trade v Styles*:⁸⁸

the test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience ... The criterion is an objective one, which requires the court to weigh the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the requirement or condition on the other. All the circumstances of the case must be taken into account.⁸⁹

The following key propositions can be distilled in relation to ‘reasonableness’ for the purposes of s 7B of the SDA:

- The test is an objective one, but the subjective preferences of an aggrieved person or a respondent may be relevant in determining the reasonableness of the alleged discriminatory conduct.⁹⁰
- Reasonableness is a question of fact which can only be determined by taking into account all of the circumstances of the case, which may include the financial or economic circumstances of the respondent.⁹¹
- The test is reasonableness, not correctness or ‘whether the alleged discriminator could have made a “better” or more informed decision’.⁹²
- It is not enough, however, that a decision have a ‘logical or understandable basis’. While this may be relevant, taking into account all of the circumstances, such a decision may nevertheless not be reasonable.⁹³

A recent example of the application of s 7B(2) is *Escobar*. As discussed above,⁹⁴ this matter concerned an employer’s refusal of a request to work part-time from an employee returning from maternity leave. Driver FM found that the respondent’s ‘refusal ... to countenance the possibility of part-time employment for the applicant’, and his subsequent dismissal of her on that

⁸⁷ *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78, 111 (Sackville J).

⁸⁸ (1989) 23 FCR 251.

⁸⁹ *Ibid* 263. This passage was approved by the High Court in *Waters v Public Transport Corporation* (1991) 173 CLR 349, 395-6 (Dawson and Toohey JJ, with whom Mason CJ and Gaudron J agreed, 365), 378 (Brennan J), 383 (Deane J); applied in *Australian Medical Council v Wilson* (1996) 68 FCR 46, 60 (Heerey J, with whom Black CJ, 47, and Sackville J, 79, agreed).

⁹⁰ *Commonwealth v Human Rights and Equal Opportunity Commission* (1995) 63 FCR 74, 83 (Lockhart J); cited with approval in *Commonwealth Bank v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78, 111 (Sackville J).

⁹¹ *Commonwealth Bank v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78, 111 (Sackville J); *Waters v Public Transport Corporation* (1991) 173 CLR 349.

⁹² *Commonwealth v Human Rights and Equal Opportunity Commission* (1995) 63 FCR 74, 87 (Sheppard J); *Australian Medical Council v Wilson* (1996) 68 FCR 46, 61 (Heerey J); *Commonwealth Bank v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78, 112 (Sackville J).

⁹³ *Commonwealth Bank v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78, 112-13 (Sackville J).

⁹⁴ See sections 3.5 and 3.6.1 above.

basis, was not reasonable.⁹⁵ In arriving at this conclusion, his Honour found the following factual matters persuasive:⁹⁶

- the respondent had, at least initially, been prepared to countenance the possibility of the applicant working part-time;
- while the employment of a full-time employee to fill the applicant's position reduced the flexibility of the respondent to offer part-time employment, that reduction of flexibility was one that the respondent brought upon itself; and
- the employment of the full-time employee was undertaken without reference to the applicant in circumstances where the respondent had agreed to discuss the applicant's future working arrangements.

In *Hickie*, where part of the complainant's practice area was taken away when she returned to work on a part-time rather than full-time basis, Commissioner Evatt found that 'the removal of her practice can be regarded as a consequence of her inability to meet a requirement that she work full time'.⁹⁷ Such a requirement was 'not reasonable having regard to the circumstances of the case'.⁹⁸ The Commissioner went on to say:

Hunt and Hunt have accepted that women should be able to work part time after their maternity leave. In that case, they should have approached Ms Hickie's problem by seeking alternative solutions which would have enabled her to maintain as much of her practice as possible. The firm should have considered seriously other alternatives. Ms Hickie would return in a few weeks and she was willing to work on urgent matters. Part of her practice could have been preserved for her with other arrangements.⁹⁹

In *Mayer*, the refusal of the applicant's request to work part-time was also found to be unreasonable. His Honour found that the evidence made it clear that there was in fact part-time work available for Ms Mayer. This work was 'different work to that which the applicant had been doing, but it was important work that the applicant was able to do and that needed to be done.'¹⁰⁰ Consequently, the respondent's refusal to accommodate the applicant's request for part-time work was not reasonable:

Ms Bailey identified work that could properly occupy Ms Mayer's time until 3 January 2003 for two days each week. At a minimum, therefore, the respondent should have offered Ms Mayer employment for two days per week for the balance of her contract until 3 January 2003.

The work that Ms Mayer could have performed part-time would have been discrete project work, rather than the performance of her previous functions.

⁹⁵ [2002] FMCA 122 [32].

⁹⁶ Ibid [32], [37].

⁹⁷ Unreported, HREOC, Commissioner Evatt, 7 March 1998, [4.5.28]. Extract at (1998) EOC 92-910.

⁹⁸ Unreported, HREOC, Commissioner Evatt, 7 March 1998, [4.5.30].

⁹⁹ Ibid.

¹⁰⁰ [2003] FMCA 209, [75].

Ms Mayer gave evidence of important projects that she could have assisted on. Ms Bailey in her e-mail, stated that there were “many projects” that Ms Mayer could work on. In my view, with a little imagination the respondent could, if it had wished to, found useful work for Ms Mayer to do for three days a week until 3 January 2003.

... [T]he respondent’s effort to find part-time work for the applicant was inadequate. The respondent’s refusal of part-time work for three days per week was not reasonable.¹⁰¹

His Honour found, however, in respect of the applicant’s proposal for job-sharing, or working partly from home:

It was reasonable for the respondent to refuse Ms Mayer’s proposal for job sharing of her role, or for her to work partly from home... Ms Mayer’s role required both a consistency of approach and regular interaction with other staff. The effective performance of that role would have been problematic if Ms Mayer had worked partly from home, or had shared her duties with another employee. It was clear from Ms Mayer’s own evidence that she would not have been able to work full-time from home while caring for her child.¹⁰²

3.6.3 The Relationship between ‘Direct’ and ‘Indirect’ Discrimination

In *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission*,¹⁰³ a matter involving a complaint arising under the pre-1995 provisions, Sackville J considered the relationship between ‘direct discrimination’ under s 5(1) and ‘indirect discrimination’ under s 5(2).

His Honour noted that s 5(2) in both its pre-1995 form and post-1995 form ‘addresses “indirect discrimination” in the sense of conduct which, although “facially neutral”, has a disparate impact on men and women’.¹⁰⁴ Citing *Waters v Public Transport Corporation*¹⁰⁵ and *Australian Medical Council v Wilson*¹⁰⁶ his Honour concluded that ‘[i]t seems to have been established that subss 5(1) and (2) are mutually exclusive in their operation.’¹⁰⁷

In *Mayer*, a matter involving a complaint arising under the post-1995 provisions, Driver FM also considered the relationship between the direct and

¹⁰¹ Ibid [75]-[76].

¹⁰² Ibid [77].

¹⁰³ (1997) 80 FCR 78. This matter concerned the issue of indirect discrimination in the context of the opportunity available to employees on extended leave (for reasons related to child birth or child care) to obtain a position after a restructuring process and to entitlement to voluntary retrenchment.

¹⁰⁴ Ibid 97.

¹⁰⁵ (1991) 173 CLR 349. This was a decision of the High Court which considered disability discrimination under the *Equal Opportunity Act 1984* (Vic): see sections 4.1 and 4.2 on the DDA.

¹⁰⁶ (1996) 68 FCR 46, 55 (Heerey J with whom Black CJ agreed), 74 (Sackville J). Note that this was a decision under the RDA.

¹⁰⁷ (1997) 80 FCR 78, 97.

indirect provisions of s 5 of the SDA and found them to be mutually exclusive. His Honour stated:

[Section] 5(2) does not depend on s 5(1) at all to give it meaning. The opening words of both ss 5(1) and 5(2) are the same. The distinction between the two sections is simply that s 5(1) deals with direct discrimination and s 5(2) with indirect discrimination. The provisions are therefore mutually exclusive. The test under s 5(2) is whether a condition, requirement or practice has, or is likely to have, the effect of disadvantaging a person of the same sex as the aggrieved person; in this case, a woman. In this case the relevant condition or requirement was that the applicant work full-time. Such a condition or requirement is likely to have the effect of disadvantaging women because, as I have noted, women have a greater need for part-time employment than men. That is because only women get pregnant and because women bear the dominant responsibility for child rearing, particularly in the period closely following the birth of a child. Discrimination under s 5(2) is either established or not by reference to its own terms, not by reference to s 5(1). In this case discrimination under s 5(2) is established because the respondent insisted upon the applicant working full-time against her wishes. The issue of family responsibilities is only relevant insofar as it establishes that women tend to be disadvantaged by such a requirement.¹⁰⁸

3.7 Discrimination in Areas of Public Life Other than Employment

The decisions discussed above largely involved allegations of breaches of s 14 of the SDA, which proscribes certain discriminatory conduct in employment. This reflects the fact that the bulk of claims based on the SDA have related to employment. As noted above, the provisions in Part II, Divisions 1 and 2 of the SDA also proscribe discrimination in other areas of public life, including:

- education;¹⁰⁹
- the provision of goods, services or facilities;¹¹⁰
- accommodation and housing;¹¹¹
- buying or selling land;¹¹² and
- Commonwealth laws and programs.¹¹³

An overview of some of the (relatively scarce) jurisprudence considering those provisions is set out below.

¹⁰⁸ [2003] FMCA 209, [71].

¹⁰⁹ Section 21 SDA.

¹¹⁰ Section 22 SDA.

¹¹¹ Section 23 SDA.

¹¹² Section 24 SDA.

¹¹³ Section 26 SDA.

3.7.1 Provision of Services (s 22) and Qualifying Bodies (s 18)

Section 22 of the SDA, which appears in Part II, Division 2 of the SDA, provides:

- (1) It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's sex, marital status, pregnancy or potential pregnancy:
 - (a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person;
 - (b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or
 - (c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.
- (2) This section binds the Crown in right of a State.

In *Ferneley v The Boxing Authority of New South Wales*¹¹⁴ ('*Ferneley*'), Wilcox J considered whether the respondent provided 'services' within the meaning of s 22 of the SDA.

The respondent had certain statutory functions under the *Boxing and Wrestling Control Act 1986* (NSW) ('*Boxing Act*'), including under s 8(1), which provides:

a male person of or above the age of 18 years may make an application to the Authority to be registered as a boxer of a prescribed class.

There were no provisions in the *Boxing Act* for registration of females. The applicant applied to the respondent to be registered as a kick boxer in New South Wales. That application was refused by the respondent, on the basis of s 8(1) of the *Boxing Act*.

It was accepted by all parties that the respondent should be treated as the Crown in right of the State of New South Wales.¹¹⁵

In the proceedings before the Federal Court, the applicant sought, inter alia, a declaration that s 8(1) of the *Boxing Act* was inoperative by reason of inconsistency with s 22 of the SDA and the operation of s 109 of the *Constitution*.

¹¹⁴ (2001) 115 FCR 306.

¹¹⁵ *Ibid* 307 [2].

It was necessary to consider whether the respondent's acts of failing to consider, on its merits, the applicant's application for registration involved a failure to provide a 'service' within the meaning of s 22.

In deciding this question, s 18, which appears in Part II, Division 2 of the SDA, was also material. This provides:

It is unlawful for an authority or body that is empowered to confer, renew, extend, revoke or withdraw an authorisation or qualification that is needed for or facilitates the practice of a profession, the carrying on of a trade or the engaging in of an occupation to discriminate against a person on the ground of the person's sex, marital status, pregnancy or potential pregnancy:

- (a) by refusing or failing to confer, renew or extend the authorisation or qualification;
- (b) in the terms or conditions on which it is prepared to confer the authorisation or qualification or to renew or extend the authorisation or qualification; or
- (c) by revoking or withdrawing the authorisation or qualification or varying the terms or conditions upon which it is held.

Section 18 did not apply in this matter, as (unlike s 22) it does not bind the Crown in right of a State. However, Wilcox J held that, as Parliament had made a special provision in s 18 of the SDA concerning sex discrimination by authorities empowered to confer an authorisation or qualification needed for engaging in an occupation, s 22 must be read down to the extent necessary to exclude cases covered by that special provision. His Honour stated that this view was supported by the structure of the SDA, the fact that the heading of Division 1 was 'Discrimination in Work' and the fact that Division 2 was headed 'Discrimination in Other Areas.' His Honour noted that the registration sought by Ms Ferneley was to enable her to 'work' (as professional kick boxing was her source of income) and stated that discrimination in that area should therefore not be read to extend to provisions relating to 'other areas'.¹¹⁶

Wilcox J thus held that it was not a breach of s 22 for the respondent to decline to consider Ms Ferneley's application on its merits and the proceedings were dismissed on that basis.

Section 22 also arose for consideration in *MW v Royal Women's Hospital*¹¹⁷ and *McBain v Victoria*¹¹⁸ (discussed in section 3.3 above).

¹¹⁶ Ibid 319 [64]-[66].

¹¹⁷ (1997) EOC 92-886.

¹¹⁸ (2000) 99 FCR 116.

3.7.2 Clubs and Associations

Section 25 of the SDA provides:

- (1) It is unlawful for a club, the committee of management of a club or a member of the committee of management of a club to discriminate against a person who is not a member of the club on the ground of the person's sex, marital status, pregnancy or potential pregnancy:
 - (a) by refusing or failing to accept the person's application for membership; or
 - (b) in the terms or conditions on which the club is prepared to admit the person to membership.
- (2) It is unlawful for a club, the committee of management of a club or a member of the committee of management of a club to discriminate against a person who is a member of the club on the ground of the member's sex, marital status, pregnancy or potential pregnancy:
 - (a) in the terms or conditions of membership that are afforded to the member;
 - (b) by refusing or failing to accept the member's application for a particular class or type of membership;
 - (c) by denying the member access, or limiting the member's access, to any benefit provided by the club;
 - (d) by depriving the member of membership or varying the terms of membership; or
 - (e) by subjecting the member to any other detriment.
- (3) . . .

In *Ciemcioch v Echuca-Moama RSL Citizens Club Ltd*,¹¹⁹ the complainant applied for membership at the respondent club. Her application was considered but rejected by the club's committee. There were only two other instances of rejection in the history of the club. The complainant's husband had been suspended from the club a year previously and had taken legal action against the club, which settled a month before the complainant's application was considered.

Commissioner O'Connor held that the club had discriminated against the complainant on the ground of marital status by having regard to an unlawful consideration, namely the characteristic of loyalty towards and support of a husband's lawful activities, a characteristic generally imputed to the relationship of marriage. The Commissioner was also satisfied that the club would not have treated a person of different marital status in the same way in similar circumstances. Although, not specifically identified, the Commissioner appears to have considered that that conduct breached s 25(1)(a) (refusal of membership). The Commissioner declared that the

¹¹⁹ Unreported, HREOC, Commissioner O'Connor, 13 July 1994. Extract at (1994) EOC 92-657.

complainant's application to join the club should be considered and that the respondent should pay her \$3,000 by way of compensation.

In contrast, the complaints in *Eleven Fellow Members of the McLeod Country Golf Club v McLeod Country Golf Club*¹²⁰ were made by existing members of a club and were therefore brought under s 25(2) of the SDA. The male complainants alleged that they had been discriminated against on the ground of sex as they were eligible only for 'fellow' membership, not ordinary membership of the club. As fellow members they were unable to participate in management of the club. Management was reserved for women.

Since in this case it was males and not females who alleged unlawful discrimination, the power of the Commission to grant relief depended upon a finding that the Club was a trading corporation for the purposes of s 9(13) of the SDA.¹²¹ In dismissing the complaint Commissioner Carter was satisfied the Club was not a trading corporation.¹²²

Commissioner Carter was also satisfied that the club's arrangements came within the exemption provided for by s 33 of the Act (see 3.9 below).¹²³

3.8 Sexual Harassment

Section 28A of the SDA provides:

- (1) For the purposes of this Division, a person sexually harasses another person (the *person harassed*) if:
 - (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
 - (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.

- (2) In this section:

conduct of a sexual nature includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.

¹²⁰ (1995) EOC 92-739.

¹²¹ The SDA has a wider application to discrimination against women under s 9(10), which provides that the relevant provisions have effect in relation to discrimination against women to the extent that those provisions give effect to the *Convention on the Elimination of All Forms of Discrimination Against Women*.

¹²² (1995) EOC 92-739, 78,483.

¹²³ *Ibid* 78,485. Note the special measures provision is now contained in s 7D.

That provision appears in Part II Division 3 of the SDA, which goes on to proscribe sexual harassment in various areas of public life, including:

- employment and partnerships;¹²⁴
- qualifying bodies;¹²⁵
- educational institutions;¹²⁶
- the provision of goods, services or facilities;¹²⁷
- accommodation;¹²⁸
- buying or selling land;¹²⁹
- clubs;¹³⁰ and
- Commonwealth laws and programs.¹³¹

This section considers the following key issues in relation to sexual harassment:

- conduct of a sexual nature;
- unwelcome conduct;
- single incidents;
- the ‘reasonable person’ test;
- sexual harassment as a form of sex discrimination; and
- sex-based harassment and sex discrimination.

3.8.1 Conduct of a Sexual Nature

Section 28A(2) defines the term ‘conduct of a sexual nature’ in a non-exhaustive fashion. A broad interpretative approach has been taken in relation to the scope of that term. For example, both in the Federal jurisdiction and in other Australian jurisdictions, exposure to sexually explicit material and sexually suggestive jokes has been held to constitute conduct of a sexual nature.¹³²

¹²⁴ Section 28B SDA.

¹²⁵ Section 28C SDA.

¹²⁶ Section 28F SDA.

¹²⁷ Section 28G SDA.

¹²⁸ Section 28H SDA.

¹²⁹ Section 28J SDA.

¹³⁰ Section 28K SDA.

¹³¹ Section 28L SDA.

¹³² *Bennett v Everitt* (1988) EOC 92-244; *Kiel v Weeks* (1989) EOC 92-245; *Horne v Press Clough Joint Venture* (1994) EOC 92-556; *Hopper v Mt Isa Mines* (1997) EOC 92-879; *Doyle v Riley* (1995) EOC 92-748; *Bebington v Dove* (1993) EOC 92-543; *Hawkins v Malnet Pty Ltd* (1995) EOC 92-767; *G v R & Department of Health and Community Services* (Unreported, HREOC, Sir Ronald Wilson, 17 September 1993); *Djokic v Sinclair* (1994) EOC 92-643; *Hill v Water Resources Commission* (1985) EOC 92-127; *Freestone v Kozma* (1989) EOC 92-249.

That line of cases was expressly approved by Driver FM in the cases of *Cooke v Plauen Holdings*¹³³ and *Johanson v Blackledge*.¹³⁴ In the latter case, the sale of a dog bone shaped so as to resemble a penis was held to be conduct of a sexual nature.

Similarly, in the case of *Aleksovski v Australia Asia Aerospace Pty Ltd*,¹³⁵ Raphael FM found that the conduct of a co-worker of the applicant constituted unwelcome conduct of a sexual nature. This conduct included: his declaration of love for the applicant; his suggestion that they discuss matters at his home; his reference to the applicant's relationship with her partner and then repeating all of these things the following day; and becoming angry and agitated when the applicant refused to do as he wished.¹³⁶

In *Cooke v Plauen Holdings*¹³⁷ the applicant complained of acts including personal and inappropriate comments and questions by a supervisor, Mr Ong. She also complained that Mr Ong had sat close to her while supervising her, had asked her to model for him and invited her to come to his home for coffee. In relation to the comments, Driver FM held:

Mr Ong was probably socially clumsy, even socially inept. He may not have intended his comments and questions to be sexual in nature but I do not think that that matters. The comments and questions can objectively be regarded as sexual in nature, they were deliberate and the applicant was the target.¹³⁸

As to the invitations to model and to come over for coffee, his Honour also found that these could properly be regarded as sexual in nature.¹³⁹ However, the conduct of Mr Ong in sitting close to the applicant was found by Driver FM to be part of Mr Ong's 'unfortunate supervision style', rather than being conduct of a sexual nature.¹⁴⁰

Certain conduct may on its own not amount to conduct of a sexual nature, however it may do so if it forms part of a broader pattern of inappropriate sexual conduct.¹⁴¹ This view was expressly adopted by Raphael FM in *Shiels v James*,¹⁴² in which it was held that incidents relating to the flicking of elastic

¹³³ [2001] FMCA 91, [24].

¹³⁴ (2001) 163 FLR 58, 75 [84].

¹³⁵ [2002] FMCA 81.

¹³⁶ *Ibid* [81]-[85].

¹³⁷ [2001] FMCA 91.

¹³⁸ *Ibid* [26].

¹³⁹ *Ibid* [29]. Driver FM found that the conduct did not constitute sexual harassment as the applicant was not 'offended, humiliated or intimidated by it', [29]. However, his Honour went on to find that the conduct amounted to sex discrimination, [31]-[33]; see 3.8.6 below.

¹⁴⁰ [2001] FMCA 91, [29].

¹⁴¹ See, for example, *Harwin v Pateluch* (Unreported, HREOC, Commissioner O'Connor, 21 August 1995). Extract at (1995) EOC 92-770.

¹⁴² [2000] FMCA 2.

bands at the applicant were of a sexual nature as they formed part of a broader pattern of sexual conduct.¹⁴³

3.8.2 Unwelcome Conduct

For a breach of s 28A to have occurred the alleged conduct or sexual advance must be ‘unwelcome’. While determining whether the conduct is of a sexual nature is an objective test, determining whether it is unwelcome is a subjective test.¹⁴⁴

In *Aldridge v Booth*¹⁴⁵ Spender J stated:

By ‘unwelcome’, I take it that the advance, request or conduct was not solicited or invited by the employee, and the employee regarded the conduct as undesirable or offensive: see Michael Rubenstein, ‘The Law of Sexual Harassment at Work’ (1983) 12 *Industrial Law Journal* 1 at 7 and *Henson v City of Dundee* (1982) 682 F 2d 897.¹⁴⁶

In *Elliott v Nanda*¹⁴⁷ the applicant alleged that she was sexually harassed during her employment at a medical centre by the Director. Moore J found that the conduct of the respondent, which involved fondling the applicant’s breast, patting her on the bottom, trying to kiss her, massaging her shoulders and brushing against her breasts was conduct of a sexual nature, and unwelcome. Relevantly, his Honour noted:

the applicant was, at the time, a teenager and the respondent a middle-aged medical practitioner. In that context it is difficult to avoid the conclusion that [the conduct of the respondent] was unwelcome as were the sexual references or allusions specifically directed to the applicant.¹⁴⁸

In relation to other conduct involving discussions about sexual matters, however, his Honour held:

the applicant bears the onus of establishing that the conduct was unwelcome and I entertained sufficient doubt that it would have been apparent to the respondent that these general discussions were unwelcome (particularly given that applicant did not complain about the discussions at the time and participated in general discussions the respondent had with his friends about topics of current interest) to find, affirmatively, that this conduct was unwelcome: see *O’Callaghan v Loder* [1983] 3 NSWLR 89 at 103-104.¹⁴⁹

¹⁴³ Ibid [72].

¹⁴⁴ *Horman v Distribution Group* [2001] FMCA 52, [44], [64], citing with approval the decision of the New Zealand Employment Tribunal in *L v M Ltd* (1994) EOC 92-617; *Wong v Su* [2001] FMCA 108, [18]; *Daley v Barrington* [2003] FMCA 93, [33]-[34]; *Font v Paspaley Pearls Pty Ltd* [2002] FMCA 142, [130].

¹⁴⁵ (1988) 80 ALR 1.

¹⁴⁶ Ibid 5, cited with approval in *Hall v Sheiban* (1989) 20 FCR 217, 247 (Wilcox J).

¹⁴⁷ (2001) 111 FCR 240.

¹⁴⁸ Ibid 277 [107].

¹⁴⁹ Ibid 277 [108].

While the behaviour of an applicant, including inappropriate behaviour, may be relevant in assessing whether or not the conduct was ‘unwelcome’, such behaviour does not disqualify an applicant from claiming sexual harassment by way of other behaviour. In *Horman v Distribution Group Ltd*,¹⁵⁰ Raphael FM held that while the conduct of the applicant resulted in a number of her claims of harassment being unsuccessful, ‘everyone [is] entitled to draw a line somewhere’, and certain of the activities complained about ‘crossed that line’.¹⁵¹

In *Wong v Su*,¹⁵² Driver FM held that there was no reliable evidence to support the applicant’s claim that the respondent’s conduct, although of a sexual nature, was unwelcome. Rather it was held that the sexual relationship between the parties was voluntarily entered into and continued for a considerable number of years.

In *Daley v Barrington*,¹⁵³ Raphael FM found that words to the effect of ‘[l]et’s go over to the horse stalls I’ll show you what a man can do’ had been spoken to the applicant by the second respondent. However, his Honour also found that the applicant’s reaction to the words being spoken was ‘friendly and included putting an arm around’ the second respondent. In these circumstances, Raphael FM stated:

I am not satisfied that the remark made was unwelcome to this applicant even if I would otherwise have found that a reasonable person would be offended, humiliated or intimidated by it.¹⁵⁴

3.8.3 Single Incidents

It is accepted that a one-off incident can amount to sexual harassment, as well as on-going behaviour.

In *Hall v Sheiban*,¹⁵⁵ all three members of the Federal Court in separate judgments expressed the view that the then s 28(3) of the SDA (now replaced by s 28A) was capable of including a single incident. Lockhart J stated that s 28(3) ‘provide[d] no warrant for necessarily importing a continuous or repeated course of conduct.’¹⁵⁶ Both Wilcox¹⁵⁷ and French¹⁵⁸ JJ expressed the view that while the ordinary English meaning of the word ‘harass’ implies repetition, s 28(3) did not contain such an element and did not use the word

¹⁵⁰ [2001] FMCA 52.

¹⁵¹ *Ibid* [64].

¹⁵² [2001] FMCA 108.

¹⁵³ [2003] FMCA 93.

¹⁵⁴ *Ibid* [34].

¹⁵⁵ (1989) 20 FCR 217.

¹⁵⁶ *Ibid* 231.

¹⁵⁷ *Ibid* 247.

¹⁵⁸ *Ibid* 279.

‘harass’ to define sexual harassment. French J emphasised that ‘circumstances, including the nature and relationship of the parties may stamp conduct as unwelcome the first and only time it occurs’.¹⁵⁹

Similarly, in the earlier decision of HREOC in *Bennett v Everitt*,¹⁶⁰ President Einfeld stated:

Some conduct may be so ‘troublesome’ or ‘vexing’ and be of such a nature, or take place in such circumstances, or between such people, as to be clearly unwelcome without the need for a repetition following rejections. Unwelcomeness in such cases should be imputed or assumed. Thus, in the absence of an invitation or intimation from an employee that sexual advances or conduct would be welcome, the legislation should be read as not permitting a generally available ‘trial contact’ by an employer to ascertain whether sexual behaviour is consented to or welcomed by an employee.¹⁶¹

This approach has been adopted in recent sexual harassment cases.¹⁶²

3.8.4 The ‘Reasonable Person’ Test

Under s 28A(1) of the SDA, a person sexually harasses another if the person engages in unwelcome conduct of a sexual nature in relation to the person harassed ‘in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated’.

Determining whether a reasonable person would have anticipated that the person harassed would be offended, humiliated or intimidated entails an objective test.¹⁶³

In *Johanson v Blackledge*,¹⁶⁴ Driver FM held that it is not necessary for a complainant alleging sexual harassment to be the conscious target of the conduct, and that an accidental act can therefore constitute harassment. As noted above, in that matter, a customer was sold a dog bone by one employee which had been fashioned into the shape of a penis by other employees. Driver FM accepted that the bone had been intended for another person and

¹⁵⁹ Ibid.

¹⁶⁰ (1988) EOC 92-244.

¹⁶¹ Ibid 77,263. These principles were cited with approval in *Johanson v Blackledge* (2001) 163 FLR 58, 75 [85].

¹⁶² See, for example, the judgement of Driver FM in *Cooke v Plauen Holdings* [2001] FMCA 91, [25], applying *Hall v Sheiban* (1989) 20 FCR 217 and *Leslie v Graham* (Unreported, HREOC, Commissioner Innes, 21 July 2000).

¹⁶³ *Johanson v Blackledge* (2001) 163 FLR 58, 75 [84]-[85]; *Cooke v Plauen Holdings* [2001] FMCA 91, [24]-[25]; *Horman v Distribution Group Limited* [2001] FMCA 52, [50]; *Wattle v Kirkland* [2001] FMCA 66, [46]; *Alekovski v Australia Asia Aerospace Pty Ltd* [2002] FMCA 81, [83]; *Elliott v Nanda* (2001) 111 FCR 240, 277 [109]; *Kennedy v ADI Ltd* [2001] FCA 614; *Wattle v Kirkland (No 2)* [2002] FMCA 135, [67]; *Font v Paspaley Pearls Pty Ltd* [2002] FMCA 142, [134].

¹⁶⁴ (2001) 163 FLR 58.

was accidentally provided to the applicant. His Honour nevertheless found there to be sexual harassment, stating:

Having regard to the necessary elements establishing harassment for the purposes of s 28A and s 28G, I do not accept the submission that an accidental act cannot constitute sexual harassment. It is clear that there have been instances where employers have been found liable for harassment of employees in circumstances where offensive posters or other offensive material have been left around the workplace and seen by the complainant. In some instances this material was on display prior to the arrival of the complainant in the workplace. In *G v R and the Department of Health, Housing and Community Services* (unreported, HREOC, 23 August 1993) a toy in [the] form of a jack-in-the-box with a penis substituted for the normal figure was put on the desk of the complainant's husband. Other employees passed comments about the toy but these were not directed at the complainant. The complaint failed for other reasons but Sir Ronald Wilson found that the conduct complained of could constitute sexual harassment of the complainant even though she was not the target. Clearly, it is not necessary that the complainant be the conscious target of the offensive conduct. Sexual harassment can occur where the conduct is directed at a limited class of people (eg employees). I see no material difference in the case of conduct directed at customers or potential customers. Once a person chooses to engage in conduct of a sexual nature in which another person, whether the intended target or not, who has not sought or invited the conduct, experiences offence, humiliation or intimidation and, in the circumstances, a reasonable person would have anticipated that reaction, the elements of sexual harassment are made out.¹⁶⁵

In *Horman v Distribution Group Ltd*,¹⁶⁶ the evidence before Raphael FM was to the effect that the applicant had engaged in behaviour including crude and vulgar language, disclosure of personal information and the display of sexually explicit photographs of herself. Nevertheless, Raphael FM found:

... I do not think that it necessarily follows that a person in the position of the applicant would still not be offended, humiliated or intimidated by some of the actions and remarks that I have found were made. To do this would assume an assent to a form of anarchy in the workplace that I do not believe a person in the position of the applicant would subscribe to. It is also significant that even Ms Gough [a co-employee], who was otherwise accepting of almost all the forms of behaviour that took place wanted to draw a line at the use of certain words. There was no denying of Ms Gough's entitlement to draw such lines, why should the applicant not be permitted the same right?¹⁶⁷

¹⁶⁵ Ibid 76 [89].

¹⁶⁶ [2001] FMCA 52.

¹⁶⁷ Ibid [51].

In relation to evidence of the applicant's own use of 'crude and vulgar language', Raphael FM stated that:

I am not sure that a reasonable person would not anticipate that the applicant would be offended, humiliated or intimidated by bad language solely because the applicant herself also used it from time to time.¹⁶⁸

In *Font v Paspaley Pearls Pty Ltd*¹⁶⁹ ('*Font*'), Raphael FM found that the second respondent, Mr Purkis, had said to the applicant, in reference to the modelling of a pearl bikini at a promotional function: 'I need someone to model the bikini. Can you do it?' Raphael FM found that the comment was conduct of a sexual nature, but was not satisfied that a reasonable person would have anticipated that the applicant would have been offended, humiliated or intimidated by the comment.¹⁷⁰

The applicant in *Font* also complained of physical contact involving a slap and also a jab with a walking stick on 'the rear' by the second respondent. His Honour found this to constitute sexual harassment. In doing so, Raphael FM refused to accept that a 'defence of homosexuality' might apply¹⁷¹ – the second respondent, it was accepted, was a gay man. His Honour noted that the fact that a person conducts themselves in a manner which would otherwise be in breach of s 28A cannot be negated by the fact that the person may not have any sexual designs upon the victim:

The SDA is a protective Act. It is designed to protect people from the type of behaviour which other members of the community would consider inappropriate by reason of its sexual connotation. It is the actions themselves that have to be assessed, not the person who is carrying them out.¹⁷²

Further to this, Raphael FM concluded that there is no requirement in the SDA that the protagonist should be of a different sex or of a different sexual preference to the victim.¹⁷³

In *Elliott v Nanda*,¹⁷⁴ the applicant was employed as a receptionist by the respondent. Moore J found that the employer's touching of the applicant and the making of sexual references or allusions directed to the applicant amounted to unwelcome conduct of a sexual nature. In making that finding his Honour noted the applicant was a teenager, and the respondent a middle aged medical practitioner. His Honour said there could be little doubt that the

¹⁶⁸ Ibid [49].

¹⁶⁹ [2002] FMCA 142.

¹⁷⁰ Ibid [130].

¹⁷¹ Ibid [134].

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ (2001) 111 FCR 240.

conduct was such that a reasonable person would have anticipated that the applicant would be at least offended and humiliated by the conduct.¹⁷⁵

3.8.5 Sexual Harassment as a Form of Sex Discrimination

The relationship between sexual harassment and discrimination on the ground of sex has been the subject of significant judicial consideration. Prior to the legislative proscription of ‘sexual harassment’ by the Commonwealth and all of the States and Territories, the NSW Equal Opportunity Tribunal held that unwelcome sexual conduct was sex discrimination under the *Anti-Discrimination Act 1977* (NSW) (as it then was) in the decision of *O’Callaghan v Loder*.¹⁷⁶

The issue also arose in relation to the SDA, even after the insertion of the sexual harassment provisions (ss 28 and 29 as they then were), in *Aldridge v Booth*.¹⁷⁷ Spender J held that sexual harassment was a form of sex discrimination.¹⁷⁸ This finding was necessary for reasons relating to the Constitutional validity of the sexual harassment provisions of the SDA as the *Convention on the Elimination of All Forms of Discrimination Against Women* (‘CEDAW’)¹⁷⁹ does not expressly deal with sexual harassment.

Spender J’s decision was approved in *Hall v Sheiban*¹⁸⁰ by French J who held that s 28 of the SDA (the precursor to the current sexual harassment provisions in the SDA):

puts beyond doubt that sexual harassment is a species of unlawful sex discrimination...[t]he requirements of s14 relating to discriminatory treatment in the terms and conditions of employment or subjection to detriment are subsumed in the nature of the prohibited conduct.¹⁸¹

While Lockhart J stated that it was an ‘open question’ as to whether the prohibition of sex discrimination included sexual harassment, he stated that ‘a finding that s 14 does not include sexual harassment of the kind to which s 28 is directed would appear contrary to the trend of judicial opinion’.¹⁸²

Wilcox J considered this issue in *Gilroy v Angelov*¹⁸³ (‘*Gilroy*’). In that case, the applicant lodged a complaint under both ss 14 and 28B of the SDA alleging sexual harassment against a fellow employee and sex discrimination

¹⁷⁵ Ibid 277 [107]-[109].

¹⁷⁶ [1983] 3 NSWLR 89.

¹⁷⁷ (1988) 80 ALR 1.

¹⁷⁸ Ibid 16-17.

¹⁷⁹ Opened for signature 18 December 1979, [1983] ATS 9, (entered into force generally 3 September 1981, and in Australia 27 August 1983).

¹⁸⁰ (1989) 20 FCR 217.

¹⁸¹ Ibid 277.

¹⁸² Ibid 235.

¹⁸³ (2000) 181 ALR 57.

against her employer. Although Wilcox J was satisfied that the first respondent did sexually harass the complainant, he expressed reservations about whether s 14 applied to this case and stated that s 28B was enacted specifically to deal with such complaints:

I have reservations as to whether s 14(1) or (2) applies to this case. I think these subsections are intended to deal with acts or omissions of the employer that discriminate on one of the proscribed grounds. It is artificial to extend the concepts embodied in those sections in such a manner as to include the sexual harassment of the employee by another. As it seems to me, it was because s14 did not really fit that case that s28B was enacted. To my mind, s28B covers this case.¹⁸⁴

In contrast, in *Elliott v Nanda*,¹⁸⁵ Moore J disagreed with Wilcox J in *Gilroy* ‘to the extent that his Honour could be taken to have expressed the view that s 28B was enacted because it is artificial to extend s14 to situations of sexual harassment.’¹⁸⁶ His Honour stated:

I respectfully agree with the statement of French J in *Hall v Sheiban* and of Spender J in *Aldridge v Booth* that s 14 is capable of extending to conduct that constitutes sexual harassment under Div 3 of Pt II. In my opinion, such a principle is consistent with the purpose and scheme of [the] SD Act and also with the overseas jurisprudence set out in *Hall v Sheiban* and *O’Callaghan v Loder* on the nature and scope of ‘sex discrimination’.¹⁸⁷

Moore J also cited with approval decisions of HREOC which had clearly proceeded on the basis that conduct is capable of constituting both sex discrimination under ss 5 and 14 and sexual harassment under Division 3 of Part II of the SDA.¹⁸⁸

In the case before him, Moore J was satisfied the conduct of the respondent was in breach of s 14(2)(d):

I have found that the conduct of the respondent involving touching the applicant and the sexual references or allusions specifically directed to the applicant were unwelcome, offensive and humiliating to the applicant and that a reasonable person would have anticipated as much. I am therefore satisfied that they imposed a detriment, within the meaning of s 14(2)(d), on the applicant on the grounds of her sex.¹⁸⁹

¹⁸⁴ Ibid 75 [102].

¹⁸⁵ (2001) 111 FCR 240.

¹⁸⁶ Ibid 281 [127].

¹⁸⁷ Ibid.

¹⁸⁸ Ibid 281-82 [128]. His Honour cited: *W v Abrop Pty Ltd* (Unreported, HREOC, Commissioner Atkinson, 27 May 1996), extract at (1996) EOC 92-858; *Phillips v Leisure Coast Removals Pty Ltd* (Unreported, HREOC, Commissioner Innes, 9 May 1997), extract at (1997) EOC 92-899; *Brown v Lemeki* (Unreported, HREOC, Commissioner Atkinson, 27 May 1997); *Biedermann v Moss* (Unreported, HREOC, Commissioner McEvoy, 20 February 1998).

¹⁸⁹ (2001) 111 FCR 240, 282 [130].

This approach was also adopted in *Horman v Distribution Group Ltd*,¹⁹⁰ *Wattle v Kirkland*¹⁹¹ and *Wattle v Kirkland (No.2)*.¹⁹²

In *Johanson v Blackledge*,¹⁹³ as discussed above,¹⁹⁴ Driver FM found that the provision by a butcher's shop to a customer of a dog bone intentionally prepared in a phallic shape constituted sexual harassment. The applicant also alleged that this conduct constituted sex discrimination for the purposes of ss 5 and 22 (provision of goods, services and facilities) of the SDA. The applicant was required to take this approach because the sexual harassment provisions of the SDA have limited operation pursuant to s 9(4) of the SDA. Section 9(10), however, provides that the provisions relating to sexual harassment have effect 'in relation to discrimination against women, to the extent that the provisions give effect to [CEDAW]'.¹⁹⁵

Driver FM noted the definition given to discrimination in art 1 of CEDAW, namely 'any distinction, exclusion or restriction made on the basis of sex' which impairs or nullifies the 'enjoyment or exercise by women...on a basis of equality of men and women, of human rights and fundamental freedoms'. Noting the decision in *Aldridge v Booth*,¹⁹⁵ Driver FM stated that even though the current sexual harassment provisions in the SDA are wider than those considered in that case, they nevertheless gave effect to CEDAW.¹⁹⁶

As there was no other connection with Commonwealth legislative power except that referred to in s 9(10), Driver FM considered that the conduct of the respondents would not be unlawful sexual harassment unless it also constituted unlawful sex discrimination.¹⁹⁷

Applying the reasoning of Samuels JA in *Jamal v Secretary of Department of Health*,¹⁹⁸ Driver FM held that in order to constitute discrimination within the meaning of ss 5 and 22 of the SDA (and hence to constitute unlawful sexual harassment within the SDA by reason of s 9(10)), the respondents must have engaged in some conduct which was deliberate and which was referable to the applicant's sex, or a characteristic of her sex. His Honour concluded that this test had been satisfied on the evidence.¹⁹⁹

¹⁹⁰ [2001] FMCA 52.

¹⁹¹ [2001] FMCA 66.

¹⁹² [2002] FMCA 135, [67]. Driver FM expressly applied the reasoning of French J in *Hall v Sheiban* (1988) 20 FCR 217, 274-77 and Moore J in *Elliott v Nanda* (2001) 111 FCR 240, 281-82 [125]-[130].

¹⁹³ (2001) 163 FLR 58.

¹⁹⁴ See 3.8.1; 3.8.4 above.

¹⁹⁵ (1988) 80 ALR 1.

¹⁹⁶ (2001) 163 FLR 58, 78 [92]-[93].

¹⁹⁷ *Ibid* 78-9 [94].

¹⁹⁸ (1988) EOC 92-234.

¹⁹⁹ (2001) 163 FLR 58, 79-80 [95]-[96].

3.8.6 Sex-based Harassment and Sex Discrimination

Conduct which falls short of sexual harassment may nevertheless constitute sex discrimination if it amounts to less favourable treatment by reason of sex. In *Cooke v Plauen Holdings*,²⁰⁰ for example, the applicant complained of the behaviour of her supervisor. This was found not to constitute sexual harassment (see 3.8.1 above). Driver FM found that the behaviour did, however, amount to sex discrimination:

I find that Mr Ong subjected Ms Cooke to a detriment by reason of her sex in the course of his supervision of her. Mr Ong's supervision of Ms Cooke was more objectionable and more vexing than it would have been if she had been a man. In *Shaw v Perpetual Trustees Tasmania Limited* (1993) EOC 92-550 HREOC found that the complainant had established unlawful conduct within the meaning of the SDA insofar as her supervisor's treatment of her made her feel uncomfortable, unwelcome and victimised and this treatment was in part referable to her sex. The Commission found that the existence of a personality clash between the complainant and her supervisor did not exclude a characterisation of his conduct as hostile conduct based at least in part on the complainant's sex. The Commission found that it was sufficient if the sex of the aggrieved person was a reason for the discriminatory conduct. It was not necessary that it be the substantial or dominant reason. I think that this is a substantially similar case. Part of the reason for Mr Ong's conduct was that he had very poor human relations skills, although he was technically highly competent. However, part of the reason for his treatment of Ms Cooke was that she was a woman and thus more susceptible to his controlling tendencies.²⁰¹

3.9 Exemptions (Part II, Division 4) and the Special Measures Provision (s 7D)

Part II, Division 4 of the SDA creates a series of exemptions to some or all of the unlawful discrimination provisions in Part II, Divisions 1 and 2. The exemptions do not operate in a blanket fashion.²⁰² They are specific to the different forms of discrimination as defined in Part I of the SDA or the different areas where discrimination may be unlawful as proscribed by Part II, Divisions 1 and 2. In summary:

- sections 30, 31, 32, 34(2), 35(1), 41, 42 and 43 create exemptions specific to discrimination on the ground of sex;
- section 35(2) creates an exemption which is specific to marital status discrimination;

²⁰⁰ [2001] FMCA 91.

²⁰¹ Ibid [33].

²⁰² See generally the Commonwealth Sex Discrimination Commissioner *Report on Review of Permanent Exemptions under the Sex Discrimination Act 1984* (1992).

- sections 41A and 41B create exemptions which are specific to discrimination in superannuation on the grounds of either sex or marital status;
- sections 38 and 39 create exemptions that apply to discrimination on the grounds of sex, marital status or pregnancy.

The balance of the exemptions in Division 4 (ss 34(1), 36(1), 37 and 40) are not specific to any particular ground of discrimination but operate in the context of specific areas such as accommodation, charities, religious bodies or an act done under statutory authority.

Section 44 empowers the Commission to grant a temporary exemption on the application of a person.

Many of the exemptions are yet to be the subject of any detailed jurisprudence. Some of the more significant decisions considering those provisions are discussed below.

Also considered below is s 7D of the SDA, which provides that actions which are ‘special measures’, as defined, are not discriminatory. This provision ‘recognises that certain special measures may have to be taken to overcome discrimination and achieve equality.’ Section 7D(2) provides that such measures are not discriminatory under the SDA.²⁰³

3.9.1 Competitive Sporting Activity (s 42)

The respondent in *Ferneley v The Boxing Authority of New South Wales*²⁰⁴ contended that, even if it was found to be providing a service and thus bound by s 22, the exemption in s 42 of the SDA would apply. Section 42(1) states:

Nothing in Division 1 or 2 renders it unlawful to exclude persons of one sex from participation in any competitive sporting activity in which the strength, stamina or physique of competitors is relevant.

In obiter comments, Wilcox J rejected the respondent’s contentions regarding the applicability of s 42.²⁰⁵ His Honour indicated that he preferred the submissions of the applicant and the Sex Discrimination Commissioner (who appeared as *amicus curiae*) to the effect that s 42(1) is only concerned with mixed-sex sporting activities and has no application to same sex sporting activity.²⁰⁶

²⁰³ Explanatory Memorandum, Sex Discrimination Amendment Bill 1995 (Cth), [37]-[38].

²⁰⁴ (2001) 115 FCR 306.

²⁰⁵ *Ibid* 326 [95].

²⁰⁶ *Ibid* 325-26 [89]-[94].

3.9.2 Voluntary Bodies (s 39)

Section 39 of the SDA provides:

Nothing in Division 1 or 2 renders it unlawful for a voluntary body to discriminate against a person, on the ground of the person's sex, marital status or pregnancy, in connection with:

- (a) the admission of persons as members of the body; or
- (b) the provision of benefits, facilities or services to members of the body.

Section 4 of the SDA defines a voluntary body as:

an association or other body (whether incorporated or unincorporated) the activities of which are not engaged in for the purpose of making a profit, but does not include:

- (a) a club;
- (b) a registered organization;
- (c) a body established by a law of the Commonwealth, of a State or of a Territory; or
- (d) an association that provides grants, loans, credit or finance to its members.

In *Gardner v All Australia Netball Association Limited*²⁰⁷ ('*Gardner*') the respondent ('AANA') had imposed an interim ban preventing pregnant women from playing netball in the Commonwealth Bank Trophy, a national tournament administered by AANA. The applicant was pregnant when the ban was imposed and was prevented from playing in a number of matches as a result. She complained of discrimination on the basis of her pregnancy in the provision of services under s 22 of the SDA. The service in this case was the opportunity to participate in the competition as a player.

It was not disputed that AANA is a voluntary body for the purposes of the SDA, membership of which consisted of State and Territory netball associations. Individual netballers were not eligible to be members of AANA. AANA accepted that it had discriminated against Ms Gardner, but argued that its actions were protected by that exemption as they were 'in connection with' the provision of services to their member associations. Raphael FM decided that the exemption in s 39 did not apply. He held that it provided protection for voluntary bodies only in their relationships with their members, but not in their relationships with non-members. Ms Gardner was not, and could not be, a member of AANA.²⁰⁸ Accordingly the actions of AANA constituted unlawful discrimination under the SDA.

²⁰⁷ [2003] FMCA 81.

²⁰⁸ *Ibid* [26].

In *Kowalski v Domestic Violence Crisis Service Inc*,²⁰⁹ the applicant complained that he had been discriminated against by the respondent. He alleged that employees of the Domestic Violence Crisis Service had spoken only to his wife when they attended their house and refused him their services and that this was by reason of his sex. Driver FM dismissed the application, finding that the applicant had not been given the service of the respondent because the employees of the service had been informed by the police that it was his wife who had complained of domestic violence and was requiring their services.²¹⁰ In relation to the issue of s 39 of the SDA, Driver FM's brief comment suggests an approach similar to that taken in *Gardner*:

The respondent had raised at the interlocutory stage of these proceedings a defence based on s.39 of the SDA. At trial, Ms Nomchong wisely did not press that defence. Section 39 clearly has no application in these proceedings because Mr Kowalski was not a member of the respondent and was not seeking to join.²¹¹

3.9.3 Services That Can Only be Provided to Members of One Sex (s 32)

Section 32 of the SDA provides:

Nothing in Division 1 or 2 applies to or in relation to the provision of services the nature of which is such that they can only be provided to members of one sex.

In *McBain v Victoria*,²¹² State legislation prohibiting the provision of fertility treatment to unmarried women not living in de facto relationships was found to be inconsistent with s 22 of the SDA²¹³ and, under s 109 of the *Constitution*, invalid to the extent of the inconsistency. On the exemption in s 32, Sundberg J stated:

Section 32 looks to the *nature* of the service provided. The nature of the service in question in this proceeding is to be determined by reference to the State Act. All infertility treatments are dealt with in the one legislative scheme. There is no breakdown of the eligibility requirements for each type of treatment. Parliament has, in effect, characterised the treatments as being of the same general nature, namely treatments aimed at overcoming obstacles to pregnancy. Accordingly, the nature of these treatments is such that they are capable of being provided to both sexes. The service is the "treatment procedure" - the artificial insemination of a woman with sperm from a man who is not her husband, or a fertilisation procedure. The reason for undertaking either of these procedures may be because of some physical

²⁰⁹ [2003] FMCA 99.

²¹⁰ *Ibid* [43].

²¹¹ *Ibid* [45].

²¹² (2000) 99 FCR 116. Note that proceedings challenging this decision were brought in the High Court, however, they were dismissed without consideration of the merits: *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372.

²¹³ For further discussion see 3.3 above.

feature of a man or a woman. The fertilisation procedure may involve taking a sound egg, capable of fulfilling its potentiality in ordinary circumstances, placing it in vitro, and fertilising it in this environment to solve a problem associated with the woman's husband. Whether the primary beneficiary of the treatment is a man or a woman, in the typical case the service is directed to achieving the desire of the couple to have a child. The fact that for biological reasons the embryo is placed into the body of the woman is but the ultimate aspect of the procedure. To concentrate solely on that aspect is not to view the overall "nature" of the service. The vice of the argument is that in order to bring the case within s 32 it is necessary to select from the scope of the service only that part of it that is provided on or with the assistance of a woman. Section 32 is intended to deal with services which are capable of being provided only to a man or only to a woman. The example given in argument is apt - a man who tells his doctor he wants a hysterectomy.²¹⁴

3.9.4 Special Measures Intended to Achieve Equality (s 7D)

Section 7D of the SDA provides:

- (1) A person may take special measures for the purpose of achieving substantive equality between:
 - (a) men and women; or
 - (b) people of different marital status; or
 - (c) women who are pregnant and people who are not pregnant; or
 - (d) women who are potentially pregnant and people who are not potentially pregnant.
- (2) A person does not discriminate against another person under section 5, 6 or 7 by taking special measures authorised by subsection (1).
- (3) A measure is to be treated as being taken for a purpose referred to in subsection (1) if it is taken:
 - (a) solely for that purpose; or
 - (b) for that purpose as well as other purposes, whether or not that purpose is the dominant or substantial one.
- (4) This section does not authorise the taking, or further taking, of special measures for a purpose referred to in subsection (1) that is achieved.

Section 7D was inserted in the SDA in December 1995²¹⁵ and is yet to be considered by the courts.

Prior to 1995, s 33 of the SDA related to special measures. It stated:

Nothing in Division 1 and 2 renders it unlawful to do an act a purpose of which is to ensure that persons of a particular sex or marital status or persons who are pregnant have equal opportunities with other persons in circumstances in relation to which provision is made by this Act.

²¹⁴ (2000) 99 FCR 116, 121 [15].

²¹⁵ *Sex Discrimination Amendment Act 1995* (Cth).

Section 33 was considered by HREOC in *Proudfoot v ACT Board of Health*.²¹⁶ Although s 33 is in substantially different terms to s 7D, Sir Ronald Wilson considered the expression ‘for the purpose of ...’ which appears in both sections. Sir Ronald stated:

Ultimately, it is not for the Commission to actually determine whether the challenged initiatives are in fact necessary or wholly suitable for achieving the purpose of ... as between men and women in the field of health care. All that s 33 requires is that those who undertake the measures must do so with that purpose in view and that it be reasonable for them to conclude that the measures would further the purpose.²¹⁷

In *Eleven Fellow Members of the McLeod Country Golf Club v McLeod Country Golf Club*²¹⁸ (discussed in 3.7.2 above), the male complainants alleged that they had been discriminated against on the ground of sex as they were not eligible for ordinary membership of the club, only ‘fellow’ membership. As fellow members they were unable to participate in management of the club.

As noted above, the complaint was dismissed on the basis of the Commissioner’s findings on s 9(13) of the SDA. Although unnecessary to decide, Commissioner Carter was also satisfied that s 33 applied. The Commissioner observed that vesting effective management at the club in women was designed solely to ensure that women were provided with equal opportunities to participate in the game of golf in all aspects including golf club management – opportunities which were either denied to women or effectively rendered nugatory by male dominated golf clubs of which females had membership or limited membership.²¹⁹

3.10 Vicarious Liability (s 106)

Section 106 of the SDA provides:

- (1) Subject to subsection (2), where an employee or agent of a person does, in connection with the employment of the employee or with the duties of the agent as an agent:
 - (a) an act that would, if it were done by the person, be unlawful under Division 1 or 2 of Part II (whether or not the act done by the employee or agent is unlawful under Division 1 or 2 of Part II); or
 - (b) an act that is unlawful under Division 3 of Part II;

this Act applies in relation to that person as if that person had also done the act.

²¹⁶ (1992) EOC 92-417.

²¹⁷ *Ibid* 78,983.

²¹⁸ (1995) EOC 92-739.

²¹⁹ *Ibid* 78,485.

- (2) Subsection (1) does not apply in relation to an act of a kind referred to in paragraph (1)(a) or (b) done by an employee or agent of a person if it is established that the person took all reasonable steps to prevent the employee or agent from doing acts of the kind referred to in that paragraph.

The following issues are considered in this section:

- onus of proof;
- ‘in connection with’ employment;
- ‘all reasonable steps’; and
- vicarious liability for victimisation.

3.10.1 Onus of Proof

The applicant bears the onus of proof, for the purposes of s 106(1) in establishing that there is a relationship of employment or agency and that the alleged act of discrimination occurred ‘in connection with’ the employment of an employee or duties of an agent.²²⁰

Once an applicant has satisfied s 106(1), then the onus of proof shifts to the employer or principal to establish that it took all reasonable steps to prevent the alleged acts taking place pursuant to s 106(2) of the SDA.²²¹

3.10.2 ‘In Connection With’ Employment

Vicarious liability extends only to those acts done ‘in connection with’ the employment of an employee or with the duties ‘of an agent as an agent’ (s 106(1)).

The phrase ‘in connection with’ has been held to have a more expansive meaning than that given to expressions used in other general law contexts such as ‘in the course of’ or ‘in the scope of’. In *McAlister v SEQ Aboriginal Corporation*²²² (*McAlister*), Rimmer FM stated that the clear intention of s 106(1) in using the word ‘connection’ was ‘to catch those acts that are properly connected with the duties of an employee’.²²³

3.10.3 ‘All Reasonable Steps’

A key issue in determining vicarious liability under s 106 is the extent to which an employer must go to prevent sexual harassment.

²²⁰ *Cooke v Plauen Holdings* [2001] FMCA 91, [35].

²²¹ *Ibid* [35]; *Aldridge v Booth* (1988) 80 ALR 1, 12 (in obiter).

²²² [2002] FMCA 109.

²²³ *Ibid* [135].

In *Boyle v Ozden*²²⁴ ('Boyle'), there was no evidence that any steps had been taken by the employers to prevent the commission of sexual harassment in the workplace. The employers in that matter were overseas at all relevant times, suggesting that they had no knowledge of the relevant incident. Nevertheless, HREOC found that s 106 of the SDA 'attaches vicarious liability to the [employers] unless they have done something active to prevent the acts complained of' and found the employers vicariously liable for the actions of its employee towards another employee.²²⁵

In *Gilroy v Angelov*²²⁶ where the employers owned a small contract cleaning business, Wilcox J found that since the respondent employers had actual knowledge of the harassment which had taken place, and had done nothing about it, they did not have a defence under s 106(2).²²⁷ His Honour noted that an employer would be more likely to show that they had taken reasonable steps to prevent sexual harassment if they followed a simple procedure of routinely providing new employees with a brief document pointing out the nature of sexual harassment, the sanctions that attach to it and the course to be followed by any employee who feels sexually harassed.²²⁸

His Honour did not express a concluded view on whether or not a defence under s 106(2) was available in circumstances where an employer has taken no steps to prevent harassment and has no knowledge that harassment has occurred or is threatened. In *Aldridge v Booth*,²²⁹ however, Spender J stated, in obiter comments (emphasis added):

It is to be noted that pursuant to [s 106(2)], it is for an employer or principal to establish all reasonable steps to be taken by that employer or principal to prevent the acts constituting the unlawful conduct. The discharge of this onus, of course, depends on the particular circumstances of a case, **but it is seriously to be doubted that it can be discharged in circumstances of mere ignorance or inactivity.** In *Tidwell v American Oil Co* (1971) 332 F Supp 424 at 436 it was said: 'The modern corporate entity consists of the individuals who manage it, and little, if any, progress in eradicating discrimination in employment will be made if the corporate employer is able to hide behind the shield of individual employee action.'²³⁰

In *Johanson v Blackledge*²³¹ ('Johanson'), discussed above,²³² the proprietors of the small butcher's shop, which had less than six employees, were unaware that their employees had provided the applicant with a bone fashioned to

²²⁴ (1986) EOC 92-165.

²²⁵ *Ibid* 76,614.

²²⁶ (2000) 181 ALR 57.

²²⁷ *Ibid* 75 [100].

²²⁸ *Ibid*.

²²⁹ (1988) 80 ALR 1.

²³⁰ *Ibid* 12.

²³¹ (2001) 163 FLR 58.

²³² See 3.8.4 and 3.8.5.

resemble a penis. The proprietors were responsible for overseeing all aspects of the daily operations of the business although they were not always present in the shop. In considering whether the proprietors could establish a defence under s 106(2), Driver FM indicated his approval of the decision in *Boyle*, as authority for the proposition that it is not necessary for a respondent to be aware of an incident of harassment for vicarious liability to apply. His Honour also confirmed that it is no excuse to a claim of sexual harassment to argue that an employee was not authorised to harass people (which might otherwise take the act outside the sphere of employment).²³³

Driver FM held that the size of the employer will be relevant to the question of whether the steps taken by the employer to prevent sexual harassment were all that could reasonably be expected in the circumstances. His Honour stated:

... it would be unrealistic to expect all employers, regardless of size, to adhere to a common standard of preventative measures. This defence has been interpreted in Australia as requiring the employer or principal to take some steps, the precise nature of which will be different according to the circumstances of the employer. Thus, large corporations will be expected to do more than small businesses in order to be held to have acted reasonably. I note, however, that the reasonableness factor applies to the nature of the steps actually taken and not to determine whether it was reasonable not to have taken steps in the first place.²³⁴

In the context of the matter before Driver FM, the butcher's shop was a very small business, and his Honour found that a written sexual harassment policy was not necessary.²³⁵ However, his Honour held that the respondents had not taken all reasonable steps in order to establish the defence under s 106(2):

There is no evidence that the respondents informed employees that disciplinary action would be taken against them should they engage in sexual harassment. No brochures containing information on sexual harassment were made available and there is no evidence that the respondents advised new staff that it was a condition of their employment that they should not sexually harass a customer or co-worker... the instructions given by the employer to the employees were not specifically targeted at sexual harassment and were manifestly ineffective in their application.²³⁶

In addition, his Honour found that the respondents in *Johanson* did not have an effective complaint handling procedure in place to deal with complaints of harassment: 'It is not enough to have a policy. One has to apply it.'²³⁷

²³³ (2001) 163 FLR 58, 80-1 [99].

²³⁴ *Ibid* 81 [101].

²³⁵ *Ibid* 82 [103].

²³⁶ *Ibid* 82 [105].

²³⁷ *Ibid*.

The principle that the size of a business will be relevant in determining whether or not ‘all reasonable steps’ have been taken has been applied elsewhere. In *McAlister*, for example, Rimmer FM stated:

Care needs to be taken when considering the meaning of the expression ‘taking reasonable steps to prevent sexual harassment occurring’. The Sex Discrimination Act expects all employers to adopt preventative measures. This defence has been interpreted in Australia as requiring the employer to take some steps, the precise nature of which will be different according to the circumstances of the employer. Thus large corporations will be expected to do more than smaller businesses in order to be held to have acted reasonably.²³⁸

In *Aleksovski v Australia Asia Aerospace Pty Ltd*,²³⁹ Raphael FM had regard to the fact that there was no system in place to ensure that the company’s equal opportunity and sexual harassment policies were disseminated to the workplace. His Honour stated that:

It is generally accepted that all ‘reasonable steps’ in connection with sexual harassment in the workplace means that the employer is required to have a policy in relation to sexual harassment which should be clear and placed in written form and communicated to all members of the workforce. But in addition to that it is generally considered that continuing education on sexual harassment should be undertaken.²⁴⁰

Raphael FM also noted that the applicant in that matter was the only female member of the workforce at that site and that no ‘special arrangements’ were made to accommodate this.²⁴¹

In *Shiels v James*²⁴² the applicant was similarly the only female employee, working on a building construction site. Raphael FM found in that case that the respondent was unable to satisfy the requirements of s 106(2) of the SDA because:

- Its anti-discrimination policy, ‘good as it was’, was not delivered to the applicant or indeed any of the workers on the site until six weeks after the applicant had commenced work and some four weeks after the allegations of sexual harassment.
- There was no verbal explanation of the policy nor was its existence specifically drawn to the attention of workers.
- The applicant could have expected that her interests would be looked after in a more direct manner in the particular circumstances in which she found herself, a lone female on a building site.

²³⁸ [2002] FMCA 109, [143]. See also *Cooke v Plauen Holdings* [2001] FMCA 91, [37].

²³⁹ [2002] FMCA 81.

²⁴⁰ *Ibid* [88].

²⁴¹ *Ibid* [92].

²⁴² [2000] FMCA 2.

- The nominated sexual harassment contact people were based off-site and the applicant had little or no contact with them on a day-to-day basis.
- The applicant complained to a senior employee about the incidents, but he did not desist from the behaviour.²⁴³

3.10.4 Vicarious Liability for Victimisation

In *Taylor v Morrison*,²⁴⁴ Phipps FM considered an application for summary dismissal on the grounds that the SDA did not provide for vicarious liability for victimisation contrary to s 94. The Commonwealth argued that s 106, which provides for vicarious liability in relation to some sections of the SDA, did not extend to the proscription of victimisation contained in s 94. In dismissing the Commonwealth's application for summary dismissal, Phipps FM found that there were substantial arguments that the common law principles of vicarious liability nevertheless applied to claims of victimisation.²⁴⁵

3.11 Aiding or Permitting an Unlawful Act (s 105)

Section 105 of the SDA provides:

A person who causes, instructs, induces, aids or permits another person to do an act that is unlawful under Division 1 or 2 of Part II shall, for the purposes of this Act, be taken also to have done the act.

Issues have arisen in a number of cases as to whether 'permitting' requires knowledge on the part of the 'permitter'.

In *Elliott v Nanda*,²⁴⁶ the issue was whether the Commonwealth, through the Commonwealth Employment Service ('CES'), permitted acts of discrimination on the grounds of sex involving sexual harassment. The primary respondent was a medical doctor. The applicant obtained employment as a receptionist with the doctor via services provided by the CES. There was evidence indicating that the respondent knew that several young women placed with the respondent had made allegations to the effect that they had been sexually harassed in a manner that would constitute discrimination on the ground of sex. (Note in this regard that s 105 relates only to Divisions 1 and 2 of Part II of the SDA, discrimination in employment and other areas. It does not extend to Division 3 of Part II – the sexual harassment provisions).

²⁴³ Ibid [74].

²⁴⁴ [2003] FMCA 79.

²⁴⁵ Ibid [22].

²⁴⁶ (2001) 111 FCR 240.

Moore J cited with approval the decision of Madgwick J in *Cooper v Human Rights and Equal Opportunity Commission*²⁴⁷ in relation to the materially identical provision of the DDA (s 122) to the effect that the notion of ‘permitting’ should not be approached narrowly.²⁴⁸ Moore J went on to state:

In my opinion, a person can, for the purposes of s105, permit another person to do an act which is unlawful, such as discriminate against a woman on the ground of her sex, if, before the unlawful act occurs, the permitter knowingly places the victim of the unlawful conduct in a position where there is a real, and something more than a remote, possibility that the unlawful conduct will occur. That is certainly so in circumstances where the permitter can require the person to put in place measures designed to influence, if not control, the person’s conduct or the conduct of the person’s employees.²⁴⁹

Moore J held that the CES had permitted the discrimination to take place as the number of complaints of sexual harassment should have alerted the CES to the distinct possibility that any young female sent to work for the doctor was at risk of sexual harassment and discrimination on the basis of sex.²⁵⁰ The fact that the particular caseworker who facilitated the employment of the applicant was probably unaware of those complaints was found by Moore J to be immaterial. His Honour said that the collective knowledge of the officers of the CES was to be treated as the knowledge of the Commonwealth.²⁵¹

²⁴⁷ (1999) 93 FCR 481. See sections 4.8 and 4.10 on the DDA for further discussion.

²⁴⁸ (2001) 111 FCR 240, 276-77 [160].

²⁴⁹ *Ibid* 292-93 [163].

²⁵⁰ *Ibid* 294-95 [169].

²⁵¹ *Ibid* 295 [170].

Chapter 4

The Disability Discrimination Act

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Chapter 4

The Disability Discrimination Act

4.1 'Disability' Defined

Section 4 of the DDA defines 'disability' as follows:

disability, in relation to a person, means:

- (a) total or partial loss of the person's bodily or mental functions; or
- (b) total or partial loss of a part of the body; or
- (c) the presence in the body of organisms causing disease or illness; or
- (d) the presence in the body of organisms capable of causing disease or illness; or
- (e) the malfunction, malformation or disfigurement of a part of the person's body; or
- (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;

and includes a disability that:

- (h) presently exists; or
- (i) previously existed but no longer exists; or
- (j) may exist in the future; or
- (k) is imputed to a person.

An issue of contention in interpreting paragraphs (f) and (g) of this definition has been whether, and to what extent, a distinction is to be drawn between a disability and its manifestations.

The issue has been settled as a result of the decision of the High Court in *Purvis v New South Wales (Department of Education and Training)*.¹ The applicant in that matter alleged that his foster son ('the student') was discriminated against on the ground of his disability when he was expelled from a school run by the respondent.

The student suffered from behavioural problems and other disabilities resulting from severe brain injury sustained when he was 6 or 7 months old.

¹ (2003) 202 ALR 133.

He was permanently excluded from his school because of incidents of 'acting out' which included verbal abuse and incidents involving kicking and punching.

The applicant claimed that the respondent had discriminated against the student by subjecting him to a 'detriment' in his education and by suspending and eventually excluding him from the school because of his misbehaviour.

The Court considered whether the definition of disability in paragraph (g) ('a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour') refers only to the underlying disorder suffered by the student, that is, his brain injury, or whether it includes the behavioural manifestations of that disorder.

The former approach had been taken by the Full Federal Court which held:

In our opinion, [the student's] conduct was a consequence of the disability rather than any part of the disability within the meaning of s 4 of the Act. This is made quite explicit in subs (g), which most appropriately describes the disability in question here and which distinguishes between the disability and the conduct which it causes...²

Such an approach was rejected by the High Court. All members of the Court (apart from Callinan J who did not express a view³) found that the definition of disability in s 4 of the DDA can include the functional limitations that may result from an underlying condition.

In relation to the facts of the present case, Kirby and McHugh JJ noted:

It is [the student's] inability to control his behaviour, rather than the underlying disorder, that inhibits his ability to function in the same way as a non-disabled person in areas covered by the Act, and gives rise to the potential for adverse treatment. To interpret the definition of 'disability' as referring only to the underlying disorder undermines the utility of the discrimination prohibition in the case of hidden impairment.⁴

Gummow, Hayne and Heydon JJ held that the paragraphs of the definition of 'disability' are not to be read as 'mutually exclusive categories of disability' and have an 'overlapping operation'.⁵ They also noted that to identify the student's disability by reference only to the physiological changes which his illness brought about in his brain, and not the behaviour it causes, would describe his disability incompletely.⁶ Furthermore, they stated that:

² *Purvis v New South Wales (Department of Education & Training)* (2002) 117 FCR 237, 248 [28].

³ (2003) 202 ALR 133, 196-97 [272].

⁴ *Ibid* 152-53 [80]. See also 137 [11] (Gleeson CJ).

⁵ *Ibid* 182 [210].

⁶ *Ibid* 182 [211].

[T]o focus on the cause of the behaviour, to the exclusion of the resulting behaviour, would confine the operation of the Act by excluding from consideration that attribute of the disabled person (here, disturbed behaviour) which makes that person 'different' in the eyes of others.⁷

The majority of the Court went on, however, to hold that the respondent did not unlawfully discriminate against the student 'because of' his disability when it suspended and then expelled him from the school by reason of his behaviour. This is discussed further in 4.2.1 below.

A similar approach to the definition of disability was also taken in an earlier decision of Raphael FM: *Randell v Consolidated Bearing Company*.⁸ In that matter, the applicant had a mild dyslexic learning difficulty and complained of discrimination when he was dismissed as a result of poor work performance. His Honour stated:

In my view there is no distinction between this applicant's 'disability' and its 'manifestation'. His 'disorder' resulted in his 'learning differently'. He learned more slowly. He was dismissed because he was learning *too* slowly.⁹

Raphael FM found in that case that the failure of the company to provide the assistance to the applicant which was available to improve his work performance and which had been made available to staff in the past, and his subsequent dismissal, constituted disability discrimination.

4.2 Direct Discrimination under the DDA

Section 5 of the DDA defines what is generally known as 'direct' discrimination. It provides:

- (1) For the purposes of this Act, a person (*discriminator*) discriminates against another person (*aggrieved person*) on the ground of a disability of the aggrieved person if, because of the aggrieved person's disability, the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person without the disability.
- (2) For the purposes of subsection (1), circumstances in which a person treats or would treat another person with a disability are not materially different because of the fact that different accommodation or services may be required by the person with a disability.

⁷ Ibid 182-83 [212].

⁸ [2002] FMCA 44. The decision was referred to with approval by McHugh and Kirby JJ in *Purvis v New South Wales (Department of Education and Training)* (2003) 202 ALR 133, 172 [168].

⁹ [2002] FMCA 44, [48].

The three key issues that have arisen in relation to this definition of discrimination are:

- issues of causation, intention and knowledge;
- the ‘comparator’ under s 5 of the DDA; and
- the concept of ‘accommodation’ under s 5(2) of the DDA.

4.2.1 Issues of Causation, Intention and Knowledge

(a) Causation and Intention

Section 5(1) of the DDA provides that discrimination occurs on the ground of a disability where there is less favourable treatment ‘because of’ the aggrieved person’s disability. Those sections which make disability discrimination unlawful under the DDA provide that it is unlawful to discriminate against a person ‘on the ground of’ the person’s disability.¹⁰ It is well established that the expression ‘because of’ requires a causal connection between the disability and any less favourable treatment accorded to the aggrieved person. It does not, however, require an intention or motive to discriminate.

In *Waters v Public Transport Corporation*¹¹ (‘*Waters*’), the High Court considered the provisions of the *Equal Opportunity Act 1984* (Vic). Section 17(1) of that Act defined discrimination as including, relevantly, less favourable treatment ‘on the ground of the status’ of a person, ‘status’ being defined elsewhere in that Act to include disability. Mason CJ and Gaudron J held:

It would, in our view, significantly impede or hinder the attainment of the objects of the Act if s 17(1) were to be interpreted as requiring an intention or motive on the part of the alleged discriminator that is related to the status or private life of the person less favourably treated. It is enough that the material difference in treatment is based on the status or private life of that person, notwithstanding an absence of intention or motive on the part of the alleged discriminator relating to either of those considerations.¹²

In *Purvis v New South Wales (Department of Education and Training)*¹³ (‘*Purvis*’), Gummow, Hayne and Heydon JJ stated:

[W]e doubt that distinctions between motive, purpose or effect will greatly assist the resolution of any problem about whether treatment occurred or was proposed ‘because of’ disability. Rather, the central questions will always be

¹⁰ See ss 15-29. Note that it is also unlawful to discriminate on the ground of a disability of any of a person’s associates.

¹¹ (1991) 173 CLR 349.

¹² Ibid 359, McHugh J agreeing, 382. Cited with approval for the purposes of the DDA in *Travers v New South Wales* (2001) 163 FLR 99, 114-15 [65].

¹³ (2003) 202 ALR 133.

– *why* was the aggrieved person treated as he or she was? If the aggrieved person was treated less favourably was it ‘because of’, ‘by reason of’, that person’s disability. Motive, purpose, effect may all bear on that question. But it would be a mistake to treat those words as substitutes for the statutory expression ‘because of’.¹⁴

Similarly in that matter, McHugh and Kirby JJ reviewed both English and Australian authority and concluded that:

... while it is necessary to consider the reason why the discriminator acted as he or she did, it is not necessary for the discriminator to have acted with a discriminatory motive. Motive is ordinarily the reason for achieving an object. But one can have a reason for doing something without necessarily having any particular object in mind.¹⁵

It appears to be accepted that a ‘real reason’ or ‘true basis’ test is appropriate in determining whether or not a decision was made ‘because of’ a person’s disability. In *IW v City of Perth*,¹⁶ Kirby J stated, in the context of the *Equal Opportunity Act 1984 (WA)*:

The object of the Act is to exclude the unlawful and discriminatory reasons from the relevant conduct. This is because such reasons can infect that conduct with prejudice and irrelevant or irrational considerations which the Act is designed to prevent. Because persons, faced with allegations of discrimination, genuinely or otherwise, assert multiple and complex reasons – and because affirmative proof of an unlawful reason is often difficult – the Act has simplified the task for the decision-maker. It is enough that it be shown that the doing of the act was ‘by reason’ or ‘on the ground’ of the particular matter in the sense that the unlawful consideration was included in the alleged discriminator’s reason or grounds. It must be the real ‘reason’ or ‘ground’. It is not enough to show that it was a trivial or insubstantial one. But once it is shown that the unlawful consideration truly played a causative part in the decision of the alleged discriminator, that is sufficient to attract a remedy under the Act.¹⁷

In *Purvis*, McHugh and Kirby JJ clarified that the appropriate test is not a ‘but for’ test, which focuses on the consequences for the complainant, but one that focuses on the mental state of the alleged discriminator and considers the ‘real reason’ for the alleged discriminator’s act.¹⁸ Gleeson CJ in *Purvis* similarly inquired into the ‘true basis’ of the impugned decision. In that case, the antisocial and violent behaviour which formed part of the student’s disability caused his expulsion from the school. Gleeson CJ held:

The fact that the pupil suffered from a disorder resulting in disturbed behaviour was, from the point of view of the school principal, neither the

¹⁴ Ibid 187 [236].

¹⁵ Ibid 171 [160].

¹⁶ (1997) 191 CLR 1,

¹⁷ Ibid 63.

¹⁸ (2003) 202 ALR 133, 171-72 [166].

reason, nor a reason, why he was suspended and expelled ... If one were to ask the pupil to explain, from his point of view, why he was expelled, it may be reasonable for him to say that his disability resulted in his expulsion. However, ss 5, 10 and 22 [of the DDA] are concerned with the lawfulness of the conduct of the school authority, and with the true basis of the decision of the principal to suspend and later expel the pupil. In light of the school authority's responsibilities to the other pupils, the basis of the decision cannot fairly be stated by observing that, but for the pupil's disability, he would not have engaged in the conduct that resulted in his suspension and expulsion. The expressed and genuine basis of the principal's decision was the danger to other pupils and staff constituted by the pupil's violent conduct, and the principal's responsibilities towards those people.¹⁹

It is important to note, however, that the DDA provides that a person's disability does not need to be the *sole*, or even the *dominant* reason for a particular decision. Section 10 provides:

If:

- (a) an act is done for 2 or more reasons; and
- (b) one of the reasons is the disability of a person (whether or not it is the dominant or a substantial reason for doing the act);

then, for the purposes of this Act, the act is taken to be done for that reason.

(b) Knowledge

Related to the question of intention and causation is the issue of the extent to which an alleged discriminator can be found to have discriminated against another person (the aggrieved person) on the ground of his or her disability where the discriminator has no direct knowledge of that disability. It appears that, at least in some circumstances, a lack of such knowledge will preclude a finding of discrimination.

The issue did not directly arise in *Purvis*, as the school knew of the disability of the student. However, at first instance, Emmett J made the following obiter comments:

where an educational authority is unaware of the disability, but treats a person differently, namely, less favourably, because of that behaviour, it could not be said that the educational authority has treated the person less favourably because of the disability...²⁰

A similar approach was taken by Wilcox J in *Tate v Rafin*.²¹ In that case, the applicant had his membership of the respondent club revoked following a

¹⁹ Ibid 138-39 [14], footnotes omitted. The majority of the Court (Gummow, Hayne and Heydon JJ with whom Callinan J agreed) decided the issue on the basis of the 'comparator' issue: see 4.2.2 below.

²⁰ *New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission* (2001) 186 ALR 69, 77 [35].

²¹ [2000] FCA 1582.

dispute. The applicant claimed, in part, that the revocation of his membership was on the ground of his psychological disability which manifested itself in aggressive behaviour, although the respondent club was unaware of his disability. Wilcox J concluded that the club had not treated Mr Tate less favourably because of his psychological disability:

The psychological disability may have caused Mr Tate to behave differently than if he had not had a psychological disability, or differently to the way another person would have behaved. But the disability did not cause the club to treat him differently than it would otherwise have done; that is, than it would have treated another person who did not have a psychological disability but who had behaved in the same way. It could not have done, if the club was unaware of the disability.²²

As can be seen from this statement, his Honour's reasoning was also related to the issue of the relevant 'comparator' for the purposes of determining 'less favourable treatment'. This issue is considered in the next section.

4.2.2 The 'Comparator' under s 5 of the DDA

Section 5(1) of the DDA requires a comparison to be made between the way in which a person with a disability is treated (or in which it is proposed they be treated) and the way in which a person 'without the disability' is treated or would be treated. That other person, whether actual or hypothetical, is often referred to as the 'comparator'.

The issue of how an appropriate comparator is chosen in a particular case has been a complicated and vexed one since the commencement of the DDA. While the law appears to have been settled by the decision of the High Court in *Purvis*, the issue is likely to remain a contentious one.

On the one hand, a line of authority had held that, when undertaking the comparison required by s 5(1) of the DDA, characteristics of the person with the disability were not to be imputed to the comparator.

The rationale for this approach was described by Sir Ronald Wilson in *Dopking v Department of Defence*:²³

It would fatally frustrate the purposes of the Act if the matters which it expressly identifies as constituting unacceptable bases for differential treatment ... could be seized upon as rendering the overall circumstances

²² Ibid [67]. See also earlier decisions of HREOC in *H v S* (Unreported, HREOC, Commissioner Webster, 23 July 1997); *White v Crown Ltd* (Unreported, HREOC, Commissioner Kenny QC, 24 July 1997); *R v Nunawading Tennis Club* (Unreported, HREOC, Commissioner Dodson, 25 September 1997). Cf *X v McHugh, Auditor-General for Tasmania* (1994) 56 IR 248.

²³ Unreported, HREOC, Sir Ronald Wilson, 13 March 1992. Extract at (1995) EOC 92-669. Note that this case is also cited as *Sullivan v Department of Defence*.

materially different, with the result that the treatment could never be discriminatory within the meaning of the Act.²⁴

This approach was approved in *IW v City of Perth*²⁵ by Toohey J (with Gummow J concurring) and Kirby J, the only members of the Court to consider this issue. In that case the aggrieved person complained of discrimination because of infection with HIV/AIDS. The respondent argued that the comparator should be imbued with the characteristics of a person infected with HIV/AIDS. Under this approach, there would not be discrimination if a person with HIV/AIDS was treated less favourably on the basis of a characteristic pertaining to HIV/AIDS sufferers, such as 'infectiousness', so long as the discriminator treated less favourably all persons who were infectious. Their Honours rejected this submission.

A similar approach to the choice of an appropriate comparator was adopted by Commissioner Innes in the *Purvis*²⁶ matter, discussed above.²⁷ The student in that case, whose behavioural problems were an aspect of his disability, was suspended, and eventually expelled, from his school. Commissioner Innes found that the comparator for the purpose of s 5 of the DDA was another student at the school in the same year but without the disability, including the behaviour which formed a part of it.

This approach was rejected on review by both Emmett J,²⁸ and the Full Federal Court.²⁹ The Full Court found that the proper comparison for the purpose of s 5 of the DDA was (emphasis in original):

... between the treatment of the complainant with the particular brain damage in question and a person without that brain damage but **in like circumstances**. This means that like conduct is to be assumed in both cases.

....

The principal object of the Act is to eliminate discrimination **on the ground of** disability (of the defined kind) in the nominated areas (s 3). The object is to remove prejudice or bias against persons with a disability. The relevant prohibition here is against discrimination **on the ground of** the person's disability (s 22). Section 5 of the Act is related to the assessment of that issue. It is difficult to illustrate the comparison called for by s 5 by way of a wholly hypothetical example, as it involves a comparison of treatment by the **particular** alleged discriminator, and requires findings of fact as to the

²⁴ *Ibid* 9.

²⁵ (1997) 191 CLR 1, 33 (per Toohey J), 67 (per Kirby J). See also *Human Rights and Equal Opportunity Commission v Mt Isa Mines Ltd* (1993) 46 FCR 301, 327 (Lockhart J); *Commonwealth of Australia v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 191, 209 (Wilcox J). Cf *Boehringer Ingelheim Pty Ltd v Reddrop* [1984] 2 NSWLR 13.

²⁶ Unreported, HREOC, Commissioner Innes, 13 November 2000.

²⁷ See 4.1 and 4.2.1 above.

²⁸ *New South Wales (Department of Education & Training) v Human Rights and Equal Opportunity Commission and Purvis* (2001) 186 ALR 69.

²⁹ *Purvis v New South Wales (Department of Education & Training)* (2002) 117 FCR 237.

particular disability, as to how the alleged discriminator treats or proposes to treat the aggrieved person, and as to how that alleged discriminator treats or would treat a person without the disability. The task is to ascertain whether the treatment or proposed treatment is based on the ground of the particular disability or on another (and non-discriminatory) ground. There must always be that contrast. To be of any value, the hypothetical illustration must make assumptions as to all factual integers.³⁰

The Full Court noted that the decisions of Toohey and Kirby JJ in *IW v City of Perth*³¹ were given in the context of the *Equal Opportunity Act 1984* (WA), which has a different structure to the DDA. The Full Court preferred the approach of Clarke JA in *Waterhouse v Bell*³² and Mahoney JA in *Boehringer Ingelheim Pty Ltd v Reddrop*.³³

The majority of the High Court in *Purvis* took the same approach as that of the Full Federal Court. While accepting that the definition of disability includes its behavioural manifestations (see section 4.1 above), the majority nevertheless held that it was necessary to compare the treatment of the pupil with the disability with a student who exhibited violent behaviour but did not have the disability. Gleeson CJ stated...

It may be accepted, as following from paras (f) and (g) of the definition of disability, that the term "disability" includes functional disorders, such as an incapacity, or a diminished capacity, to control behaviour. And it may also be accepted, as the appellant insists, that the disturbed behaviour of the pupil that resulted from his disorder was an aspect of his disability. However, it is necessary to be more concrete in relating part (g) of the definition of disability to s 5. The circumstance that gave rise to the first respondent's treatment, by way of suspension and expulsion, of the pupil, was his propensity to engage in serious acts of violence towards other pupils and members of the staff. In his case, that propensity resulted from a disorder; but such a propensity could also exist in pupils without any disorder. What, for him, was disturbed behaviour, might be, for another pupil, bad behaviour. Another pupil "without the disability" would be another pupil without disturbed behaviour resulting from a disorder; not another pupil who did not misbehave. The circumstances to which s 5 directs attention as the same circumstances would involve violent conduct on the part of another pupil who is not manifesting disturbed behaviour resulting from a disorder. It is one thing to say, in the case of the pupil, that his violence, being disturbed behaviour resulting from a disorder, is an aspect of his disability. It is another thing to say that the required comparison is with a non-violent pupil. The required comparison is with a pupil without the disability; not a pupil without the violence. The circumstances are relevantly the same, in terms of treatment, when that pupil engages in violent behaviour.³⁴

³⁰ Ibid 248 [29], 249 [32].

³¹ (1997) 191 CLR 1.

³² (1991) 25 NSWLR 99.

³³ [1984] 2 NSWLR 13.

³⁴ (2003) 202 ALR 133, 137 [11].

Similarly in their joint judgment, Gummow, Hayne and Heydon JJ stated:

In requiring a comparison between the treatment offered to a disabled person and the treatment that would be given to a person without the disability, s 5(1) requires that the circumstances attending the treatment given (or to be given) to the disabled person must be identified. What must then be examined is what would have been done in *those* circumstances if the person concerned was not disabled...

The circumstances referred to in s 5(1) are all of the objective features which surround the actual or intended treatment of the disabled person by the person referred to in the provision as the "discriminator". It would be artificial to exclude (and there is no basis in the text of the provision for excluding) from consideration some of these circumstances because they are identified as being connected with that person's disability ... Once the circumstances of the treatment or intended treatment have been identified, a comparison must be made with the treatment that would have been given to a person without the disability in circumstances that were the same or were not materially different.

In the present case, the circumstances in which [the student] was treated as he was, included, but were not limited to, the fact that he had acted as he had. His violent actions towards teachers and others formed part of the circumstances in which it was said that he was treated less favourably than other pupils.³⁵

In *Power v Aboriginal Hostels Ltd*,³⁶ Selway J followed the approach set out by Gummow, Hayne and Heydon JJ in *Purvis*. His Honour considered the correct approach to a claim of discrimination in which an applicant was dismissed from work following absences for illness. Selway J held:

If the employer would treat any employee the same who was absent from work for some weeks (whether or not the employee had a disability or not) then this would not constitute discrimination under the DDA. On the other hand, if the employer terminates the employment of an employee who has a disability (including an imputed disability) in circumstances where the employer would not have done so to an employee who was not suffering a disability then this constitutes discrimination for the purpose of the DDA.³⁷

The same approach had been taken by the FMS in the earlier case of *Randell v Consolidated Bearing Company*.³⁸ The applicant, who had a mild dyslexic learning difficulty, was employed by the respondent on a traineeship to work in the warehouse sorting and arranging stock for delivery. The applicant was dismissed after seven weeks on the basis of his poor work performance.

³⁵ Ibid 185-86 [223]-[225].

³⁶ [2003] FCA 1475.

³⁷ Ibid [6]-[8].

³⁸ [2002] FMCA 44.

Raphael FM found that the appropriate comparator was other trainees employed by the respondent who had difficulties with their performance.³⁹ The evidence established that in the past the respondent had sought assistance in relation to such difficult trainees from Employment National but, in the case of the applicant, it had failed to do so. Raphael FM concluded that the applicant had been discriminated against on the basis of his disability.

In *Minns v New South Wales*,⁴⁰ the applicant was a student at two State schools. The applicant alleged that those schools had directly discriminated against him on the basis of his disabilities (Asperger's syndrome, Attention Deficit Hyperactivity Disorder and Conduct Disorder) by requiring that he attend part-time, by suspending him and by expelling him.

In determining whether the allegation of direct discrimination had been made out, Raphael FM applied the reasoning of Emmett J at first instance in *Purvis*.⁴¹ As it was not submitted by either party that an actual comparator existed in this case, Raphael FM held that the appropriate comparator was a hypothetical student who had moved into both high schools with a similar history of disruptive behaviour to that of the applicant.⁴² His Honour ultimately found that there was no direct disability discrimination as in the majority of cases he could not conclude that the treatment of the applicant had been 'less favourable' than that of this hypothetical student.⁴³

4.2.3 'Accommodation' under s 5(2) of the DDA

Section 5(2) of the DDA provides that for the purposes of the comparison required by subsection (1):

[The] circumstances in which a person treats or would treat another person with a disability are not materially different because of the fact that different accommodation or services may be required by the person with a disability.

This section has been said to acknowledge that people with disabilities may require different treatment to achieve equality. In *AJ & J v A School (No 1)*,⁴⁴ Sir Ronald Wilson stated that:

It will be remembered that s 5(2) of the Act ensures that it is not just a question of treating the person with a disability in the same way as other people are treated; it is to be expected that the existence of the disability may

³⁹ Ibid [48].

⁴⁰ [2002] FMCA 60.

⁴¹ *New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission and Purvis* (2001) 186 ALR 69.

⁴² [2002] FMCA 60, [197].

⁴³ Ibid [211].

⁴⁴ (1998) EOC 92-948.

require the person to be treated differently from the norm; in other words that some reasonable adjustment be made to accommodate the disability.⁴⁵

On review in the Federal Court in *A School v Human Rights and Equal Opportunity Commission*,⁴⁶ the respondent argued that this interpretation of s 5(2) was incorrect as it imposed a positive obligation to treat a person with a disability more favourably than a person without a disability. Mansfield J did not accept the respondent's argument (although he ultimately found that HREOC had erred in other ways). His Honour held that it is not necessarily the case that, where the DDA applies to a particular relationship or circumstance, there is no positive obligation to provide for the need of a person with a disability for different or additional accommodation or services.

On remittal to HREOC, Commissioner McEvoy in *AJ & J v A School (No 2)*⁴⁷ interpreted Mansfield J's comments as follows:

in some circumstances there may be some positive obligation on a respondent to take steps in order to ensure there is no material difference between the treatment accorded to a person with a disability and the treatment accorded to a person in similar circumstances but without a disability. Mansfield J alludes to this in his judgment in this matter. It is my view that without this interpretation of s 5(2), it would be difficult to establish direct discrimination under the Act, except in the most blatant circumstances, and a person subjected to discriminatory treatment within the intention of the Act would most often have to rely on section 6 and establish indirect discrimination.

...

It is my view the substantial effect of s 5(2) is to impose a duty on a respondent to make a reasonably proportionate response to the disability of the person with which it is dealing in the provision of appropriate accommodation or other support as may be required as a consequence of the disability, so that in truth the person with the disability is not subjected to less favourable treatment than would a person without a disability in similar circumstances.⁴⁸

To the extent that Commissioner McEvoy's interpretation of s 5(2) suggests an obligation imposed by that subsection to provide accommodation, this has not been accepted. In *Commonwealth of Australia v Humphries*,⁴⁹ the complainant, who is visually impaired, alleged that she had been discriminated against on the basis of her disability by her employer as it had failed to provide her with equipment to perform her job. Kiefel J did not agree that there was an implied obligation on an employer to take such steps as were

⁴⁵ Ibid 78,313.

⁴⁶ [1998] 1437 FCA.

⁴⁷ Unreported, HREOC, Commissioner McEvoy, 10 October 2000.

⁴⁸ Ibid 31.

⁴⁹ (1998) 86 FCR 324.

necessary to enable a disabled employee to fulfil their employment duties. Her Honour stated:

I do not think the stated objects of the DDA go that far. ... The obligation on employers, then, is not to discriminate against disabled employees because of their disability. An unreasonable refusal to assist them may amount to wrongful conduct in a particular case. Section 5 however, does not permit the question, as to whether there is discrimination, to be answered in the affirmative on each occasion where an employer has in some way failed to assist a disabled employee.⁵⁰

In *Purvis*, a majority of the High Court rejected the suggestion that s 5(2) imposes an obligation to provide accommodation.⁵¹ While delivering separate judgments, McHugh, Kirby, Gummow, Hayne and Heydon JJ (Gleeson CJ and Callinan J not considering the issue) appeared to agree that s 5(2) is to be applied strictly in accordance with its terms.

McHugh and Kirby JJ stated:

It is not accurate... to say that s 5(2) of the Act imposes an obligation to provide accommodation. No matter how important a particular accommodation may be for a disabled person or disabled persons generally, failure to provide it is not a breach of the Act *per se*. Rather, s 5(2) has the effect that a discriminator does not necessarily escape a finding of discrimination by asserting that the actual circumstances involved applied equally to those with and without disabilities. No doubt as a practical matter the discriminator may have to take steps to provide the accommodation to escape a finding of discrimination. But that is different from asserting that the Act imposes an obligation to provide accommodation for the disabled.

As indicated by the Explanatory Memorandum, s 5(2) recognises rather than imposes the obligation of accommodation. It makes it clear that circumstances will not be materially different for the purpose of s 5(1) because, for example, a student in a wheelchair may require a ramp to gain access to a classroom while other students do not need the ramp.⁵²

⁵⁰ Ibid 335.

⁵¹ Note that at first instance, Emmett J formed a view that 'accommodation' and 'services' should be understood by reference to the inclusive definitions of those terms in s 4 of the DDA. For example, 'accommodation' under that definition 'includes residential or business accommodation'. His Honour concluded that the case before him did not have anything to do with 'accommodation' or 'services' in the sense defined and hence s 5(2) had no relevant application to the case: *New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission and Purvis* (2001) 186 ALR 69, 79 [48]. This point was not considered on appeal by the Full Federal Court and the approach of Emmett J was rejected by McHugh and Kirby JJ ([86]-[89]) and also appears to have been implicitly rejected by Gummow, Hayne and Heydon JJ in their joint judgment ([217]-[218]). Such an argument was earlier rejected by Kiefel J in *Commonwealth of Australia v Humphries* (1998) 86 FCR 324.

⁵² (2003) 202 ALR 133, 58 [104].

Gummow, Hayne and Heydon JJ also considered a suggestion that s 5(2) had the effect that a failure to provide accommodation would itself constitute ‘less favourable treatment’ – a suggestion they rejected. They stated:

What is meant by the reference, in s 5(1) of the Act, to "circumstances that are the same or are not materially different"? Section 5(2) provides some amplification of the operation of that expression. It identifies one circumstance which does not amount to a material difference: "the fact that different accommodation or services may be required by the person with a disability". But s 5(2) does not explicitly oblige the provision of that different accommodation or those different services. Rather, s 5(2) says only that the disabled person's need for different accommodation or services does not constitute a material difference in judging whether the discriminator has treated the disabled person less favourably than a person without the disability.

The Commission submitted that s 5(2) had greater significance than providing only that a need for different accommodation or services is not a material difference. It submitted that, if a school did not provide the services which a disabled person needed and later expelled that person, the circumstances in which it expelled the person would be materially different from those in which it would have expelled other students. In so far as that submission depended upon construing s 5, or s 5(2) in particular, as requiring the provision of different accommodation or services, it should be rejected. As the Commonwealth rightly submitted, there is no textual or other basis in s 5 for saying that a failure to provide such accommodation or services would constitute less favourable treatment of the disabled person for the purposes of s 5.⁵³

4.3 Indirect Discrimination under the DDA

Section 6 of the DDA provides:

For the purposes of this Act a person (‘discriminator’) discriminates against another person (‘aggrieved person’) on the ground of a disability of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition:

- (a) with which a substantially higher proportion of persons without the disability comply or are able to comply;
- (b) which is not reasonable having regard to the circumstances of the case; and
- (c) with which the aggrieved person does not or is not able to comply.

The key issues that have arisen in the context of indirect discrimination under the DDA are as follows:

- the relationship between ‘direct’ and ‘indirect’ discrimination;

⁵³ Ibid 184 [217]-[218].

- defining the ‘requirement or condition’;
- section 6(a) – comparison with persons without the disability;
- section 6(b) - ‘reasonableness’; and
- section 6(c) - ability to comply with a requirement or condition.

4.3.1 The Relationship Between ‘Direct’ and ‘Indirect’ Discrimination

In *Waters v Public Transport Corporation*⁵⁴ (‘*Waters*’), Dawson and Toohey JJ considered, in obiter comments, whether or not the provisions of the *Equal Opportunity Act 1984* (Vic) relating to direct and indirect discrimination (on grounds including ‘impairment’, as was the subject of that case) were mutually exclusive. Citing the judgments of Brennan and Dawson JJ in *Australian Iron & Steel Pty Ltd v Banovic*⁵⁵ (‘*Banovic*’), which had considered the sex discrimination provisions of the *Anti-Discrimination Act 1977* (NSW), their Honours concluded:

discrimination within s 17(1) [direct discrimination] cannot be discrimination within s 17(5) [indirect discrimination] because otherwise the anomalous situation would result whereby a requirement or condition which would not constitute discrimination under s 17(5) unless it was unreasonable could constitute discrimination under s 17(1) even if it was reasonable ... there are strong reasons for ... concluding that s 17(1) and s 17(5) deal separately with direct and indirect discrimination and do so in a manner which is mutually exclusive.⁵⁶

In *Minns v New South Wales*⁵⁷ (‘*Minns*’), the applicant alleged direct and indirect disability discrimination by the respondent. The respondent submitted that the definitions of direct and indirect discrimination are mutually exclusive and that the applicant therefore had to elect whether to pursue his or her claim as a direct or indirect discrimination complaint.

Raphael FM cited the views of Dawson and Toohey JJ in *Waters*, as well as the decision of the Federal Court in *Australian Medical Council v Wilson*⁵⁸ (a case under the RDA), in holding that the definitions of direct and indirect discrimination are mutually exclusive, stating: ‘that which is direct cannot also be indirect’.⁵⁹

However, Raphael FM stated that this does not prevent an applicant from arguing that the same set of facts constitutes direct and indirect

⁵⁴ (1991) 173 CLR 349.

⁵⁵ (1989) 168 CLR 165, 184, 171.

⁵⁶ (1991) 173 CLR 349, 393.

⁵⁷ [2002] FMCA 60.

⁵⁸ (1996) 68 FCR 46, 55.

⁵⁹ [2002] FMCA 60, [173].

discrimination: ‘The complainant can surely put up a set of facts and say that he or she believes that those facts constitute direct discrimination but in the event that they do not they constitute indirect discrimination’. His Honour relied upon the approach of Emmett J at first instance in *New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission and Purvis*⁶⁰ and that of Wilcox J in *Tate v Rafin*⁶¹ to suggest that ‘the same facts can be put to both tests’.⁶²

Before the High Court in *Purvis v New South Wales (Department of Education and Training)*,⁶³ the case was argued only as one of direct discrimination and the question of the relationship between direct and indirect discrimination was not argued. The possible factual overlap between the two grounds of discrimination was, however, highlighted in the decision of McHugh and Kirby JJ in an example given in the context of considering ‘accommodation’ under s 5(2) of the DDA.⁶⁴ Their Honours cited the example of a ‘student in a wheelchair who may require a ramp to gain access to a classroom while other students do not need the ramp’. In such a case, they stated that s 5(2) makes clear that the circumstances of that student are not materially different for the purposes of s 5(1). However, they continued:

This example also illustrates the unique difficulty that arises in discerning the division between s 5 and s 6 of the Act because s 5(2) brings the requirement for a ramp, normally associated with indirect discrimination, into the realm of direct discrimination.⁶⁵

4.3.2 Defining the ‘Requirement or Condition’

The words ‘requirement or condition’ should be construed broadly ‘so as to cover any form of qualification or prerequisite, although the actual requirement or condition in each instance should be formulated with some precision’.⁶⁶

In defining a requirement or condition in the context of goods or services being provided, it is necessary to distinguish the relevant requirement or condition from the inherent features of the relevant goods or services. In *Waters*, Mason CJ and Gaudron J noted:

the notion of ‘requirement or condition’ would seem to involve something over and above that which is necessarily inherent in the goods or services provided. Thus, for example, it would not make sense to say that a manicure

⁶⁰ (2001) 186 ALR 69.

⁶¹ [2000] FCA 1582, [69].

⁶² [2002] FMCA 60, [245].

⁶³ (2003) 202 ALR 133.

⁶⁴ See generally 4.2.3 above.

⁶⁵ (2003) 202 ALR 133, 159 [105].

⁶⁶ *Waters v Public Transport Corporation* (1991) 173 CLR 349, 393 (Dawson and Toohey JJ), 406-07 (McHugh J); *Daghlian v Australian Postal Corporation* [2003] FCA 759, [110] (Conti J).

involves a requirement or condition that those availing themselves of that service have one or both of their hands.⁶⁷

In *Clarke v Catholic Education Office*⁶⁸ ('Clarke'), the applicant contended that his son ('the student'), who was deaf, was subjected to indirect discrimination by virtue of the 'model of learning support' put forward by the respondents as part of the terms and conditions upon which the offer of his admission to their school was made. It was claimed that the 'model of learning support' did not include the provision of Australian Sign Language ('Auslan') interpreting assistance and instead relied upon the use of note-taking as the primary communication tool to support the student in the classroom. It was alleged that this would not allow the student to adequately participate in and receive classroom instruction.

Madgwick J affirmed the principles outlined above and noted that the DDA is beneficial legislation which is to be broadly construed: 'it would defeat the purpose of the DDA if a narrow interpretation [of the expression "requirement or condition"] were to be taken'.⁶⁹

His Honour found that the requirement or condition was correctly defined as being a requirement that the student was 'to participate in and receive classroom instruction without the assistance of an interpreter'.⁷⁰ His Honour did not accept the argument by the respondent that it was an intrinsic feature of the service provided, namely 'education' or 'teaching' that such education be provided in English.

Madgwick J held that a characterisation of the requirement or condition as being participation in classroom instruction without an Auslan interpreter:

...makes a cogent and fair distinction between the service provided, namely education by classroom instruction or teaching, and an imposed requirement or condition, namely that [the student] participate in such instruction without the assistance of an Auslan interpreter. It is not necessarily inherent in the education of children in high schools that such education be undertaken without the aid of an interpreter. It is not perhaps even necessarily inherent, in an age of computers and cyberspace, that it be conducted to any particular degree in spoken English or in any other spoken language, although the concept of conventional classroom education may be accepted as necessarily implying the use of a spoken language. At least in the circumstances of this case, it was not inherent, however, that an interpreter would not be supplied, if needed. It is accepted by the respondents that their schools are and should be open for the reception and education of pupils with disabilities, including congenital profound deafness. A person disabled by that condition may, at

⁶⁷ (1991) 173 CLR 349, 361 (Mason CJ and Gaudron J, with whom Deane J agreed), see also 394 (Dawson and Toohey JJ), 407 (McHugh J).

⁶⁸ (2003) 202 ALR 340.

⁶⁹ *Ibid* 351 [44].

⁷⁰ *Ibid* 351 [45].

least for a significant period of time, be unable, to a tolerable level, to receive or to offer communication in or by means of spoken English or any other spoken language, without the aid of an interpreter, at least in some areas of discourse, knowledge or skill. Effectively to require such a person to receive education without the aid of an interpreter, while it may or may not be reasonable in the circumstances, is to place a requirement or condition upon that person's receipt of education or educational services that is not necessarily inherent in classroom instruction. There is nothing inherent in classroom instruction that makes the provision of silent sign interpretation for a deaf pupil impossible...⁷¹

4.3.3 Comparison with Persons without the Disability (s 6(a))

Section 6(a) requires a consideration of whether or not a substantially higher proportion of persons without the disability of the aggrieved person comply or are able to comply with an impugned requirement or condition. Accordingly, a key element in any indirect discrimination claim will be identification of a pool of persons with whom the aggrieved person can be compared.

In the context of sex discrimination cases brought under state legislation and the former provisions of the SDA,⁷² a number of decisions have considered the manner in which such comparison is to take place. In *Banovic*, a majority of the High Court held that it was necessary to first identify a 'base group' or 'pool' which will then 'enable the proportions of complying men and women to be calculated'.⁷³ As Dawson J expressed it:

a proportion must be a proportion of something, so that it is necessary to determine the appropriate grouping or pool within which to calculate the proportions which are to be compared.⁷⁴

Determining the appropriate 'pool' will vary according to the nature and context of the case.⁷⁵ Few cases have considered this issue in the context of the DDA. One reason for this may be that in the context of physical disability particularly, compliance or non-compliance with a requirement or condition (such as the use of stairs) is a matter easily accepted without the need for complex comparisons or statistical information.

⁷¹ Ibid.

⁷² Note that the provisions of the SDA and the DDA were previously in the same terms in relation to indirect discrimination. However, the SDA was amended to insert the current s 5(2) by the *Sex Discrimination Amendment Act 1995* (Cth). See section 3.6 for further discussion of the amended provisions.

⁷³ (1987) 168 CLR 165, 178 (Deane and Gaudron JJ).

⁷⁴ Ibid 187.

⁷⁵ Ibid 177-78 (Deane and Gaudron JJ), 187 (Dawson J). See also *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 150 ALR 1, 40-3 (Sackville J); *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251, 259-63 (Bowen CJ and Gummow J).

In *Daghlian v Australian Postal Corporation*⁷⁶ ('Daghlian'), for example, Conti J considered a requirement or condition imposed by the respondent upon its employees that they not be seated at the retail counter of one of its offices during work hours. His Honour stated:

No issue arises in relation to ss6(a) or 6(c) of the DD Act, since there is no evidence that for instance any Manly Post Officer employee, other than the applicant, was not able to comply with Australia Post's so-called chair policy.⁷⁷

Raphael FM in *Minns* suggested that the 'complex comparisons' proposed in cases such as *Banovic* may not be appropriate or necessary in the context of disability discrimination cases. His Honour noted that such an approach is 'required in cases where it is necessary to tease out actual discrimination which is not evident at first blush'. He also noted that the cases 'in support of the complex comparisons are sex discrimination cases', not disability discrimination cases.⁷⁸

While his Honour accepted that 'it is for the applicant to prove his case and if that requires a complex, time consuming and undoubtedly expensive exercise in comparisons then it must be undertaken', he cited the comments of Emmett J (in obiter comments) at first instance in the *Purvis* matter⁷⁹ and suggested that his Honour 'did not appear to be troubled by fitting the applicant into a pool'.⁸⁰

As discussed above,⁸¹ the applicant in *Minns* alleged that a State high school had indirectly discriminated against him on the basis of his disability by requiring that he comply with its disciplinary policy and subsequently suspending and expelling him. He claimed that he was, by virtue of his disabilities (Asperger's syndrome, Attention Deficit Hyperactivity Disorder and Conduct Disorder), unable to comply with the requirement or condition imposed in the form of this disciplinary policy.

Having considered the authorities on the issue of the comparison required by s 6(a), Raphael FM found:

There is no evidence in this case that any one else suffered [the student]'s disabilities although it is known from the evidence of the teachers and of the school records placed in evidence that the majority of students in [the student]'s classes did comply with the policies. No evidence was produced by

⁷⁶ [2003] FCA 759.

⁷⁷ *Ibid* [110]. Note, however, that the onus is on an applicant to make out indirect discrimination.

⁷⁸ [2002] FMCA 60, [250]-[253].

⁷⁹ *New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission* (2001) 186 ALR 69.

⁸⁰ [2002] FMCA 60, [253]-[254].

⁸¹ See 4.2.2 above.

the respondent that any members of [the student]'s classes were unable to comply with the policies apart from [the student].⁸²

In *Clarke*, however, Madgwick J followed the approach in *Banovic*. As outlined above,⁸³ the case concerned the complaint that a student, who was deaf, was indirectly discriminated against by virtue of the 'model of learning support' put forward by the respondents as part of the terms and conditions upon which the offer of admission to their school was made. His Honour stated:

To determine whether there has been discrimination it is necessary to identify an "appropriate base group" with which to compare the individual claiming discrimination, and to decide whether a substantial proportion of those individuals in the base group are able to comply with the relevant requirement or condition: *Australian Iron & Steel Pty Ltd v Banovic* (1987) 168 CLR 165 at 178-79; 187. The applicant defines the relevant base group for comparison with [the student] as either those students attending year seven at the College in 2000 or all students enrolling in classes at the College in 2000. It is submitted, on either definition, that a substantial proportion of the base group is able to meet the requirement or condition (to participate and receive classroom instruction without an interpreter).

Counsel for the respondents concedes that, if the applicant's characterisation is accepted, then the requirements of s 6(a) of the DDA will be met. However, the respondents submit that the applicant's choice of a base group is legally inappropriate, as students without [the student]'s disability would not, as a matter of law, have been "provided with", that is: made subject to, the model of support...

The respondent's contentions as to the appropriateness of the base group really involve the re-assertion, in another guise, of its proposed characterisation of the essential nature of the relevant service, which, as indicated, I reject.⁸⁴

It would appear that the approach taken in cases such as *Banovic* should be regarded as the correct one, but in practice it may be that the comparison required for the purposes of s 6(a) is in fact a reasonably simple one, and that courts continue to be 'untroubled' by the issue.

4.3.4 Reasonableness (s 6(b))

Section 6(b) requires that the relevant requirement or condition be 'not reasonable having regard to the circumstances of the case'.

In *Sluggett v Human Rights and Equal Opportunity Commission*,⁸⁵ Drummond J cited with approval the following statement of McHugh J in

⁸² [2002] FMCA 60, [254].

⁸³ See 4.3.2 above.

⁸⁴ (2003) 202 ALR 340, 352 [46]-[48].

⁸⁵ (2002) 123 FCR 561.

Waters in which the High Court had considered a provision in the *Equal Opportunity Act 1984* (Vic) similar to s 6(b) of the DDA:

In reconsidering whether the imposition of the requirements or conditions was reasonable, the Board must examine all the circumstances of the case. This inquiry will necessarily include a consideration of evidence viewed from the point of view of the appellants [the applicants at first instance] and of the Corporation [the respondent at first instance].⁸⁶

In *Minns*, Raphael FM approved the test of reasonableness articulated by Bowen CJ and Gummow J in *Secretary, Department of Foreign Affairs and Trade v Styles*⁸⁷ as follows:

The test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience. ... The criterion is an objective one, which requires the court to weigh the nature and extent of the discretionary effect on the one hand, against the reasons advanced in favour of the requirement or condition on the other. All of the circumstances of the case must be taken into account.⁸⁸

Raphael FM noted that this passage was approved in *Waters*, in the context of the *Equal Opportunity Act 1984* (Vic) by Dawson, Toohey and Deane JJ.⁸⁹

Raphael FM stated that it is not sufficient that reasonableness be considered only from the perspective of the applicant. It must be looked at in the context of all persons to whom the condition or requirement might apply.⁹⁰ In the present case, the applicant complained about the application of a school's disciplinary policy to him.⁹¹ Raphael FM held that the high school disciplinary policy was reasonable in all of the circumstances. He found that the classes would not have been able to function if a student could not be removed for disruptive behaviour and other students would not be able to achieve their potential if most of the teacher's time was taken up handling that student.⁹²

In *Travers v New South Wales*⁹³ ('*Travers*'), Raphael FM considered a requirement or condition that students in a particular class utilise the toilet in another building, rather than a toilet outside her classroom (which was available to another student with a disability). This was a requirement with which the applicant, a student with a disability that caused incontinence, could

⁸⁶ (1991) 173 CLR 349, 411, cited in *Sluggett v Human Rights and Equal Opportunity Commission* (2002) 123 FCR 561, 574 [46].

⁸⁷ (1989) 88 ALR 621, 263, affirming the test applied by Wilcox J at first instance: *Styles v Secretary, Department of Foreign Affairs & Trade* (1988) 84 ALR 408, 429.

⁸⁸ [2002] FMCA 60, [258].

⁸⁹ (1991) 173 CLR 349, 395-96 (Dawson and Toohey JJ), 383 (Deane J). Raphael FM also cited with approval a similar statement by Harper J in *Victoria v Schou* (2001) 3 VR 655 under the *Equal Opportunity Act 1995* (Vic).

⁹⁰ [2002] FMCA 60, [260].

⁹¹ See 4.2.2 above.

⁹² [2002] FMCA 60, [263].

⁹³ (2001) 163 FLR 99.

not comply.⁹⁴ Raphael found the requirement or condition to be unreasonable, having considered the perspective of the applicant, the school and other students.

In *Clarke*, Madgwick J stated as follows:

Following *Secretary, Department of Foreign Affairs and Trade v Styles and Anor* (1989) 23 FCR 251, *Commonwealth Bank of Australia v Human Rights & Equal Opportunity Commission* (1997) 80 FCR 78, the following may be stated as settled propositions of law:

- (1) The onus of showing that the impugned requirement or condition is not reasonable rests on the person aggrieved by it.
- (2) Reasonableness is to be determined having regard to all the circumstances of the case. These include, but are not limited to:
 - the nature and extent of the effect of the discriminatory requirement or condition;
 - the reasons advanced in favour of it;
 - the possibility of alternative action; and
 - matters of “effectiveness, efficiency and convenience”.
- (3) The test is an objective one – neither the preferences of the aggrieved person nor the mere convenience of the service supplier can be determinative, though both may be relevant factors.
- (4) The test of reasonableness is “less demanding than one of necessity, but more demanding than a test of convenience”. Thus, if the aggrieved person can show that it may have been convenient for the discriminator to impose the requirement or condition but it was not reasonable in all the circumstances, that will suffice. Likewise, if it appears that although it was not necessary for the discriminator to impose the requirement or condition, but the aggrieved person does not establish that it was unreasonable to do so, there is no indirect discrimination, as statutorily defined.
- (5) The test is reasonableness not correctness; that is, a decision of the putative discriminator to impose the requirement or condition, may be a reasonable one although not everyone, or even most people, would agree with it.⁹⁵

On balance in the case before him, his Honour found that the unwillingness of the respondent school to make Auslan interpretation available to a deaf student was unreasonable.

The approach by Conti J in *Daghlian* confirms the broad scope of considerations relevant to the question of ‘reasonableness’. In that matter, the respondent’s ‘no chair’ policy, preventing employees from using stools behind the retail counter, was found to impose a ‘requirement or condition’

⁹⁴ See 4.3.5 below on the issue of the ability to comply with a requirement or condition.

⁹⁵ (2003) 202 ALR 340, [51].

that the applicant not be seated at the retail counter during her work hours. The applicant had physical disabilities which limited her ability to stand for long periods.

In finding that the requirement or condition was not reasonable, his Honour considered a range of factors, including:

- health and safety issues (it was claimed by the respondent that the presence of stools created a danger of tripping for other staff);
- the needs of the applicant (identified in medical and ergonomic reports) to assist her to work satisfactorily and efficiently in the performance of her duties, notwithstanding her physical disabilities;
- the applicant's status as a competent and conscientious employee and a dutiful member of the counter staff;
- the desire of the respondent to create a 'new image' for its post shops; and
- the ability for the needs of the applicant to be accommodated through structural changes to the counter area.⁹⁶

Earlier decisions of HREOC (sitting as a tribunal as it did at the time) had held that evidence adduced by a respondent in relation to financial hardship faced should not be considered relevant to determining the reasonableness or otherwise of a requirement or condition. On this view, such matters should be considered instead in the context of 'unjustifiable hardship' (see 4.8 below). The rationale for this approach was given by Sir Ronald Wilson in *Scott v Telstra Corporation Ltd*:⁹⁷

The careful elaboration in the DDA of the defence of unjustifiable hardship would be a nonsense if all such matters were relevant to establish the reasonableness of the requirement. Furthermore, there would be a reversal of the onus of proof. This is not to say that the financial circumstances of the respondent are necessarily irrelevant. It all depends on the precise character of the requirement.⁹⁸

The 'reversal of the onus of proof' to which Sir Ronald Wilson refers arises because the onus is on an applicant to establish discrimination, including that the relevant requirement or condition is 'not reasonable', while the onus of proving unjustifiable hardship falls on a respondent.

While not directly considering these earlier decisions, the more recent decisions under the DDA discussed above take a broad approach to

⁹⁶ [2003] FCA 759, [111].

⁹⁷ (1995) EOC 92-917.

⁹⁸ *Ibid* 78,400. See also *Francey v Hilton Hotels of Australia Pty Ltd* (1997) EOC 92-903, 77,450-51 (Commissioner Innes).

‘reasonableness’ which would appear to be inconsistent with the exclusion from consideration of factors relevant to ‘unjustifiable hardship’.⁹⁹

4.3.5 Ability to Comply with a Requirement or Condition (s 6(c))

In *Travers*, the Federal Court considered the test for indirect discrimination, in the context of an application for summary dismissal. The Federal Court held that a ‘reasonably liberal’ interpretation of the phrase ‘is not able to comply’ in s 6(c) is required.¹⁰⁰ As discussed above,¹⁰¹ the applicant in that case was a 12-year-old girl with spina bifida and resultant bowel and bladder incontinence. She claimed that she was denied access to a toilet for disabled students which was near her classroom. It was argued by the applicant that requiring her to use toilets further away from her classroom imposed a condition with which she was unable to comply because she was unable to reach the toilet in time to avoid an accident.¹⁰² Lehane J held that while it was not literally impossible for the applicant to comply with the condition, the consequences would have been seriously embarrassing and distressing. In those circumstances, the applicant was not able to comply with the requirement or condition in the relevant sense.

Similarly, in *Clarke*, Madgwick J held that ‘compliance’ with a requirement or condition ‘must not be at the cost of being thereby put at a disadvantage in relation to the comparable base group’.¹⁰³ In concluding that a deaf student would not have been able to ‘comply’ with a requirement or condition that he participate in classroom instruction without an Auslan interpreter, His Honour stated:

In my opinion, it is not realistic to say that [the student] could have complied with the model. In purportedly doing so, he would have faced serious disadvantages that his hearing classmates would not. These include: contemporaneous incomprehension of the teacher’s words; substantially impaired ability to grasp the context of, or to appreciate the ambience within which, the teacher’s remarks are made; learning in a written language without

⁹⁹ It can be noted, however, that the statutory context of the DDA differs from that under the RDA or SDA, which do not contain notions of ‘unjustifiable hardship’ and, in the case of the SDA, has a different statutory framework for ‘reasonableness’ (see SDA ss 7C and 7B). The DDA also differs relevantly from other statutes such as the (then) *Equal Opportunity Act 1984* (Vic), which was the subject of consideration in *Waters v Public Transport Corporation* (1991) 173 CLR 349. That Act contained a defence which required a respondent to establish ‘more onerous terms’, an expression which was not defined, and which may appear to contemplate a lesser standard to that required by ‘unjustifiable hardship’ under the DDA.

¹⁰⁰ [2000] FCA 1565, [17].

¹⁰¹ See 4.3.4 above.

¹⁰² Lehane J referred to the line of cases including *Mandla v Lee* [1983] 2 AC 548; *Australian Public Service Association v Australian Trade Commission* [1988] EOC 92-228, 77,162; *Styles v Secretary, Department of Foreign Affairs and Trade* [1988] EOC 92-239, 77,238; in support of this interpretation of compliance.

¹⁰³ (2003) 202 ALR 340, 352-53 [49].

the additional richness which, for hearers, spoken and “body” language provides and which, for the deaf, Auslan (and for all I know, other sign languages) can provide, and the likely frustration of knowing, from his past experience in primary school, that there is a better and easier way of understanding the lesson, which is not being used. In substance, [the student] could not meaningfully “participate” in classroom instruction without Auslan interpreting support. He would have “received” confusion and frustration along with some handwritten notes. That is not meaningfully to receive classroom education.¹⁰⁴

4.4 Disability Discrimination in Employment

Section 15 of the DDA provides:

15 Discrimination in employment

- (1) It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against a person on the ground of the other person’s disability or a disability of any of that other person’s associates:
 - (a) in the arrangements made for the purpose of determining who should be offered employment; or
 - (b) in determining who should be offered employment; or
 - (c) in the terms or conditions on which employment is offered.
- (2) It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against an employee on the ground of the employee’s disability or a disability of any of that employee’s associates:
 - (a) in the terms or conditions of employment that the employer affords the employee; or
 - (b) by denying the employee access, or limiting the employee’s access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment; or
 - (c) by dismissing the employee; or
 - (d) by subjecting the employee to any other detriment.
- (3) Neither paragraph (1)(a) nor (b) renders it unlawful for a person to discriminate against another person, on the ground of the other person’s disability, in connection with employment to perform domestic duties on the premises on which the first-mentioned person resides.
- (4) Neither paragraph (1)(b) nor (2)(c) renders unlawful discrimination by an employer against a person on the ground of the person’s disability, if taking into account the person’s past training, qualifications and experience relevant to the particular employment and, if the person is already employed by the employer, the person’s performance as an

¹⁰⁴ Ibid.

employee, and all other relevant factors that it is reasonable to take into account, the person because of his or her disability:

- (a) would be unable to carry out the inherent requirements of the particular employment; or
- (b) would, in order to carry out those requirements, require services or facilities that are not required by persons without the disability and the provision of which would impose an unjustifiable hardship on the employer.

The key issues for cases under s 15 of the DDA, considered in this section, are:

- the meaning of ‘employment’;
- ‘benefits associated with employment’ and ‘any other detriment’; and
- inherent requirements.

Note that the issue of unjustifiable hardship which arises in s 15(4)(b) and elsewhere in the DDA is considered separately below: see 4.8.

4.4.1 Meaning of ‘Employment’

In *Ryan v Presbytery of Wide Bay Sunshine Coast*,¹⁰⁵ the applicant had been forced to resign from a position as Minister with the respondent Church. The nature of that ‘resignation’ was a matter of dispute, and followed the respondent ‘severing of the pastoral tie’ with, or ‘demişsioning’, the applicant.

Baumann FM considered an application to allow an extension of time for the commencement of proceedings pursuant to s 46PO(2) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (‘HREOC Act’). In dismissing the application, Baumann FM considered the prospects of success of the application, including whether or not the applicant and respondent were in a relationship of employer and employee for the purposes of s 15 of the DDA.

Based on common law authorities, Baumann FM found that the applicant would have ‘some difficulty in establishing, as a matter of law, that he was an employee of the Church at the time’. This was because the relationship with the church was ‘a religious one, based on consensual compact to which the parties were bound by their shared faith, based on spiritual and religious ideas, and not based on common law contract’.¹⁰⁶

¹⁰⁵ [2001] FMCA 12.

¹⁰⁶ *Ibid*, [16]-[17]. Baumann FM cited with approval *Greek Orthodox Community of South Australia Inc v Ermogenous*, (2000) 77 SASR 523, which had adopted a decision of Wright J, President of the Industrial Relations Commission of New South Wales, in *Knowles v Anglican Church Property Trust, Diocese of Bathurst* [1999] 89 IR 47, a case of alleged unfair dismissal by a priest of the Anglican church.

4.4.2 'Benefits Associated with Employment' and 'Any Other Detriment'

In *McBride v Victoria (No 1)*¹⁰⁷ the applicant had complained to a supervisor about rostering for duties which were inconsistent with her disabilities (which had resulted from work-related injuries). The supervisor was found to have responded: 'What the fuck can you do then?'¹⁰⁸

McInnis FM accepted an argument by the applicant that this behaviour denied the applicant 'quiet enjoyment' of her employment which was a benefit associated with employment, in breach of s 15(2)(b) of the DDA.¹⁰⁹ He further held that the conduct was sufficient to constitute 'any other detriment' under s 15(2)(d).

4.4.3 Inherent Requirements

Section 15(4) provides a defence to a claim of unlawful discrimination in circumstances where a person is unable to 'carry out the inherent requirements of the particular employment'. The onus of proving the defence is on the respondent.¹¹⁰

In *Qantas Airways Ltd v Christie*,¹¹¹ Mr Christie had complained that he was terminated from his employment as a pilot by reason of his age (60) contrary to s 170DF(1) of the *Industrial Relations Act 1988* (Cth). Section 170DF(2) of that Act provided a defence if the reason for termination was based on the 'inherent requirements of the particular position'. In considering the meaning of 'inherent requirements', Brennan CJ stated:

The question whether a requirement is inherent in a position must be answered by reference not only to the terms of the employment contract but also by reference to the function which the employee performs as part of the employer's undertaking and, except where the employer's undertaking is organised on a basis which impermissibly discriminates against the employee, by reference to that organisation.¹¹²

Gaudron J held that an 'inherent requirement' was something 'essential to the position'¹¹³ and suggested that:

¹⁰⁷ [2003] FMCA 285.

¹⁰⁸ *Ibid* [48].

¹⁰⁹ *Ibid* [55], [61]. The applicant relied upon *R v Equal Opportunity Board; Ex parte Burns* (1985) VR 317.

¹¹⁰ *Commonwealth of Australia v Human Rights and Equal Opportunity Commission* (1996) 70 FCR 76, 87-8 (Cooper J); *Power v Aboriginal Hostels Ltd* [2003] FCA 1475, [19] (Selway J); *Williams v Commonwealth* [2002] FMCA 89, [144] (McInnis FM).

¹¹¹ (1998) 193 CLR 280.

¹¹² *Ibid* 284 [1].

¹¹³ *Ibid* 294 [34].

A practical method of determining whether or not a requirement is an inherent requirement, in the ordinary sense of that expression, is to ask whether the position would be essentially the same if that requirement were dispensed with.¹¹⁴

In *X v Commonwealth*¹¹⁵ the High Court considered s 15(4) of the DDA. The appellant, X, was discharged from the Army upon being diagnosed HIV-positive (although he enjoyed apparent good health and was ‘symptom free’). The Commonwealth argued that it was an inherent requirement of the applicant’s employment that he be able to be deployed as required by the Defence Force. This requirement arose out of considerations of operational effectiveness and efficiency. The Commonwealth maintained that the appellant could not be deployed as needed because, whether in training or in combat, he may be injured and spill blood with the risk of transmission of HIV infection to another soldier.

In proceedings at first instance before HREOC,¹¹⁶ it was held that the ‘inherent requirements’ of the employment should be understood as referring to the employee’s physical ability to perform the characteristic tasks or skills of the particular employment. In the present case, the employee was able to perform the requisite tasks and on this basis, the complaint was upheld. The inability to deploy the complainant was found to result not from the personal consequence of the complainant’s disability, but from the policy of the ADF. Judicial review of that decision was sought in the Federal Court. That application was initially dismissed¹¹⁷ and then, on appeal to the Full Court, upheld.¹¹⁸ On appeal to the High Court, the Court found that the decision of HREOC was wrong in law and allowed the appeal, remitting the matter to be determined according to law. McHugh J stated:

‘the inherent requirements’ of a ‘particular employment’ are not confined to the physical ability or skill of the employee to perform the ‘characteristic’ task or skill of the employment. In most employment situations, the inherent requirements of the employment will also require the employee to be able to work in a way that does not pose a risk to the health or safety of fellow employees.¹¹⁹

Similarly, Gummow and Hayne JJ (with whom Gleeson CJ and Callinan J agreed), held:

It follows from both the reference to inherent requirements and the reference to particular employment that, in considering the application of s 15(4)(a), it is necessary to identify not only the terms and conditions which stipulate

¹¹⁴ Ibid 295 [36].

¹¹⁵ (1999) 200 CLR 177.

¹¹⁶ *X v Department of Defence* (1995) EOC 92-715.

¹¹⁷ *Commonwealth v Human Rights and Equal Opportunity Commission* (1996) 70 FCR 76.

¹¹⁸ *Commonwealth v Human Rights and Equal Opportunity Commission* (1998) 76 FCR 513.

¹¹⁹ (1999) 200 CLR 177, 181-82 [11].

what the employee is to do or be trained for, but also those terms and conditions which identify the circumstances in which the particular employment will be carried on. Those circumstances will often include the place or places at which the employment is to be performed and may also encompass other considerations. For example, it may be necessary to consider whether the employee is to work with others in some particular way. It may also be necessary to consider the dangers to which the employee may be exposed and the dangers to which the employee may expose others.¹²⁰

McHugh J noted that it is for the trier of fact to determine whether or not a requirement is inherent in a particular employment. A respondent is not able to organise or define their business so as to permit discriminatory conduct.¹²¹ However, his Honour suggested that ‘appropriate recognition’ must be given ‘to the business judgment of the employer in organizing its undertaking and in regarding this or that requirement as essential to the particular employment’.¹²²

McHugh J also noted that the concept of ‘inherent requirements’ must be understood in the context of the defence of ‘unjustifiable hardship’ (see 4.8 below), such that an employer may be required to provide assistance to an employee to enable them to fulfil the inherent requirements of a job.

He stated:

Section 15(4) must be read as a whole. When it is so read, it is clear enough that the object of the sub-section is to prevent discrimination being unlawful whenever the employee is discriminated against because he or she is unable either alone or with assistance to carry out the inherent requirements of the particular employment. If the employee can carry out those requirements with services or facilities which the employer can provide without undue hardship, s 15(4) does not render lawful an act of discrimination by the employer that falls within s 15. For discrimination falling within s 15 to be not unlawful, therefore, the employee must have been discriminated against because he or she was:

- (a) not only unable to carry out the inherent requirements of the particular employment without assistance; but was also
- (b) able to do so only with assistance that it would be unjustifiably harsh to expect the employer to provide.¹²³

Note, however, that this does not mean that an employer is required to modify the nature of a particular employment, or its inherent requirements, to accommodate a person with a disability:

¹²⁰ Ibid 208 [103].

¹²¹ Ibid 189-90 [37]. See also Gummow and Hayne JJ (with whom Gleeson CJ and Callinan J agreed) who note that ‘the reference to “inherent” requirements would deal with some, and probably all, cases in which a discriminatory employer seeks to contrive the result that ... disabled [people] are excluded from a job’, 208 [102].

¹²² Ibid 189 [37].

¹²³ Ibid 190 [39]. Gummow and Hayne JJ (with whom Gleeson CJ and Callinan J agreed) noted their agreement with McHugh J on this point, 208-09 [104].

the requirements that are to be considered at the requirements of the *particular* employment, not the requirements of employment of some identified type or some different employment modified to meet the needs of a disabled employee or applicant for work.¹²⁴

This point was central to the decision in *Cosma v Qantas Airways Limited*¹²⁵ ('*Cosma*'). The applicant in that matter was employed by the respondent as a porter in ramp services at Melbourne Airport. It was accepted that he was not able to perform the 'inherent requirements' of his position due to a shoulder injury. His application was dismissed by Heerey J because the applicant failed to identify any services or facilities which might have been provided by the employer pursuant to s 15(4)(b) to enable him to fulfil the inherent requirements of the particular employment. His Honour noted:

this provision does not require the employer to alter the nature of the particular employment or its inherent requirements. Rather it is a question of overcoming an employee's inability, by reason of disability, to perform such work. This is to be done by provision of assistance in the form of 'services', such as providing a person to read documents for a blind employee, or 'facilities' such as physical adjustment like a wheel chair ramp. The 'services' or 'facilities' are external to the 'particular employment' which remains the same.¹²⁶

The decision in *Cosma* was distinguished in the case of *Barghouthi v Transfield Pty Limited*¹²⁷ ('*Barghouthi*'), where Hill J found that an employee had suffered unlawful discrimination when he was constructively dismissed from his employment after advising his employer that he was unable to return to work on account of a back injury. Hill J held that, unlike the position in *Cosma*, there was no evidence that the applicant 'could not continue his employment with [the respondent] working in an office or in some capacity not inconsistent with his disability'. His Honour went on to find that:

The failure to explore such possibilities means that the respondent's dismissal cannot fall within the terms of s 15(4) and the dismissal amounts to discrimination in employment.¹²⁸

While the decision would appear to blur the distinction between factors which accommodate the needs of a person with a disability and those which require a modification of the nature of a particular employment, the decision highlights that the onus is on the respondent to make out this defence to a claim of discrimination.

¹²⁴ Ibid 208 [102] (Gummow and Hayne JJ, with whom Gleeson CJ and Callinan J agreed).

¹²⁵ [2002] FCA 640.

¹²⁶ Ibid [67]. Alternative duties which had been arranged as part of the applicant's rehabilitation programme (which was ultimately unsuccessful) were found not to be part of his 'particular employment': Ibid [54]-[55]. The decision of Heerey J was upheld on appeal: *Cosma v Qantas Airways Ltd* (2002) 124 FCR 504.

¹²⁷ (2002) 122 FCR 19.

¹²⁸ Ibid 27 [24].

In *Williams v Commonwealth*,¹²⁹ the applicant was discharged from the RAAF on the ground of his disability, namely insulin dependent diabetes ('IDD'). His discharge followed the introduction of a directive requiring every member of the RAAF to be able to be deployed to 'Bare Base' facilities (which imposed arduous conditions and provided little or no support) and undertake base combatant duties.

The Commonwealth argued that the applicant was unable to carry out these 'inherent requirements' by virtue of his IDD. This was due to problems with ensuring a regular supply of insulin, potential complications relating to IDD and the conditions under deployment including arduous conditions and irregular meals. Alternatively it was argued that in order for the applicant to carry out the inherent requirements of the employment, he would require services or facilities which would impose unjustifiable hardship on the respondent.

McInnis FM, at first instance, applied *X v Commonwealth*¹³⁰ and upheld the application, finding that deployment of the type suggested by the Commonwealth was not, in fact, part of the inherent requirements of the applicant's particular employment. In doing so he distinguished the 'theoretical potential requirements' of the employment from its inherent requirements:

On the material before me I am not prepared to find that in analysing the particular employment of this Applicant that there are inherent requirements of that employment that he should perform combat or combat related duties in any real or actual day to day sense. At its highest there is a requirement or minimum employment standard which has been artificially imposed on all defence personnel which cannot in my view simply apply to each and every occupation regardless of the practical day to day reality of the inherent requirements of the particular employment of the member concerned ... I reject [the respondent's submission] that the theoretical potential requirements of members of the RAAF should be used as a basis upon which an analysis of the particular employment and inherent requirements of the particular employment can be assessed for this Applicant.¹³¹

In *Power v Aboriginal Hostels Ltd*,¹³² the applicant had been dismissed from his employment after the respondent had determined that his disability, depression, rendered him unable to perform the inherent requirements of the position of assistant manager at one of its hostels. At first instance, Brown FM considered whether or not the termination was justified, in the context of s

¹²⁹ [2002] FMCA 89.

¹³⁰ (1999) 200 CLR 177.

¹³¹ [2002] FMCA 89, [146]. The decision of McInnis FM was overturned by the Full Federal Court in *Commonwealth of Australia v Williams* [2002] FCAFC 435 on the basis of the exemption in s 53 of the DDA (considered below in section 4.9.2). See also section 4.8 below for his Honour's discussion of 'unjustifiable hardship'.

¹³² [2003] FCA 1475, [6]-[8].

15(4) of the DDA. His Honour concluded that '[i]n essence, the respondent was entitled to consider that Mr Power was not cut out for the particular job...'.¹³³

On appeal, Selway J held that the learned Federal Magistrate had erred, stating:

The requirement of s 15(4) of the DDA in the current context is to determine whether or not the employee 'because of his or her disability would be unable to carry out the inherent requirements of the particular employment'. It is not relevant to that determination to consider whether the termination may have been justifiable for other reasons or not.¹³⁴

4.5 Education

A number of significant cases under the DDA have related to disability discrimination in education.¹³⁵ Section 22 of the DDA provides:

- (1) It is unlawful for an educational authority to discriminate against a person on the ground of the person's disability or a disability of any of the other person's associates:
 - (a) by refusing or failing to accept the person's application for admission as a student; or
 - (b) in the terms or conditions on which it is prepared to admit the person as a student.
- (2) It is unlawful for an educational authority to discriminate against a student on the ground of the student's disability or a disability of any of the student's associates:
 - (a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority; or
 - (b) by expelling the student; or
 - (c) by subjecting the student to any other detriment.
- (3) This section does not render it unlawful to discriminate against a person on the ground of the person's disability in respect of admission to an educational institution established wholly or primarily for students who have a particular disability where the person does not have that particular disability.
- (4) This section does not render it unlawful to refuse or fail to accept a person's application for admission as a student at an educational

¹³³ [2003] FMCA 42, [119].

¹³⁴ [2003] FCA 1475, [13].

¹³⁵ See, for example, *Purvis v New South Wales (Department of Education & Training)* (2003) 202 ALR 133; *Purvis v New South Wales (Department of Education & Training)* (2002) 117 FCR 237; *New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission and Purvis* (2001) 186 ALR 69; *Minns v New South Wales* [2002] FMCA 60; *Clarke v Catholic Education Office* (2003) 202 ALR 340; *Finney v Hills Grammar School* (Unreported, HREOC, Commissioner Innes, 20 July 1999), extract at (1999) EOC 93-020; *Travers v New South Wales* (2001) 163 FLR 99; *AJ & J v A School (No 2)* (Unreported, HREOC, Commissioner McEvoy, 10 October 2000).

institution where the person, if admitted as a student by the educational authority, would require services or facilities that are not required by students who do not have a disability and the provision of which would impose unjustifiable hardship on the educational authority.

It should be noted that the defence of unjustifiable hardship in s 22(4) applies only to admission of students to educational institutions.¹³⁶ The defence is not available in relation to the treatment of students once they have been admitted. However, it has been observed that:

this does not necessarily mean that an educational institution has no protection whatsoever. Once a student has been enrolled in an educational institution, any subsequent inability of the School to provide its services to the student is likely to raise issues relating to indirect, rather than direct discrimination. That being the case, a school in such a position can rely upon the reasonableness requirement contained in s 6(b) of the [DDA].¹³⁷

In *Purvis v New South Wales (Department of Education and Training)*,¹³⁸ Gleeson CJ noted that difficult issues are raised in the context of education where a school has a duty of care to all of its pupils and staff. His Honour stated:

The Act, in its application to educational authorities, and in its prohibition of discrimination against persons on the ground of a disability, requires a judgment both as to alleged differential treatment and as to the ground upon which action was taken. In both respects, it is impossible to ignore the context in which the first respondent, by its officers, was acting. It was charged with the care and protection of all the pupils in the school in question. The first respondent showed concern and sensitivity in its dealings with the pupil. It also recognised its legal responsibilities to the other pupils and to the school staff. If there is a reasonable construction of the Act which avoids a conflict between those responsibilities and the obligations imposed by the Act, then that construction should be preferred. And in the practical application of the Act in an evaluation of the conduct of the first respondent, those responsibilities should be kept in mind.¹³⁹

Gleeson CJ applied this approach to the question of whether or not the respondent had treated its student less favourably 'because of' his disability when it expelled him by reason of behaviour which formed a part of his disability. His Honour concluded that the 'true basis' for the decision was the 'danger to other pupils and staff constituted by the pupil's violent conduct and the principal's responsibilities towards those people'.¹⁴⁰

¹³⁶ See 4.8 below on the issue of unjustifiable hardship.

¹³⁷ This statement was made by counsel for the applicant in *Finney v Hills Grammar School* (Unreported, HREOC, Commissioner Innes, 20 July 1999), 35, and accepted by Commissioner Innes,

51. Extract of case appears at (1999) EOC 93-020.

¹³⁸ (2003) 202 ALR 133.

¹³⁹ *Ibid* 135-36 [7].

¹⁴⁰ *Ibid* 138 [13]. See discussion at 4.1 and 4.2.1(a) above.

In *Clarke v Catholic Education Office*,¹⁴¹ the applicant's complaint related to the terms and conditions under which his son was offered enrolment at the respondent's school. This was argued as being both unlawful discrimination contrary to s 22(1)(b) or alternatively unlawful discrimination in the provision of educational services, contrary to s 24(1)(b). Madgwick J was prepared to permit this alternative claim to be included as part of the proceedings.¹⁴² His Honour upheld the application, although it is not made clear under which specific provision the discrimination was found to be unlawful.¹⁴³

4.6 Access to Premises: 'Terms and Conditions'

Section 23 of the DDA makes it unlawful to discriminate against a person on the ground of that person's disability or a disability of any of that person's associates in (amongst other things) the terms or conditions on which the first-mentioned person is prepared to allow the other person access to, or the use of, any such premises.

In *Haar v Maldon Nominees*,¹⁴⁴ the FMS considered the scope of the expression 'terms and conditions' for the purposes of s 23. In this matter the applicant, who was visually impaired and had a guide dog, complained that she had been discriminated against when she was asked to sit outside on her next visit to the respondent's premises. McInnis FM upheld the complaint, finding:

In my opinion the imposition of terms and conditions for the purpose of s 23 of the DDA does not have to be in writing or in precise language. So long as the words uttered are capable of meaning and were understood to mean that the Applicant would only be allowed access to the premises in a restricted manner and/or use of the facilities in a restricted manner then in my view that is sufficient to constitute a breach of the legislation.¹⁴⁵

In *Sheehan v Tin Can Bay Country Club*¹⁴⁶ ('*Sheehan*'), Raphael FM decided that a man with an anxiety disorder that required him to have an assistance dog in social situations was deemed to have been discriminated against under s 23(1)(b) and (e) of the DDA when his local club imposed the condition that his dog not be allowed into the club unless it was on a leash.¹⁴⁷

¹⁴¹ (2003) 202 ALR 340.

¹⁴² *Ibid* 349-50 [39]. Cf *Ferneley v The Boxing Authority of New South Wales* [2001] FCA 1740 in the context of the SDA.

¹⁴³ [2002] FMCA 60, 360 [82].

¹⁴⁴ (2000) 184 ALR 83.

¹⁴⁵ *Ibid* 94 [68].

¹⁴⁶ [2002] FMCA 95.

¹⁴⁷ *Ibid* [24].

4.7 Provision of Goods, Services and Facilities

Section 24 of the DDA provides:

- (1) It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's disability or a disability of any of that other person's associates:
 - (a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person; or
 - (b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or
 - (c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.
- (2) This section does not render it unlawful to discriminate against a person on the ground of the person's disability if the provision of the goods or services, or making facilities available, would impose unjustifiable hardship on the person who provides the goods or services or makes the facilities available.

The applicant in *Vintila v Federal Attorney General*¹⁴⁸ sought to challenge a Regulation Impact Statement ('RIS') prepared by the Commonwealth Attorney-General for Cabinet in relation to draft disability standards for public transport. He argued that the RIS could be viewed as a provision of a service and was thus covered by the DDA.

In summarily dismissing the application, McInnis FM found that an RIS does not constitute the provision of a 'service':

In my view an RIS cannot possibly constitute the provision of a service for the purpose of section 24 of the DDA. In my view it is further not correct to suggest that a proposal set out in a document which is no more than an impact statement, or indeed if one uses the expression, "a cost benefit analysis," can in any way constitute conduct which would attract the attention of section 24 of the DDA. It is, as I have indicated, a document that can be characterised as no doubt a significant document for the proper consideration of cabinet which may reject or accept it, which may decide to introduce a bill into parliament which may decide to embrace part, all or nothing which is set out in the RIS.¹⁴⁹

In *Tate v Rafin*,¹⁵⁰ Wilcox J rejected an argument that a person is not discriminated against by being refused access to goods, services or facilities

¹⁴⁸ [2001] FMCA 110.

¹⁴⁹ *Ibid* [22].

¹⁵⁰ [2000] FCA 1582.

in circumstances where they have access to goods, services or facilities from another source. His Honour held:

it is no answer to a claim of discrimination by refusal of provision of goods, services or facilities to say that the discriminatee is, or may be, able to obtain the goods, services or facilities elsewhere. The Act is concerned to prevent discrimination occurring; that is why it makes the particular discriminatory act unlawful and provides a remedy to the discriminatee.¹⁵¹

In *Ball v Morgan*¹⁵² McInnis FM considered whether, when enforcing rights under human rights legislation, the conduct of the parties should be examined. In this case, the applicant had been at an illegal brothel in Victoria and alleged she had been discriminated against in the provision of the services and facilities at that brothel on the basis of her disability which required her to use a wheelchair.

McInnis FM dismissed the application. His Honour found that there were strong public policy reasons precluding him from granting relief in circumstances where to do so would establish a standard and duty of care owed by the respondents to the applicant in the provision of a service from an illegal brothel. He stated:

In my view it is clearly relevant when considering the enforcement of rights by this court pursuant to human rights legislation that the court should consider in the public interest the conduct of the parties which is the subject of the right sought to be enforced.

It would be contrary to the public interest for the courts to simply enforce a right arising out of human rights legislation if indeed that right were not to be enforceable as a contract due to illegality. In the present case the applicant would have great difficulty in my view seeking to claim a breach of contract if the subject matter of that contract was the provision of an illegal service, that is a service provided by an illegal brothel.¹⁵³

His Honour concluded that ‘the refusal to grant relief under the appropriate legislation is not a disproportionate outcome having regard to the nature of the activity involved’.¹⁵⁴

4.8 Unjustifiable Hardship

It is a defence to a claim of discrimination in many of the areas specified in Division 1 of the DDA, that ‘unjustifiable hardship’ would be imposed upon a respondent in order for them to avoid discriminating against an aggrieved

¹⁵¹ Ibid [53].

¹⁵² [2001] FMCA 127.

¹⁵³ Ibid [55]-[56].

¹⁵⁴ Ibid [61].

person.¹⁵⁵ For example, s 15 provides that it will not be unlawful for an employer to discriminate against a person on the ground of the person's disability:

if taking into account the person's past training, qualifications and experience relevant to the particular employment and, if the person is already employed by the employer, the person's performance as an employee, and all other relevant factors that it is reasonable to take into account, the person because of his or her disability:

- (a) would be unable to carry out the inherent requirements of the particular employment; or
- (b) would, in order to carry out those requirements, require services or facilities that are not required by persons without the disability and the provision of which would impose an unjustifiable hardship on the employer.

'Unjustifiable hardship' is defined by s 11 of the DDA as follows:

For the purposes of this Act, in determining what constitutes unjustifiable hardship, all relevant circumstances of the particular case are to be taken into account including:

- (a) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned; and
- (b) the effect of the disability of a person concerned; and
- (c) the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship; and
- (d) in the case of the provision of services, or the making available of facilities, an action plan given to the Commission under section 64.

The appropriate approach by a Court to the concept of unjustifiable hardship is first to determine whether or not the respondent has discriminated against the complainant and then determine whether or not the respondent is able to make out the defence of unjustifiable hardship.¹⁵⁶

The onus is on the respondent to establish unjustifiable hardship by way of defence: 'the essential elements of the principal discriminator's liability do not include the negative proposition that there be no unreasonable hardship to such discriminator'.¹⁵⁷

¹⁵⁵ See ss 15, 16, 17, 18, 22, 23, 24, 25 and 27 of the DDA.

¹⁵⁶ *Sluggett v Human Rights and Equal Opportunity Commission* (2002) 123 FCR 561, 568 [24]-[25] (Drummond J); *Daghlian v Australian Postal Corporation* [2003] FCA 759, [113]-[114] (Conti J).

¹⁵⁷ *Cooper v Human Rights and Equal Opportunity Commission* (1999) 93 FCR 481, 492 [32] (Madgwick J); cited with approval in *Sluggett v Human Rights and Equal Opportunity Commission* (2002) 123 FCR 561, 567-568 [23]-[24] (Drummond J).

Implicit in the concept of unjustifiable hardship is that some hardship will be justifiable:

the concept of ‘unjustifiable hardship’ connotes much more than just hardship of the respondent. The objects of the [DDA] make it clear that elimination of discrimination as far as possible is the legislation’s purpose. Considered in that context, it is reasonable to expect that [a respondent] should have to undergo some hardship...¹⁵⁸

It has been suggested that the financial circumstances of the respondent should also be viewed from this perspective:

Many respondents imply that [their financial circumstances] should be given greater weight than other factors. Whilst it is important, it, along with all other provisions of the [DDA], must be considered in the context of the [DDA’s] objects. I do not suggest that intolerable financial imposts should be placed on respondents. However, for this defence to be made out the hardship borne must be unjustifiable. Therefore, if other factors mitigate in favour of preventing the discrimination – which is the Parliament’s intention in this legislation – then the bearing of a financial burden by the respondent may cause hardship which is deemed justifiable.¹⁵⁹

In cases before HREOC, when it sat as a tribunal, a number of decisions considered s 11(a), which requires consideration be given to ‘the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned’. It was held in those decisions that the group of ‘any persons concerned’ extends beyond the immediate complainant and respondent.

In *Francey v Hilton Hotels of Australia Pty Ltd*,¹⁶⁰ for example, Commissioner Innes considered a complaint brought by a person with asthma (and her associate) that the respondent’s policy of allowing people to smoke in their nightclub made it a condition of access to those premises that patrons be able to tolerate environmental tobacco smoke. This was a condition with which the complainant could not comply. In finding that the defence of unjustifiable hardship was not made out, Commissioner Innes considered the benefits and detriments to the complainants, the respondent, staff and potential staff, patrons and potential patrons of the nightclub.

In *Cooper v Holiday Coast Cinema*,¹⁶¹ the complaint concerned the condition that patrons of a cinema access the premises by way of stairs. This was a condition with which the complainant, who used a wheelchair, could not comply. Commissioner Keim considered s 11(a) and stated as follows:

¹⁵⁸ *Finney v Hills Grammar School* (Unreported, HREOC, Commissioner Innes, 20 July 1999), 52.

Extract at (1999) EOC 93-020. Decision affirmed on review in *Hills Grammar School v Human Rights and Equal Opportunity Commission* (2000) 100 FCR 306, 318 [48] (Tamberlin J).

¹⁵⁹ *Francey v Hilton Hotels of Australia Pty Ltd* (1997) EOC 92-903, 77,453 (Commissioner Innes).

¹⁶⁰ *Ibid*, 77,452.

¹⁶¹ Unreported, HREOC, Commissioner Keim, 29 August 1997.

I am of the view that the phrase should be interpreted broadly. I am of the view that it is appropriate not only to look to the complainants themselves but also their families and to other persons with disabilities restricting their mobility who might, in the future, be able to use the respondent's cinema. In the same way, in terms of the effect of the order on the respondent, it is appropriate for me to look at the hardship that might be suffered by the shareholders of the respondent; its employees; and also its current and potential customers. The latter groups of people are particularly important in terms of financial hardship from an order forcing the cinema complex to close.¹⁶²

In *Scott v Telstra Corporation Ltd*,¹⁶³ the issue of unjustifiable hardship concerned the provision of a tele-typewriter ('TTY') to customers of the respondent who had profound hearing loss. The respondent argued that it was relevant to consider costs relating to its potential liability if it was required to provide *other* products to facilitate access to its services by people with disabilities. The argument was dismissed:

The respondent has also provided figures on a best and worst case basis of its potential liability if it has to provide other products as well as TTYS. I do not consider these figures relevant. The only relevant factors that have to be considered are those referable to the supply of TTYS and the resultant revenue to the respondent. It is quite wrong to confuse the issue of unjustifiable hardship arising from the supply of TTY's to persons with a profound hearing loss with possible hardship arising from other potential and unproved liabilities. It follows that the reliance by the respondent on the cost of providing products other than the TTY to persons other than persons with a profound hearing loss to show unjustifiable hardship is an erroneous application of s 11 of the DDA.¹⁶⁴

In *Williams v Commonwealth*,¹⁶⁵ as discussed at 4.4.3 above, the applicant had been discharged from the RAAF on the basis of disability, namely, his insulin dependent diabetes ('IDD'). His discharge followed the introduction of a directive requiring every member of the RAAF to be able to be deployed to 'Bare Base' settings, which were arduous in nature and lacking in support facilities. As noted above,¹⁶⁶ the Commonwealth unsuccessfully argued that the applicant was unable to meet these 'inherent requirements' by virtue of his IDD. It also raised the issue of unjustifiable hardship. In relation to that issue, McInnis FM noted the requirement to read s 15(4) 'as a whole', applying McHugh J's statement in *X v Commonwealth*.¹⁶⁷ He found that even if the applicant was required to deploy to 'Bare Base' facilities, the accommodation required for his disability (regular meals and backup supplies of insulin,

¹⁶² Ibid 7.

¹⁶³ (1995) EOC 92-717, 78,402 (Sir Ronald Wilson).

¹⁶⁴ Ibid.

¹⁶⁵ [2002] FMCA 89.

¹⁶⁶ See 4.4.3 above.

¹⁶⁷ (1999) 200 CLR 177, 190.

for example) would not have imposed an unjustifiable hardship on the Commonwealth.¹⁶⁸

4.9 Other Exemptions to the DDA

4.9.1 Annuities, Insurance and Superannuation (s 46)

Section 46 of the DDA provides:

- (1) This Part does not render it unlawful for a person to discriminate against another person, on the ground of the other person's disability, by refusing to offer the other person:
 - (a) an annuity; or
 - (b) a life insurance policy; or
 - (c) a policy of insurance against accident or any other policy of insurance; or
 - (d) membership of a superannuation or provident fund; or
 - (e) membership of a superannuation or provident scheme;
 if:
 - (f) the discrimination:
 - (i) is based upon actuarial or statistical data on which it is reasonable for the first-mentioned person to rely; and
 - (ii) is reasonable having regard to the matter of the data and other relevant factors; or
 - (g) in a case where no such actuarial or statistical data is available and cannot reasonably be obtained—the discrimination is reasonable having regard to any other relevant factors.

In *Xiros v Fortis Life Assurance Ltd*¹⁶⁹ Driver FM considered s 46(1). The applicant had been diagnosed HIV positive and it was not disputed that he had been discriminated against on that basis when his claim under an insurance policy which excluded 'all claims made on the basis of the condition of HIV/AIDS' was declined.

Driver FM considered the meaning of the term 'reasonable' in the context of s 46(1)(f)(i). His Honour described as a 'useful guide', the consideration of 'reasonableness' in the context of the indirect discrimination (see 4.3.4 above) by the High Court in *Waters v Public Transport Corporation*¹⁷⁰ and the

¹⁶⁸ [2002] FMCA 89 [149]. The decision of McInnis FM was overturned by the Full Federal Court in *Commonwealth of Australia v Williams* [2002] FCAFC 435 on the basis of the exemption in s 53 of the DDA (considered below in section 4.9.2). The aspects of his Honour's decision relating to unjustifiable hardship were not considered.

¹⁶⁹ (2001) 162 FLR 433.

¹⁷⁰ (1991) 173 CLR 349.

Federal Court in *Secretary, Department of Foreign Affairs and Trade v Styles*.¹⁷¹

His Honour concluded that ‘all relevant circumstances’, including statistical data that is available, should be taken into account. In the matter before him, his Honour held that it was reasonable for the respondent to maintain its ‘HIV/AIDS exclusion’, based upon the statistical information and actuarial advice available.¹⁷²

The same approach to ‘reasonableness’ was taken by Raphael FM in *Bassanelli v QBE Insurance*.¹⁷³ In that matter, the applicant sought travel insurance for an overseas trip. She was denied the insurance on the basis of her disability, metastatic breast cancer. The applicant’s evidence was that she did not expect insurance for her pre-existing medical condition, but rather other potential losses such a theft, loss of luggage, other accidental injury, or injury or illness to her husband.

The respondent conceded that there was no actuarial or statistical data relied upon in making the decision to refuse insurance, but maintained that their conduct was ‘reasonable’ and therefore fell within s 46(1) of the DDA.

While the applicant was able to obtain insurance through another insurer, Raphael FM noted that:

the fact that one insurer may provide cover for a particular risk does not mean that it is unreasonable for another insurer to decline it. The court must first look, objectively, at the reasons put forward by the insurer for declining the risk and consider the evidence brought to justify that decision. The reasonableness or otherwise of that evidence can be tested against the conduct of other insurers who are offered the same risk.¹⁷⁴

His Honour noted that the onus is on the respondent to establish ‘reasonableness’ in this context,¹⁷⁵ and found that the decision by the respondent was not reasonable in all of the circumstances of the case.

4.9.2 Defence Force (s 53(1))

Section 53(1) of the DDA provides:

This Part does not render it unlawful for a person to discriminate against another person on the ground of the other person’s disability in connection with employment, engagement or appointment in the Defence Force:

¹⁷¹ (1989) 23 FCR 251.

¹⁷² (2001) 162 FLR 433, 439-40 [16]-[18].

¹⁷³ [2003] FMCA 412.

¹⁷⁴ *Ibid* [37].

¹⁷⁵ *Ibid* [52].

- (a) in a position involving the performance of combat duties, combat-related duties or peacekeeping service; or
- (b) in prescribed circumstances in relation to combat duties, combat-related duties or peacekeeping service; or
- (c) in a position involving the performance of duties as a chaplain or a medical support person in support of forces engaged or likely to be engaged in combat duties, combat-related duties or peacekeeping service.

Pursuant to the regulation making power conferred by s 53(2) and s 132 of the DDA, ‘combat duties’ and ‘combat-related duties’ were defined in the *Disability Discrimination Regulations 1996* (Cth).

Regulation 3 defines ‘combat duties’ as:

duties which require, or which are likely to require, a person to commit, or participate directly in the commission of, an act of violence in the event of armed conflict.

Regulation 4 defines ‘combat-related duties’ as:

- (a) duties which require, or which are likely to require, a person to undertake training or preparation for, or in connection with, combat duties; or
- (b) duties which require, or which are likely to require, a person to work in support of a person performing combat duties.

In *Williams v Commonwealth of Australia*,¹⁷⁶ McInnis FM at first instance held that this exemption did not apply to the applicant who had been employed as a Communications Operator with the RAAF for over ten years and, apart from some training, could not be said to have been involved in combat duties or combat-related duties. His Honour stated that:

To apply a ‘blanket’ immunity from the application of the DDA simply on the basis of a general interpretation of combat related duties would be inconsistent with the day to day reality of the Applicant’s inherent requirements of his particular employment ... If that were the case then s 53 would only need to say that this part does not render it unlawful for a person to discriminate against another person who is employed, engaged or appointed in the Defence Forces. The section clearly contemplates the distinction between combat and non combat personnel ...¹⁷⁷

This decision was overturned on appeal by the Full Federal Court in *Commonwealth v Williams*.¹⁷⁸ The Full Court held that s 53 of the DDA, when read in conjunction with the relevant definitions in the *Disability*

¹⁷⁶ [2002] FMCA 89.

¹⁷⁷ *Ibid* [154]. See 4.4.3 above for general discussion on the issue of inherent requirements.

¹⁷⁸ (2002) 125 FCR 229.

Discrimination Regulations 1996 (Cth) ('the Regulations'), covers duties which are likely to require (as distinct from actually require) the commission of an act of violence in the event of armed conflict. The Full Court found that the respondent, who was employed in a position providing 'communications and information systems support to deployed forces', was clearly performing 'work in support of' such forces within the meaning of reg 4(b). Therefore the respondent was not covered by the operation of the DDA due to s 53.¹⁷⁹

The Full Court noted that this did not mean that all members of the Australian Defence Force were exempted from the operation of the DDA by virtue of s 53. They stated that s 53 and the Regulations require an element of directness, and accordingly staff in a recruiting office or in public relations may not be caught by the section.¹⁸⁰

4.9.3 Compliance with a Prescribed Law (s 47(2))

Section 47(2) provides that Part 2 of the DDA, which contains the specific prohibitions against discrimination, 'does not render unlawful anything done by a person in direct compliance with a prescribed law'.¹⁸¹

Section 47(3) further provides that Part 2 does not render unlawful 'anything done by a person in direct compliance with another law' for 3 years from the commencement of the section (1 March 1993).

In *McBride v Victoria (No 1)*,¹⁸² McInnis FM considered issues surrounding the return to work, in 1994, of an employee with a disability which resulted from a workplace injury. While finding that there was no unlawful discrimination arising out of the allegations relating to the applicant's return to work, he indicated, in obiter remarks, that a narrow interpretation of the expression 'in direct compliance' as it appears in ss 47(2) and (3) should be taken.¹⁸³

On this view, it is not sufficient for a respondent to show that it was acting generally in pursuance of its statutory authority. His Honour stated, in the context of the administration of a prison pursuant to the *Corrections Act 1986* (Vic), at which the applicant was employed:

The general nature of the conduct, whilst no doubt complying with the requirements of the Respondent to properly administer prisons as a public correctional enterprise and service agency within the Department of Justice of the State of Victoria, does not of itself provide a sufficient basis which would

¹⁷⁹ Ibid 237 [32]-[33].

¹⁸⁰ Ibid [34].

¹⁸¹ 'Prescribed laws' are those for which regulations have been made by the Governor-General pursuant to s 132 of the DDA.

¹⁸² [2003] FMCA 285.

¹⁸³ Ibid [46].

enable s 47(3) to apply to this application. I am mindful of the fact that the *Corrections Act 1986* and regulations made thereunder place upon the Governor of the prison duties and obligations which relate to security and welfare and officers, subject to directions (see ss 19, 20 & 21). However compliance with that Statute as indeed the Respondent is required to comply with the *Accident Compensation Act 1985* does not of itself constitute direct compliance with a law which would otherwise attract the operation of s 47(2) and (3). To do so would be to ignore the reality of the general nature of the allegations in this matter though of course if part of the response in the matter includes compliance with the law then that would be relevant but not determinative of the merits of the application. Where part of the conduct of a Respondent may be said to be compliance with the law but forms only part of the overall conduct then it would be inappropriate to then excuse all of the conduct of the Respondent in a claim for unlawful discrimination.¹⁸⁴

4.10 Permitting an Unlawful Act

Section 122 of the DDA provides for liability of persons involved in unlawful acts:

A person who causes, instructs, induces, aids or permits another person to do an act that is unlawful under Division 1,2, or 3 of Part 2 is, for the purposes of this Act, taken also to have done the act.

In *Cooper v Human Rights and Equal Opportunity Commission*,¹⁸⁵ the applicant alleged that the Coffs Harbour City Council ('the Council') was in breach of the DDA by virtue of s 122, for having allowed the redevelopment of a cinema complex without requiring that wheelchair access be incorporated as part of the redevelopment.¹⁸⁶

The following principles can be distilled from the decision of Madgwick J:

- The first step in establishing liability under s 122 is to establish whether or not there was an unlawful act of a principal under Division 1, 2 or 3 of Part 2.¹⁸⁷

¹⁸⁴ Ibid.

¹⁸⁵ (1999) 93 FCR 481.

¹⁸⁶ HREOC had previously found that the cinema proprietor had unlawfully discriminated against the applicant by requiring him to use stairs to gain access to the cinema, and in doing so rejected the defence of unjustifiable hardship: see *Cooper v Holiday Coast Cinema Centers Pty Ltd* (Unreported, HREOC, Commissioner Keim, 29 August 1997). However, in a separate decision in relation to the Council, HREOC held that there was no liability under s 122: *Cooper v Coffs Harbour City Council* (1998) EOC 92-962.

¹⁸⁷ (1999) 93 FCR 481, 490 [27]. The liability of the principal had been established in *Cooper v Holiday Coast Cinemas* (Unreported, HREOC, Commissioner Keim, 29 August 1997) and was not an issue in the proceedings before Madgwick J.

- To find that a person has permitted a particular act, it is necessary to show that they were able to prevent it.¹⁸⁸
- The high standard of knowledge required to prove liability as an accessory in criminal cases is not required: s 122 has been drafted so as to be wider in its scope and the DDA was intended to have far-reaching consequences.¹⁸⁹
- Where it is shown that permission was given for an unlawful act of discrimination, it is not necessary to show either knowledge or belief that there was no defence or exemption available to the principal (in the present case, that there was no unjustifiable hardship).¹⁹⁰
- It will be an exception to s 122 for a permitter to show that an act was permitted based on an honest and reasonable mistake of fact.¹⁹¹

4.11 Other Issues

4.11.1 Limited Application Provisions and Constitutionality

Section 12 of the DDA provides, in part:

12 Application of Act

- (1) In this section:
 - ... *limited application provisions* means the provisions of Divisions 1, 2 and 3 of Part 2 other than sections 20, 29 and 30.
- (2) Subject to this section, this Act applies throughout Australia.
- ...
- (8) The limited application provisions have effect in relation to discrimination against a person with a disability to the extent that the provisions:
 - (a) give effect to the [ILO Convention concerning Discrimination in Respect of Employment and Occupation (No.111)¹⁹²]; or
 - (b) give effect to the Covenant on Civil and Political Rights; or

¹⁸⁸ (1999) 93 FCR 481, 494 [41], citing with approval *Adelaide City Corporation v Australasian Performing Rights Association Ltd* (1928) 40 CLR 481, 490-91 (Isaacs J). Cited with approval in *Elliott v Nanda* (2001) FCR 240; followed in *Oberoi v HREOC* [2001] FMCA 34, [27]-[29]; *Phillips v Australian Girls' Choir* [2001] FMCA 109, [24].

¹⁸⁹ (1999) 93 FCR 481, 493 [37]-[39].

¹⁹⁰ *Ibid* 493-94 [40]-[41]. In the present case, the key issue in determining principal liability had been whether or not there was unjustifiable hardship. The particular question was therefore whether or not, to find liability under s 122, it was necessary for the 'permitter' to have knowledge that there was no unjustifiable hardship.

¹⁹¹ *Ibid* 495-96 [46]-[49].

¹⁹² *International Labour Organisation Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation*, opened for signature 25 June 1958, 1974 ATS 12, (entered into force generally 15 June 1960, and in Australia 15 June 1974) (*ILO Convention (No. 111)*). This Convention is scheduled to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) at Schedule 1.

- (c) give effect to the International Covenant on Economic, Social and Cultural Rights; or
- (d) relate to matters external to Australia; or
- (e) relate to matters of international concern.

HREOC considered the operation of s 12(8) in *Allen v United Grand Lodge of Queensland* ('*Allen*').¹⁹³ In that case, the applicant, a person with reduced mobility, complained that he was not able to access the respondent's premises because those premises could only be accessed by stairs. The applicant alleged that this constituted disability discrimination pursuant to s 23 of the DDA.

In considering whether s 23 related to 'matters of international concern', Commissioner Carter QC considered the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities which were adopted by a Resolution of the General Assembly of the United Nations in 1994. Rule 5 identifies access to the physical environment as one of the target areas for equal participation by disabled persons. Commissioner Carter QC concluded that as s 23 has a 'direct relationship' with this Rule, it relates to a matter of international concern. He stated:

Clearly the United Nations Resolution and the Rules annexed evidence the joint concern of Member States to promote the equalisation of opportunities for persons with disabilities. The corollary of that proposition is that discrimination by one person against another on the ground of the latter's disability has to be rejected. The equalisation of opportunities for the disabled is the very antithesis of a regime which condones discrimination on the ground of one's disability. Therefore one can only conclude that the equalisation of opportunities for the disabled and the avoidance of discrimination on the ground of disability has become a matter of international concern and one manifestation of that concern is the United Nations Resolution referred to in some detail above.¹⁹⁴

The operation of the limited application provisions of the DDA was raised in the Federal Court in *Court v Hamlyn-Harris*¹⁹⁵ ('*Court*'). In that case, the applicant, who has a vision impairment, alleged that the respondent, his employer, had unlawfully discriminated against him by dismissing him. The respondent, Hamlyn-Harris, was a sole-trader carrying on business in two States.

¹⁹³ Unreported, HREOC, Commissioner Carter QC, 12 April 1999. Extract at (1999) EOC 92-985. See also *Maguire v Sydney Organising Committee for the Olympic Games* (Unreported, HREOC, Commissioner Carter QC, 18 November 1999). Extract at (2000) EOC 93-041.

¹⁹⁴ Unreported, HREOC, Commissioner Carter QC, 12 April 1999, 7. Extract at (1999) EOC 92-985.

¹⁹⁵ [2000] FCA 1870.

In support of his application alleging discrimination in the course of employment (that is, a breach of s 15, which is a limited operation provision), the applicant relied upon s 12(12) of the DDA. That subsection provides:

- 12(12) The limited application provisions have effect in relation to discrimination in the course of, or in relation to, trade or commerce:
- (a) between Australia and a place outside Australia; or
 - (b) among the States; or
 - (c) between a State and a Territory; or
 - (d) between 2 territories.

In his decision, Heerey J considered s 12(12) of the DDA and, in particular, whether the alleged termination of the applicant's employment was in the course of, or in relation to, trade or commerce. In finding that the alleged termination did not come within the meaning of 'in trade or commerce', his Honour relied upon the decision of the High Court in *Concrete Constructions (NSW) Pty Ltd v Nelson* ('*Concrete Constructions*').¹⁹⁶ Heerey J concluded:

In the present case the dealings between Mr Court and his employer Mr Hamlyn-Harris were matters internal to the latter's business. They were not in the course of trade or commerce, or in relation thereto ...

That being so, I conclude this Court has no jurisdiction to hear the application. I do not accept the argument of counsel for Mr Court that the [HREOC Act] is not confined to the limited application provisions of the [DDA] but applies to 'unlawful discrimination in general'. Being a Commonwealth Act, the [DDA] has obviously been carefully drafted to ensure that it is within the legislative power of the Commonwealth.¹⁹⁷

It does not appear that Heerey J in *Court* was referred to other sub-sections of s 12, such as s 12(8), or to the decision in *Allen* to overcome the perceived 'jurisdictional issue' in this case.

In *O'Connor v Ross (No.1)*,¹⁹⁸ the applicant complained of discrimination in the terms and conditions upon which accommodation was offered, contrary to s 25 of the DDA. Driver FM stated that 'it is sufficient for the application to come within the purview of the DDA if discrimination in relation to accommodation for disabled persons can be found to be a matter of international concern'.¹⁹⁹ His Honour found that equal access to accommodation for people with disabilities was a matter of international concern, and adopted the views expressed by HREOC in *Allen*.²⁰⁰

¹⁹⁶ (1990) 169 CLR 594.

¹⁹⁷ [2000] FCA 1870, [14]-[15].

¹⁹⁸ [2002] FMCA 210.

¹⁹⁹ *Ibid* [7].

²⁰⁰ Unreported, HREOC, Commissioner Carter QC, 12 April 1999. Extract at (1999) EOC 92-985.

In *Souliotopoulos v La Trobe University Liberal Club*,²⁰¹ Merkel J also considered the limited application provisions of the DDA. Merkel J was satisfied that the prohibition of disability discrimination was a matter of international concern, and that the limited application provisions in Divisions 1, 2 and 3 of Part 2 of the DDA, but in particular s 27(2), have effect by reason of s 12(8)(e). Merkel J also noted that his decision was consistent with that of HREOC in *Allen*.

4.11.2 Retrospectivity of the DDA

In *Parker v Swan Hill Police*,²⁰² the applicant complained of discrimination against her son as a result of events occurring in 1983. North J held that the DDA, which commenced operation in 1993, did not have retrospective operation. The application was therefore dismissed.

4.11.3 Assistance animals

Section 9 of the DDA provides that a person will be taken to have discriminated against an aggrieved person with a disability, if the aggrieved person is treated less favourably because he or she is accompanied by a guide dog, hearing assistance dog or any other animal ‘trained to assist the aggrieved person to alleviate the effect of the disability’.

Early cases decided by HREOC in relation to s 9 involved persons with visual or hearing disabilities and their appropriately trained guide or hearing dogs. In *Jennings v Lee*,²⁰³ for example, the respondent was found to have discriminated against the applicant, who has a visual impairment, under s 9 of the DDA by refusing to permit her to be accompanied by her guide dog while the applicant ate in his restaurant.

Similar findings of unlawful discrimination were made in the context of the refusal to provide accommodation in a caravan park to an applicant with a hearing impairment because he was accompanied by his hearing dog²⁰⁴ and the refusal to allow an applicant with a visual impairment to enter a store because she was accompanied by her guide dog.²⁰⁵

Before Raphael FM in *Sheehan v Tin Can Bay Country Club*²⁰⁶ (‘*Sheehan*’), the respondent club was found to have discriminated unlawfully against the applicant, who suffers from an anxiety disorder, when it refused to permit the

²⁰¹ (2002) 120 FCR 584.

²⁰² [2000] FCA 1688.

²⁰³ Unreported, HREOC, Commissioner Nader, 1 October 1996.

²⁰⁴ *Brown v Birss Nominees Pty Ltd* (Unreported, HREOC, Commissioner Innes, 3 July 1997).

²⁰⁵ *Grovenor v Eldridge* (Unreported, HREOC, President Tay, 18 December 1998).

²⁰⁶ [2002] FMCA 95.

applicant's unleashed dog on the premises. His Honour gave s 9 a wide application, finding:

The symptoms of Mr Sheehan's disability include a concern about meeting people and a concern about the way in which people will react to him. He therefore sought, in approximately 1997, to relieve these symptoms by training a dog to be an animal assistant. He thought that utilising the dog to break the ice between himself and people he would meet for the first time would enable him to overcome the concerns which he felt. The use of the dog in this manner would qualify the dog to be an 'assistance dog' within s9 of the Act, see s 9(1)(f):

'... any other animal trained to assist the aggrieved person to alleviate the affect of the disability, or because of any matter related to that fact.'

Mr Sheehan trained the dog Bonnie himself and he described to the Court a number of ways in which the dog assisted him, both as I have previously described and also in other matters.²⁰⁷

The decision in *Sheehan* has highlighted the fact that s 9 does not prescribe any regime or test to determine whether and when assistance animals come within the scope of that section. In particular, there is no express requirement in s 9 that the animal be trained by a recognised agency. Nor is it necessary to show that the training of the animal extends (as guide dog and hearing dog training does) to appropriate behaviour and health standards in the animal, such that it can be safely admitted where dogs or other animals are not otherwise permitted.

The Acting Disability Discrimination Commissioner ('the Commissioner') has suggested that *Sheehan* 'creates an unsustainable position for service providers and other members of the public while not giving surety of access rights to users of appropriate assistance animals' and has suggested to the Attorney-General that an amendment to this section may be appropriate.²⁰⁸ The Commissioner has also suggested that a different approach to the exemption may be arguable in future cases.²⁰⁹

²⁰⁷ Ibid [2].

²⁰⁸ See HREOC, *Disability Rights Update* (2002)

<www.humanrights.gov.au/disability_rights/update/1002.htm> at 4 February 2004.

²⁰⁹ See HREOC, *Discussion Paper on Assistance Animals Under the Disability Discrimination Act* <http://www.hreoc.gov.au/disability_rights/inquiries/animal03/discuss.htm> at 4 February 2004.

Chapter 5

Damages and Remedies

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Chapter 5

Damages and Remedies

5.1 Section 46PO(4) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth)

Section 46PO(4) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ('HREOC Act') provides:

If the court concerned is satisfied that there has been unlawful discrimination by any respondent, the court may make such orders (including a declaration of right) as it thinks fit, including any of the following orders or any order to a similar effect:

- (a) an order declaring that the respondent has committed unlawful discrimination and directing the respondent not to repeat or continue such unlawful discrimination;
- (b) an order requiring a respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by an applicant;
- (c) an order requiring a respondent to employ or re-employ an applicant;
- (d) an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent;
- (e) an order requiring a respondent to vary the termination of a contract or agreement to redress any loss or damage suffered by an applicant;
- (f) an order declaring that it would be inappropriate for any further action to be taken in the matter.

This chapter discusses the general principles which apply to the making of orders under that provision. It also provides an overview of the orders made by the Federal Court and FMS under s 46PO(4) since the federal unlawful jurisdiction was transferred to those courts (on 13 April 2000).

5.2 Damages

5.2.1 General Approach to Damages

(a) *Torts principles apply*

The Full Federal Court discussed the approach to damages under the SDA in the matter of *Hall v Sheiban*.¹ Lockhart, Wilcox and French JJ delivered separate judgments and while there is no clear ratio on the issue of damages, the case has been cited for the proposition that torts principles are a starting point for the assessment of damages under discrimination legislation, but those principles should not be applied inflexibly.²

Lockhart J expressed the view that:

As anti-discrimination, including sex discrimination, legislation and case law with respect to it is still at an early stage of development in Australia, it is difficult and would be unwise to prescribe an inflexible measure of damage in cases of this kind and, in particular, to do so exclusively by reference to common law tests in branches of the law that are not the same, though analogous in varying degrees, with anti-discrimination law. Although in my view it cannot be stated that in all claims for loss or damage under the Act the measure of damages is the same as the general principles respecting measure of damages in tort, it is the closest analogy that I can find and one that would in most foreseeable cases be a sensible and sound test. I would not, however, shut the door to some case arising which calls for a different approach.³

His Honour went on to say that, generally speaking, the correct approach to the assessment of damages under the SDA is to compare the position the complainant might have been in had the discriminatory conduct not taken place with the situation in which the complainant was placed by reason of the conduct of the respondent.⁴ This approach has been followed in a number of subsequent cases under the SDA, RDA and DDA.⁵

¹ (1989) 20 FCR 217.

² See, for example, *Stephenson v Human Rights and Equal Opportunity Commission* (1995) 61 FCR 134, 142; *Ardeshirian v Robe River Iron Associates* (1993) 43 FCR 475.

³ (1989) 20 FCR 217, 239.

⁴ *Ibid.*

⁵ *Johanson v Blackledge* (2001) 163 FLR 58, 83 [110]; *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91, [39]; *McAlister v SEQ Aboriginal Corporation* [2002] FMCA 109, [150]; *Escobar v Rainbow Printing Pty Ltd* [2002] FMCA 122, [39]; *Wattle v Kirkland (No 2)* [2002] FMCA 135, [70]; *Borg v Commissioner, Department of Corrective Services* (2002) EOC 93-198, 76,365; *Evans v National Crime Authority* [2003] FMCA 375, [110], [112]; *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209, [89]; *Carr v Boree Aboriginal Corporation* [2003] FMCA 408; *Bassanelli v QBE Insurance* [2003] FMCA 412, [56]; *Darlington v CASCO Australia Pty Ltd* [2002] FMCA 176, [39]; *McBride v Victoria (No.1)* [2003] FMCA 285, [119]-[128]; *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd* [2003] FMCA 160, [89]-[93].

(b) Hurt, humiliation and distress

In a number of cases it has been held that in assessing general damages for hurt, humiliation and distress, awards should be restrained in quantum, although not minimal. Such awards should not be so low as to diminish the respect for the public policy of the legislation. In *Hall v Sheiban*,⁶ Wilcox J cited with approval (in the context of damages for sexual harassment) the following statement of May LJ in *Alexander v Home Office*:

As with any other awards of damages, the objective of an award for unlawful racial discrimination is restitution. Where the discrimination has caused actual pecuniary loss, such as the refusal of a job, then the damages referable to this can be readily calculated. For the injury to feelings however, for the humiliation, for the insult, it is impossible to say what is restitution and the answer must depend on the experience and good sense of the judge and his assessors. Awards should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the Act gives effect. On the other hand, just because it is impossible to assess the monetary value of injured feelings, awards should be restrained. To award sums which are generally felt to be excessive does almost as much harm to the policy and the results which it seeks to achieve as do nominal awards. Further, injury to feelings, which is likely to be of a relatively short duration, is less serious than physical injury to the body or the mind which may persist for months, in many cases for life.⁷

In *Clarke v Catholic Education Office* ('Clarke'),⁸ Madgwick J emphasised the compensatory nature of damages, stating:

It was faintly suggested, on the strength of remarks made in a case decided by the Human Rights & Equal Opportunity Commission, that there were policy reasons why damages for a breach of the DDA should be substantial. It was also faintly suggested that an award should not be so low that it might be eaten up by non-recoverable costs. Both propositions must be rejected. Damages are compensatory and no more.

Nevertheless, his Honour made a significant award for the hurt caused to the student on whose behalf the case had been brought: \$20,000 plus \$6,000 in interest. The respondent in that matter was found to have indirectly discriminated against a student in requiring him to receive teaching at one of their schools without the assistance of an Auslan interpreter. The basis for the award of general damages was as follows:

Fortunately, as matters transpired, the injury to [the student] has probably not been great: the injury to his parents' sensibilities may have been acute but the

⁶ (1989) 20 FCR 217, 256. See also *Gilroy v Angelov* (2000) 181 ALR 57, 76 [105]; *Johanson v Blackledge* (2001) 163 FLR 58, 84 [115] citing with approval *Horne v Press Clough Joint Venture* (1994) EOC 92-591, 77, 179; *Wattle v Kirkland (No 2)* [2002] FMCA 135, [71].

⁷ [1988] 2 All ER 118, 122.

⁸ (2003) 202 ALR 340.

damages are not to compensate them. They are to compensate the “aggrieved person”, namely [the student].

[The student] would have been distressed and confused by the events in question. As a result of the respondents’ proscribed conduct, he was effectively removed from the company of his primary school peers and friends on his transition to high school. Further and very significantly, these were friends who had learned Auslan. That would be very distressing. His transition was from a religious to a secular milieu, an added degree of change to cope with. As a child, it is very likely that he would and did register the respondents’ attitude as one of rejection of him on account of his deafness, even though the disinterested adult can see that the position was much more complex than that. That would have been hurtful.

In the scheme of things, the harm to [the student] is likely to prove to have been transient and not extreme. There is no warrant to inflate damages. In my view \$20,000 together with some allowance for interest on three quarters of that sum would be ample compensation. I assess such interest at \$6,000.⁹

(c) Aggravated and exemplary damages

In *Elliott v Nanda*,¹⁰ Moore J referred to a range of authorities, including discrimination cases, and noted that it is ‘generally accepted that the manner in which a defendant conducts his or her case may exacerbate the hurt and injury suffered by the plaintiff so as to warrant the award of additional compensation in the form of aggravated damages’.¹¹

His Honour noted that in the context of anti-discrimination law ‘a wide variety of matters may affect the decision to award aggravated damages in any particular case’.¹² He stated, however, that the stress of litigation is not, in itself, sufficient to attract an award of aggravated damages: ‘the defendant must conduct his or her case in a manner which is unjustifiable, improper or lacking in bona fides’.¹³

In that matter, the first respondent was found to be liable to pay the applicant the amount of \$5,000 in aggravated damages to compensate her for the additional stress and mental anguish resulting from the considerable delay to the resolution of the complaint caused by him.¹⁴

⁹ Ibid 360-61 [83]-[86].

¹⁰ (2001) 111 FCR 240.

¹¹ Ibid 297 [180].

¹² Ibid 297 [181].

¹³ Ibid 297-98 [182]. His Honour’s decision was applied in *Oberoi v Human Rights and Equal Opportunity Commission* [2001] FMCA 34, [44].

¹⁴ *Elliott v Nanda* (2001) 111 FCR 240, 298 [185]. The proceedings before Moore J were for enforcement of the decision by HREOC, HREOC having heard the matter as a tribunal at first instance. Particularly relevant on this issue was the first respondent’s failure to participate in the HREOC hearing.

In *Font v Paspaley Pearls*¹⁵ Raphael FM indicated that damages arising from a party's conduct of litigation may, in some circumstances, be better characterised as 'exemplary' rather than 'aggravated' damages. In that matter, his Honour noted that exemplary damages are more punitive than compensatory in character. The type of action which might occasion an award of exemplary damages is

reprehensible conduct which might perhaps have warranted punishment, rather than findings of the infliction of hurt, insult and humiliation.¹⁶

In *Hehir v Smith*,¹⁷ such conduct included the appellant's active distortion of the written documentary evidence of several witnesses in a case where he was accused of sexual harassment. Raphael FM noted in *Font v Paspaley Pearls*¹⁸ that, in discrimination matters like *Hehir* where exemplary damages have been contemplated or awarded, emphasis has been placed on the 'aggravating conduct rather than its effect.'¹⁹ His Honour viewed this as significant because, unlike compensatory damages, which would require the applicant to establish loss, punitive damages will not require the applicant to adduce further evidence about the hurt and distress occasioned by the offending conduct.²⁰ His Honour further noted that this may be particularly important where the conduct occurs during the trial itself, as was the case in both *Font v Paspaley Pearls*²¹ and *Hehir v Smith*.²²

In *Font v Paspaley Pearls*,²³ the conduct said to warrant an award of exemplary damages was the respondent putting into written evidence by way of witness affidavits 'various matters relating to the way [the applicant] conducted herself with men, her conversations on sexual matters and her dress'.²⁴ The respondent had also cross-examined the applicant on these points. Raphael FM stated:

Although the applicant sought to have these matters removed from the affidavits, I was pressed by the respondents to keep them in. I did so reluctantly and subject to their relevance. I found nothing relevant about them. They did not assist me in anyway to form a view about the applicant or the truth of her allegations ... I accept the submission by the applicant's Counsel that the former evidence was no more than an attempt to blacken the character of the applicant so that I should think less favourably of her in coming to any conclusions about the truthfulness of her evidence or the quantum of any damage she might have suffered. I think the whole exercise

¹⁵ [2002] FMCA 142, [161]-[166].

¹⁶ *Hehir v Smith* [2002] QSC 92, [42]. Cited in *Font v Paspaley Pearls* [2002] FMCA 142, [162].

¹⁷ [2002] QSC 92, [42].

¹⁸ [2002] FMCA 142, [161]-[166].

¹⁹ *Ibid* [165].

²⁰ *Ibid*.

²¹ [2002] FMCA 142.

²² [2002] QSC 92.

²³ [2002] FMCA 142.

²⁴ *Ibid* [160].

was unjustifiable and inappropriate and must have added to the distress felt by the applicant in giving her evidence and proceeding with the claim.²⁵

Finding that the mischaracterisation of the damages as aggravated was not a bar to recovery, his Honour stated:

The Federal Magistrates Court is not a court of strict pleading and this is particularly true in matters brought to it under the HREOC Act for breaches of one of the Commonwealth Anti-discrimination Acts. I do not think that the fact that the conduct complained of was described as entitling the applicant to aggravated damages, when in fact a proper description would have included exemplary damages, should prevent the applicant from recovering ... All that I propose to do is to give the award which I intend to make its proper nomenclature, and that is 'exemplary damages'.²⁶

5.2.2 Damages under the RDA

The following table gives an overview of damages awarded under the RDA since the transfer of the hearing function to the FMS and the Federal Court. The reasoning underlying those awards is summarised below.

Table 1: Overview of damages awarded under the RDA

Case	Damages awarded
<i>Carr v Boree Aboriginal Corp</i> [2003] FMCA 408	\$11,848.61 (special damages) \$1,917.89 (interest) \$7,500.00 (general damages)
<i>McMahon v Bowman</i> [2000] FMCA 3	\$1,500
<i>Horman v Distribution Group</i> [2001] FMCA 52	\$12,500

In *Carr v Boree Aboriginal Corp*,²⁷ Raphael FM made a finding that the respondent employer, through its agents and servants, had unlawfully discriminated against Ms Carr and dismissed her because of her 'race or non-Aboriginality'.²⁸ In the absence of any evidence to the contrary, his Honour accepted the claimed amount for special damages and awarded the sum of \$11, 848.61 for loss of earnings, made up of lost wages, holiday pay and unpaid overtime together with interest. In making an award of \$7,500.00 for general damages, Raphael FM took into account that the applicant had 'suffered hurt, humiliation and distress'²⁹ and the fact that no medical evidence had been adduced.

²⁵ Ibid [160].

²⁶ Ibid [166]. Cf *Hehir v Smith* [2002] QSC 92; *Myer Stores Limited v Soo* [1991] 2 VR 597 where it was held that an absence of a claim for exemplary damages prevented such an award being made.

²⁷ [2003] FMCA 408.

²⁸ Ibid [9].

²⁹ Ibid [12].

In *McMahon v Bowman*,³⁰ Driver FM considered the appropriate amount of the award of damages for an act of racial hatred which had taken place as part of a neighbourhood dispute. His Honour did not award damages in respect of the altercation between Mr Bowman and Mr McMahon that had formed part of the complaint on the basis that the altercation was the subject of proceedings in the local court (where Mr McMahon was defending a charge of assault), ‘as Mr McMahon should not be twice punished for his actions’.³¹ His Honour was of the view that the words the subject of the complaint, addressed as they were to an entire family including impressionable children, were insulting and the appropriate amount of compensation was \$1,500.

In the case of *Horman v Distribution Group*³² the applicant partially succeeded in her complaints under the RDA and the SDA. In awarding damages, Raphael FM took into account the medical symptoms the applicant suffered (mainly anxiety and panic attacks, confirmed by medical practitioners, and concern over the possibility of miscarriage), and the type of incident to which the applicant was subjected. His Honour awarded \$12,500 including special damages for medication costs.³³

In *Gibbs v Wanganeen*,³⁴ Driver FM dismissed the application, but went on to consider the relief that he would have awarded had the complaint succeeded. The case involved an allegation of vilification of a prison officer by a prisoner. His Honour noted that there was a procedure within the prison for dealing with racial abuse, or any other abuse, of a prison officer by a prisoner. That procedure was followed and had resulted in a penalty being imposed upon the prisoner. In those circumstances, Driver FM suggested that it ‘would be neither necessary nor desirable that this Court impose an additional penalty on the respondent’.³⁵ However, he accepted that:

the legislation is not punitive, it is compensatory and there is the possibility that a prison officer, or even this prison officer, may sustain injury, whether to his feelings or otherwise, necessitating some form of compensation. This Court cannot arbitrarily refuse to provide relief where relief is called for: *Hall v Sheiban* (1988) 85 ALR 503. As a general principle, however, my view is that matters such as the present can and should be adequately dealt with in accordance with the rules regulating conditions within the prison.³⁶

³⁰ [2000] FMCA 3.

³¹ *Ibid* [30].

³² [2001] FMCA 52.

³³ *Ibid* [70].

³⁴ (2001) 162 FLR 333.

³⁵ *Ibid* 338 [20].

³⁶ *Ibid* 338 [21].

5.2.3 Damages under the SDA Generally

The following table gives an overview of damages awarded under the SDA since the transfer of the hearing function to the FMS and the Federal Court. The reasoning underlying those awards is summarised below. Note that sexual harassment matters are not dealt with in this section; they are considered separately in 5.2.4.

Table 2: Overview of damages awarded under the SDA

Case	Damages awarded
<i>Font v Paspaley</i> [2002] FMCA 142	\$7,500 (exemplary damages) \$10,000 (general damages)
<i>Grukke v KC Canvas Pty Ltd</i> [2000] FCA 1415	\$7,000 (loss of earnings) \$3,000 (general damages)
<i>Cooke v Plauen Holdings</i> [2001] FMCA 91	\$750
<i>Song v Ainsworth Game Technology Pty Ltd</i> [2002] FMCA 31	\$10,000 (general damages) \$244.44 per week from 21 February 2001 until the date of judgment, less \$977.76 already paid (special damages)
<i>Escobar v Rainbow Printing Pty Ltd (No.2)</i> [2002] FMCA 122	\$2,500 (non-economic loss) \$4,825.73 (economic Loss)
<i>Mayer v Australian Nuclear Science and Technology Organisation</i> [2003] FMCA 209	\$39,294 (minus an amount due for income tax, to be paid to the Australian Taxation Office)
<i>Evans v National Crime Authority</i> [2003] FMCA 375	\$25,000 (general damages) \$7,493.84 (interest) \$21,994.73 (special damages for economic loss)
<i>Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd</i> [2003] FMCA 160	\$10,000 plus interest (non-economic loss)
<i>Kelly v TPG Internet Pty Ltd</i> [2003] FMCA 584	\$7,500 (general damages)
<i>Gardner v All Australia Netball Association</i> (2003) 197 ALR 28	\$6,750

In *Font v Paspaley Pearls*,³⁷ in addition to the amount allowed for exemplary damages,³⁸ Raphael FM awarded the applicant the amount of \$10,000 as general damages. In arriving at that figure, his Honour had regard to a schedule of damages awarded during the period HREOC had its hearing function and to decisions of the FMS. His Honour also noted that he had

³⁷ [2002] FMCA 142.

³⁸ See 5.2.1(c) above.

borne in mind ‘what I regard to be a serious failure of the first respondent to put in place any appropriate machinery for dealing with this type of complaint’.³⁹

In *Grukke v KC Canvas Pty Ltd*,⁴⁰ the precise basis of the claim is unclear from the report, although Ryan J noted that he was satisfied that s 14 of the SDA had been contravened. His Honour awarded \$7,000 for lost earnings and \$3,000 for general damages as compensation for ‘psychological harm inflicted by the injury to the applicant’s feelings which occurred during the course of employment.’⁴¹ That injury was said to be ‘substantially exacerbated by the termination of that employment in the circumstances that she recounted’⁴² (again the nature of those circumstances is unclear from the report). Ryan J declined to order an apology in light of the fact that the respondent was a corporation and that a pecuniary award of damages had been made.

The applicant in *Cooke v Plauen Holdings*⁴³ failed to make out a claim of sexual harassment. However, Driver FM was satisfied that the applicant had been discriminated against on the basis of her sex in contravention of s 14 of the SDA. His Honour refused the applicant’s claim for economic loss. In assessing general damages at an amount of \$750, his Honour said:

Although in recent times there has been a tendency for damages awards for non-economic loss to increase, most of the higher awards of damages in recent years have concerned very serious cases of sexual harassment. I have found that this is not a case of sexual harassment. The conduct complained of in this case was reprehensible in management terms but not otherwise. It was conduct that a reasonable person would have anticipated would be distressing to a young and inexperienced employee.⁴⁴

In *Song v Ainsworth Game Technology Pty Ltd*,⁴⁵ Raphael FM awarded the applicant \$10,000 general damages in respect of a claim that the applicant’s dismissal involved discrimination on the ground of family responsibilities in contravention of s 14(3A) of the SDA. His Honour also awarded damages for loss of earnings up to the date of judgment. His Honour further ordered that the applicant be reinstated and made orders varying her employment agreement.

Escobar v Rainbow Printing Pty Ltd (No.2),⁴⁶ also involved a successful claim of discrimination on the ground of family responsibilities. In calculating the

³⁹ [2002] FMCA 142, [155].

⁴⁰ [2000] FCA 1415.

⁴¹ *Ibid* [2].

⁴² *Ibid*.

⁴³ [2001] FMCA 91.

⁴⁴ *Ibid* [42].

⁴⁵ [2002] FMCA 31.

⁴⁶ [2002] FMCA 122.

applicant's economic loss, Driver FM first reduced the amount claimed to take into account the fact that, if the applicant had not been dismissed, she would have been available for work only two days per week.

His Honour further reduced the amount of damages claimed for economic loss having regard to the applicant's duty to mitigate her loss. The applicant's relationship with her partner broke down after her dismissal. From the time that that relationship broke down, she was unable to work (save for limited casual work) by reason of her family responsibilities. His Honour said that the applicant's inability to work from that time was not something for which the respondent should be held responsible.⁴⁷

In relation to non-economic loss, his Honour said:

... the applicant suffered hurt, humiliation and distress when she was terminated... In *Hickie v Hunt & Hunt* an amount of \$25,000 was awarded for non economic loss. In *Song v Ainsworth Game Technology* the sum of \$10,000 was awarded. Both of those cases involved a continuing employment relationship in unsatisfactory circumstances and the distress of the applicant was ongoing. In the present case the distress of the applicant was severe initially but would have resolved within a few months when the applicant reconciled herself to her present position. In addition, there was an intervening factor of the breakdown of the applicant's personal relationship with her partner for which the respondent was not responsible. An award of damages for non-economic loss in the present case should be somewhat lower than that awarded in *Hickie* and in *Song*. The award made in *Bogel v Metropolitan Health Services* (2000) EOC Para 93-069 was in the sum of \$2,500 which I find to be an appropriate award in the present circumstances.⁴⁸

In *Mayer v Australian Nuclear Science and Technology Organisation*⁴⁹ ('*Mayer*'), the applicant was awarded damages in the sum of \$39,294, including pre-judgment interest of \$3,599, after the applicant was successful in her claim of pregnancy and sex discrimination. As in *Escobar v Rainbow Printing Pty Ltd (No.2)*,⁵⁰ Driver FM assessed the damages for economic loss on the basis that the applicant was only able to work for 3 days a week. Entitlements for economic loss suffered in terms of lost salary, motor vehicle benefits and superannuation amounted to \$30,695. The applicant received this compensation for the period when she was entitled to receive a full-time income and the three-month notice period. She did not receive any compensation for the period following as the respondent was entitled to terminate her employment from this date. In addition, his Honour found that the applicant did not make any serious efforts to find alternative employment,

⁴⁷ Ibid [40].

⁴⁸ Ibid [42].

⁴⁹ [2003] FMCA 209.

⁵⁰ [2002] FMCA 122.

and therefore failed to mitigate any loss that she may have suffered after that date. Any failure to mitigate loss prior to this date was held to be immaterial.

The respondent in *Mayer* claimed that the applicant failed to mitigate her loss by not making adequate enquiries about child care. Driver FM rejected this contention, stating:

It is true that Ms Mayer's efforts to find child care were desultory and limited. She only looked for full-time places. However, Ms Mayer was proceeding (correctly) on the basis that her employer required her to work full-time, and she did not want to. Ms Mayer's efforts to find child care are irrelevant to the issue of mitigation.⁵¹

The applicant was also awarded \$5,000 for non economic loss. Driver FM considered it appropriate that the award on this issue should be in excess of the \$2,500 awarded in *Escobar v Rainbow Printing Pty Ltd (No.2)*⁵² by reason of the fact that the applicant suffered depression requiring treatment. Driver FM found the applicant 'was depressed and her state of mind would have been adversely affected by the respondent's refusal of part time work'.⁵³ The respondent was ordered to deduct from the damages awarded and remit to the ATO an amount due for income tax calculated on the basis that the damages awarded included an assessable income in the sum of \$13,642, and an eligible termination payment in the sum of \$9,852.⁵⁴

In *Evans v National Crime Authority*,⁵⁵ general damages in the sum of \$25,000 plus interest in the sum of \$7,493.84 were awarded following a finding of discrimination on the ground of family responsibilities. Raphael FM stated:

In anti-discrimination cases where no medical evidence is called or any serious medical sequelae alleged damages are given for hurt and humiliation...

....

In this case, medical evidence was produced, the consensus of opinion is that the applicant suffered clinical depression as a result of the actions of the NCA which lasted at least up until the end of 2000 ... [T]he appropriate figure for general damages in this case should take into account the effect of the actions of the NCA upon the applicant. I note that it is over 10 years since Wilcox J awarded damages of \$20,000 ... and that in *Rugema v Gadston Pty Limited* (1997), (unreported Commissioner Webster) the sum of \$30,000.00 in non economic losses was awarded for major depressive disorder. It is

⁵¹ Ibid [95].

⁵² [2002] FMCA 122.

⁵³ Ibid [97].

⁵⁴ Note that because this amount was necessarily unspecified (until calculated by the ATO), it is not reflected in the damages figure stated in the table at the start of this section.

⁵⁵ [2003] FMCA 375.

my view that the sum of \$25,000.00 is the appropriate award today for this applicant.⁵⁶

Special damages for economic loss were also awarded in the sum of \$21,994.73. This figure includes wage loss, loss of superannuation and interest on both of these amounts.

In *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd*,⁵⁷ the applicant was awarded \$10,000 plus interest for non-economic loss after she was found to have been discriminated against on the ground of pregnancy. The first respondent was also ordered to provide the applicant with a personal apology. The non-economic loss suffered was the anger and upset the applicant felt when the position she returned to following her maternity leave was not what had been represented to her. She had suffered a loss of status. She felt she was not being given important work to do and was concerned she would suffer a loss of career opportunity. Driver FM stated:

Ms Rispoli should receive a substantial sum for her non-economic loss, given the period of approximately 16 months over which it was experienced, given that it was aggravated by the confirmation of Ms Rispoli's loss of status in March 2000 and given the need to enforce respect for the public policy behind the SDA.⁵⁸

The sum awarded for non-economic loss was only awarded for the period until her resignation. She resigned of her own accord. Although the applicant was clearly distressed when she resigned from her employment, that was a problem of her own making, for which the respondent was not liable.

The applicant did not receive damages for economic loss. Although she was placed in a position not comparable in status to the position she held prior to taking maternity leave, she received the same remuneration and therefore suffered no loss during the period up to her resignation. In relation to the period after her resignation, his Honour declined to award damages for economic loss because 'the chain of causation between the discrimination committed by the first respondent and Ms Rispoli's loss of income following her resignation was broken by her own action.'⁵⁹ Damages and personal apologies were also sought against the second and third respondents, who were natural persons employed by the first respondent, however these proceedings were dismissed on an issue of jurisdiction.

In *Kelly v TPG Internet Pty Ltd*⁶⁰ the applicant was awarded \$7,500 in general damages on the grounds of pregnancy discrimination. No special damages for

⁵⁶ Ibid [111]-[112].

⁵⁷ [2003] FMCA 160.

⁵⁸ Ibid [92].

⁵⁹ Ibid [89].

⁶⁰ [2003] FMCA 584.

economic loss were awarded in this case as the respondent had discriminated against the applicant by offering her the position of customer service and billing manager on an acting basis, rather than in a permanent capacity following a period of maternity leave. As such, it was held that no loss of wages arose out of the discriminatory conduct.

In *Gardner v All Australia Netball Association*⁶¹ the respondent discriminated against the applicant by imposing an interim ban preventing pregnant women from playing in a netball tournament administered by the respondent. Raphael FM found this to be a breach of ss 7 and 22 of the SDA. The applicant was awarded the sum of \$6,750 by way of agreed damages. This covered lost match payments, sponsorship and hurt and humiliation suffered by the applicant.

5.2.4 Damages in Sexual Harassment Cases

The following table gives an overview of damages awarded in sexual harassment cases under the SDA since the transfer of the hearing function to the FMS and the Federal Court. The reasoning underlying those awards is summarised below.

Table 3: Overview of damages awarded in sexual harassment cases under the SDA

Case	Damages awarded
<i>Gilroy v Angelov</i> (2000) 181 ALR 57	\$24,000.00
<i>Elliott v Nanda</i> (2001) 111 FCR 240	\$15,000 (general damages) \$100 (compensation for counselling) \$5,000 (aggravated damages)
<i>Shiels v James</i> [2000] FMCA 2	\$13,000 (hurt and humiliation) \$4,000 (economic loss)
<i>Johanson v Blackledge</i> (2001) 163 FLR 58	\$6,000 (general damages) \$500 (special damages)
<i>Horman v Distribution Group</i> [2001] FMCA 52	\$12,500
<i>Wattle v Kirkland (No 2)</i> [2002] FMCA 135	\$28,035
<i>Aleksovski v Australia Asia Aerospace Pty Ltd</i> [2002] FMCA 81	\$7,500 (non-economic loss)
<i>McAlister v SEQ Aboriginal Corporation</i> [2002] FMCA 109	\$4,000 (general damages) \$1,100 (special damages)

⁶¹ (2003) 197 ALR 28.

The applicant in *Gilroy v Angelov*⁶² was dismissed from her employment. However, Wilcox J found that the dismissal was not causally connected to the acts of sexual harassment which his Honour had found to have taken place. Rather, his Honour found that the dismissal was caused by a misunderstanding and jealousy on the part of one of the principals of the respondent employer.

In those circumstances, there could be no award of special damages for economic loss arising from the dismissal. Nevertheless, Wilcox J found that the conduct that constituted sexual harassment had serious consequences for the applicant. Those consequences were exacerbated by her employer's failure to support her and by her abrupt and unfair dismissal. Wilcox J quoted and adopted his comments in *Hall v Sheiban*⁶³ in relation to the calculation of general damages for discrimination and awarded the applicant \$20,000 plus interest under that head.

In *Elliott v Nanda*,⁶⁴ the first respondent, Dr Nanda, was found to have engaged in conduct which amounted to sexual harassment and discrimination on the basis of sex. Moore J awarded \$15,000 for general damages as well as \$100 as compensation for counselling received by the applicant. Moore J further found that the first respondent (Dr Nanda) was liable to pay the applicant the amount of \$5,000 in aggravated damages to compensate her for the additional stress and mental anguish resulting from the considerable delay to the resolution of the complaint caused by him.⁶⁵

As noted in section 3.11 of Chapter 3 above, the Commonwealth was found to be liable for the conduct of Dr Nanda under s 105 of the SDA. Moore J accordingly held that the amounts awarded (with the exception of the award of aggravated damages) could be recovered from either respondent, although the applicant could not be compensated twice. In arriving at that conclusion, his Honour rejected the Commonwealth's submission to the effect that the applicant could only obtain relief for sexual harassment against Dr Nanda, stating:

This submission fails to give full effect to s.105 which results in a person to whom the section applies being treated as having done the unlawful act of another...the Court has power under s 46PO(4) to make such orders...as it thinks fit [including] an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent.⁶⁶

⁶² (2000) 181 ALR 57.

⁶³ (1989) 20 FCR 217.

⁶⁴ (2001) 111 FCR 240.

⁶⁵ *Ibid* 298 [185]. See 5.2.1(c) above.

⁶⁶ (2001) 111 FCR 240, 298 [186].

His Honour permitted the parties to make further submissions addressing the form of orders to be made to give effect to his Honour's findings. In his subsequent decision regarding that issue, Moore J said:

In my opinion both the respondent and the Commonwealth should be jointly ordered to pay the applicant \$15,100 compensation on the basis that, if that liability is satisfied by one party, the other party effectively provide contribution. In the orders I use the words 'joint and several' to signify the nature of the liability to pay that I intend to create, by the orders, in exercise of the powers conferred by the legislation. I do not suggest that some common law principle, such as that which applies to joint tortfeasors, is to be applied in the present case with a particular result. As the respondent was the primary and immediate cause of the compensable loss and damage, he should bear the greater portion of the burden. I do not accept, however, that the Commonwealth should bear none of the burden. First, orders are not being made to punish either the respondent or the Commonwealth but rather are being made to compensate the applicant. Secondly, had the Commonwealth not engaged in conduct which I have found permitted the unlawful conduct of the respondent, that unlawful conduct would or may never have taken place. Accordingly I propose to order that, in the event that the respondent satisfies the liability to pay the \$15,100, the Commonwealth is to contribute \$5000. If the Commonwealth satisfies the liability then the respondent is to contribute \$10,100. Plainly it is only the respondent who is liable to pay the \$5000 aggravated damages.⁶⁷

In *Shiels v James*⁶⁸ ('*Shiels*'), Raphael FM awarded general damages and damages for economic loss, after finding that the applicant had been subjected to behaviour including comments of a sexual nature, unwelcome touching and a 'pattern of sexual pressure'.⁶⁹ As to the first head, his Honour noted that the sexual harassment cases heard by HREOC and the Federal Court during the time that HREOC had its hearing function indicated a range for general damages of between \$7,500 and \$20,000. His Honour further noted that the higher awards had been made in cases involving more physical action⁷⁰ or more substantial physical sequelae.⁷¹ Bearing these matters in mind, Raphael FM ordered the respondents to pay the applicant \$13,000 for hurt and humiliation. His Honour also awarded special damages for economic loss in the amount of \$4,000, which he described as a 'cushion for loss of employability'.⁷²

In *Johanson v Blackledge*,⁷³ Driver FM compared the hurt and distress suffered by the applicant to that suffered by the applicant in *Shiels*. His

⁶⁷ *Elliott v Nanda* [2001] FCA 550, [14].

⁶⁸ [2000] FMCA 2.

⁶⁹ *Ibid* [62]-[64].

⁷⁰ *Harwin v Pateluch* (Unreported, HREOC, Commissioner O'Connor, 21 August 1995). Extract at (1995) EOC 92-770.

⁷¹ *Smith v Buvet* (1996) EOC 92-840.

⁷² [2000] FMCA 2, [79].

⁷³ (2001) 163 FLR 58.

Honour expressed the view that the sexual harassment in the case before him was substantially less serious than *Shiels*, involving a single event which occurred by accident with none of the consequences involved in *Shiels*. Accordingly, he awarded \$6,000 for general damages, reduced by one third in recognition of a voluntary apology made by the respondents. His Honour also allowed the applicant \$500 for special damages (being compensation for the cost of three counselling sessions).

The applicant in *Horman v Distribution Group*⁷⁴ led medical evidence concerning the effect of the conduct which was found to constitute sexual harassment and discrimination in contravention of s 14(2)(b) of the SDA. That evidence indicated that the applicant had suffered from anxiety and panic attacks and that, as a result of a heated argument the applicant had with another employee in September 1997, the applicant nearly suffered a miscarriage. Raphael FM found that the applicant's symptoms fell within the 'less serious band', although he specifically noted that he was not underestimating the 'concern that any pregnant woman in the workplace would feel at the possibility of a miscarriage brought about by actions in the workplace.'⁷⁵ His Honour awarded the amount of \$12,500, which was a global figure to compensate the applicant for general non-economic loss and any special damage for the cost of medication.

In *Wattle v Kirkland*⁷⁶ ('*Wattle*'), \$15,000 was awarded to the applicant in general damages. In arriving at that figure, Raphael FM referred to the applicant's evidence that she suffered hurt and humiliation, fear and concern, which manifested itself in panic attacks and exacerbation of her existing asthma. Despite difficulties with the evidence led by the applicant (who was self-represented), his Honour also awarded \$9,100 to compensate the applicant for lost earnings for 26 weeks. Raphael FM found that the lack of evidence of a medical nature meant that he could not extend the period for loss of earnings beyond that time.

Raphael FM's decision in *Wattle* was successfully appealed.⁷⁷ Although the calculation of damages was not the subject of the appeal, Dowsett J noted that 'the basis of calculating the award may be suspect'.⁷⁸ The matter was remitted and heard by Driver FM, who awarded the same amount as Raphael FM for general damages.⁷⁹ However, the applicant claimed a lesser amount for economic loss than that awarded by Raphael FM, to take into account the

⁷⁴ [2001] FMCA 52.

⁷⁵ *Ibid* [70].

⁷⁶ [2001] FMCA 66.

⁷⁷ *Kirkland v Wattle* [2002] FCA 145.

⁷⁸ *Ibid* [3].

⁷⁹ *Wattle v Kirkland (No 2)* [2002] FMCA 135, [71].

payment of a disability support pension during the period for which she claimed lost income.⁸⁰

A relatively lower award in respect of general damages for a successful sexual harassment claim was made by Raphael FM in *Aleksovski v Australia Asia Aerospace Pty Ltd*.⁸¹ His Honour stated that he was ‘prepared to accept that the applicant was seriously offended by the conduct of [the harasser]’, however ‘the applicant’s experiences were not as traumatic as those of many people who come before this court making allegations of sexual harassment.’⁸² His Honour ordered that the respondent pay the applicant the sum of \$7,500 by way of damages for non-economic loss. His Honour refused the applicant’s claim for damages in respect of economic loss incurred as a result of her dismissal. His Honour was not satisfied that there was a causal connection between the applicant’s dismissal and the conduct constituting sexual harassment.

Another relatively low award for general damages in a sexual harassment matter was made by Rimmer FM in *McAlister v SEQ Aboriginal Corporation*.⁸³ Her Honour referred to Raphael FM’s discussion in *Shiels v James*⁸⁴ of the range for general damages for sexual harassment matters, stating:

In [*Shiels*] Raphael FM reviewed a number of cases and found that the current range for hurt and humiliation is between \$7,500.00 and \$20,000.00. He was, however, looking at cases involving overt and sustained sexual harassment. This case is distinguishable from those cases; it was a one-off request for sex by Mr Lamb in return for providing a single service. It was not repeated. Accordingly, the award for non-economic loss should be at least at the lower end of the scale.⁸⁵

Rimmer FM noted that the applicant’s hurt and humiliation in the matter before her was initially substantial, but that there was no evidence before her to suggest when it was resolved. Her Honour further noted that the applicant’s evidence was that she had received counselling for a period of twelve months. In those circumstances, her Honour awarded the applicant \$4,000 for general damages.

Her Honour also awarded the applicant damages to compensate her for loss she incurred in connection with relocating following the acts of sexual harassment. The amounts allowed under that head were \$600 for the applicant’s moving costs and \$500 to compensate the applicant for the loss of

⁸⁰ Ibid [70].

⁸¹ [2002] FMCA 81.

⁸² Ibid [102].

⁸³ [2002] FMCA 109.

⁸⁴ [2000] FMCA 2.

⁸⁵ Ibid [157].

goods and furniture which the applicant disposed of or gave away prior to moving.

5.2.5 Damages under the DDA

The following table gives an overview of damages awarded under the DDA since the transfer of the hearing function to the FMS and the Federal Court. The reasoning underlying those awards is summarised below.

Table 4: Overview of damages awarded under the DDA

Case	Damages awarded
<i>Barghouthi v Transfield Pty Ltd</i> (2002) 122 FCR 19	One week's salary
<i>Haar v Maldon Nominees</i> (2000) 184 ALR 83	\$3,000
<i>Travers v New South Wales</i> (2001) 163 FLR 99	\$6,250
<i>McKenzie v Department of Urban Services and Canberra Hospital</i> (2001) 163 FLR 133	\$15,000 (hurt, humiliation and distress) \$24,000 (lost wages)
<i>Oberoi v Human Rights and Equal Opportunity Commission</i> [2001] FMCA 34	\$18,500 (pain and suffering, hurt, humiliation and loss of employability) \$1,500 (special damages)
<i>Sheehan v Tin Can Bay Country Club</i> [2002] FMCA 95	\$1,500
<i>Randell v Consolidated Bearing Company (SA) Pty Ltd</i> [2002] FMCA 44	\$10,000 (hurt, humiliation and distress) \$4,701 (economic loss)
<i>McBride v Victoria (No. 1)</i> [2003] FMCA 285	\$5,000
<i>Bassanelli v QBE Insurance</i> [2003] FMCA 412	\$5,000 \$543.70 (interest)
<i>Darlington v CASCO Australia Pty Ltd</i> [2002] FMCA 176	\$1,140 (lost wages; plus interest to be calculated at 9.5%)
<i>Clarke v Catholic Education Office</i> (2003) 202 ALR 340	\$20,000 \$6,000 (interest)

In *Barghouthi v Transfield Pty Limited*,⁸⁶ Hill J found that an employee had suffered unlawful discrimination when he was constructively dismissed from his employment after advising his employer that he was unable to return to work on account of a back injury. In accordance with his contract of employment, the employee was awarded one week's salary as compensation. He was not awarded compensation for the full period of his contract as he was unable to return to work during that period. As there was no evidence before

⁸⁶ (2002) 122 FCR 19.

the Court in relation to any pain and suffering by the complainant, Hill J stated that he was not able to award any damages on that basis.

McInnis FM in *Haar v Maldon Nominees*⁸⁷ ('Haar') found that a visually impaired applicant who was accompanied by her guide dog had been discriminated against when she was asked to sit outside on her next visit to the respondent's restaurant. Compensation of \$3,000 was ordered for injured feelings, distress and embarrassment. McInnis FM stated that it is important to make due allowance in damages where a disabled person has suffered 'diminished self worth' (in this case confirmed by a medical report) as a result of the discrimination.⁸⁸

In *Travers v New South Wales*,⁸⁹ Raphael FM 'agreed with the views'⁹⁰ of McInnis FM in *Haar* and awarded Ms Travers \$6,250 for hurt, humiliation and distress. The applicant, who has spina bifida, had suffered discrimination when her school had required her to utilise a toilet which was not the nearest and most accessible. In reaching this assessment, Raphael FM took into account the following factors:

- the applicant had not been entirely happy at the school before the incidents of February 1996 occurred;
- the applicant's removal from the school was caused by a number of factors which contributed to her unhappiness of which the discrimination was only one, albeit an important, factor;
- no medical evidence was called and there was no allegation that the applicant was suffering from any psychiatric disturbance or post traumatic stress disorder;
- there was no intention on the part of the school to deliberately discriminate against the applicant; and
- the applicant had suffered no long term damage as she was happy at another school.

In *McKenzie v Department of Urban Services*⁹¹, Raphael FM found that the applicant had been discriminated against by her employers over a two year period. As a result of the discrimination she had suffered, the applicant had taken a period of leave without pay and ultimately resigned from her employment. His Honour awarded the applicant \$15,000 for hurt, humiliation and distress.

⁸⁷ (2000) 184 ALR 83.

⁸⁸ Ibid 97 [89].

⁸⁹ (2001) 163 FLR 99.

⁹⁰ Ibid [73].

⁹¹ (2001) 163 FLR 133.

Raphael FM also awarded the applicant \$24,000 in lost wages for the period of leave without pay. Relying on the decision in *McNeill v Commonwealth of Australia*,⁹² and Tax Ruling IT2424, this award of damages was made on a gross basis.

His Honour rejected the applicant's submission that they were entitled to two and a half year's wages for the constructive dismissal element of the claim. His Honour noted that the applicant had received a redundancy payout of approximately nine months wages, and that the maximum damages payable in an unfair dismissal claim under the *Workplace Relations Act 1996* (Cth) was six months and concluded:

In my view before a person can succeed in a claim for future economic loss under s.46PO of HREOC Act they would have to prove that had they not been discriminated against they would have remained in employment and that they made some real attempt to mitigate their loss. None of this appears from Ms McKenzie's evidence and I am therefore not prepared to make an award of this type in her case.⁹³

In *Oberoi v Human Rights and Equal Opportunity Commission*,⁹⁴ Raphael FM awarded the applicant compensation of \$18,500 for pain and suffering, hurt, humiliation and loss of employability. His Honour also ordered that the respondent pay the applicant \$1,500 special damages to cover the cost of sporting equipment, and his costs of preparing the case, including for photocopying and legal advice. Raphael FM further ordered the President of HREOC to apologise.

The respondent club in *Sheehan v Tin Can Bay Country Club*,⁹⁵ was found to have discriminated unlawfully pursuant to s 9 of the DDA in refusing to permit the complainant's 'assistance' dog on the premises. The respondent was ordered to pay damages of \$1,500 for hurt and distress to the applicant.

In *Randell v Consolidated Bearing Company (SA) Pty Ltd*,⁹⁶ Raphael FM awarded the applicant \$10,000 for hurt, humiliation and distress following his dismissal from a traineeship with the respondent on the basis of his dyslexia. He followed his award for such loss in *Song v Ainsworth Game Technology Pty Ltd*⁹⁷ as he was of the view that the hurt, humiliation and distress suffered by the applicant in this case was similar to that suffered by the applicant in that case.⁹⁸

⁹² (1995) EOC 92-714.

⁹³ (2001) 163 FLR 133, 155 [94].

⁹⁴ [2001] FMCA 34.

⁹⁵ [2002] FMCA 95.

⁹⁶ [2002] FMCA 44.

⁹⁷ [2002] FMCA 31.

⁹⁸ [2002] FMCA 44, [55].

Raphael FM also awarded the applicant, \$4,701 for past economic loss following his dismissal from a year long traineeship with the respondent. That damages award was the difference between his wage for a year as a trainee and his wage for a year in his new position of employment.

In *Forbes v Commonwealth*,⁹⁹ Driver FM found that the applicant's employer, the Australian Federal Police ('AFP'), had discriminated against her by withholding relevant information from a review committee which was considering a decision not to appoint her as a permanent employee. A relevant issue for the review committee was the apparent breakdown in the relationship between the applicant and AFP. The information withheld related to her disability and explained the breakdown in the relationship. Driver FM considered that the AFP was under an obligation to put before the review committee information concerning the applicant's illness as its failure to do so left the review committee 'under the impression that [the applicant] was simply a disgruntled employee'.¹⁰⁰

His Honour declined, however, to award damages for non-economic loss, stating:

Ms Forbes clearly went through a great deal of emotional trauma following her departure from work on 17 December 1997. However, the only discriminatory conduct of the AFP was its withholding of relevant information from the review committee. Ms Forbes was undoubtedly distressed by the loss of her career in the AFP, but even if there had been no discrimination, the result would probably have been the same. Moreover, given the nature and causes of Ms Forbes' depressive illness and the reasons for the subsequent improvement of it, Ms Forbes actually benefited emotionally from the cessation of her employment. That episode in her life was resolved and she could move forward. In addition, the disclosure of Ms Forbes' medical details to the Review Committee would no doubt have been distressing for her. The withholding of that information, though discriminatory, protected her from that distress. I find that Ms Forbes has not suffered any non-economic loss meriting the award of damages by reason of the discriminatory conduct of the AFP.¹⁰¹

In *McBride v Victoria (No. 1)*,¹⁰² the applicant had complained to a supervisor about rostering for duties which were inconsistent with her disabilities (which had resulted from work-related injuries). The supervisor was found to have responded: 'What the fuck can you do then?'¹⁰³ McInnis FM found that this constituted unlawful discrimination contrary to ss 15(2)(b) and (d) of the DDA. His Honour found that the incident caused 'significant upset and hurt'

⁹⁹ [2003] FMCA 140.

¹⁰⁰ *Ibid* [28].

¹⁰¹ *Ibid* [33].

¹⁰² [2003] FMCA 285.

¹⁰³ *Ibid* [48].

to the applicant (but not more significant injury which had been claimed) and awarded \$5,000 in damages.

Raphael FM in *Bassanelli v QBE Insurance*,¹⁰⁴ found that the respondent had discriminated against the applicant when it refused her travel insurance by reason of her disability, namely metastatic breast cancer. His Honour awarded \$5,000 for the distress caused by the discrimination (relevantly, she was able to find other insurance and was not prevented from travelling). Raphael FM noted that the applicant was motivated by a ‘personal campaign for fair treatment of cancer sufferers’ and that while she was entitled to bring a claim for these reasons, ‘she should not personally benefit because their outrage has been assuaged’.¹⁰⁵

In *Darlington v CASCO Australia Pty Ltd*,¹⁰⁶ Driver FM found the respondent had unlawfully discriminated against the applicant by reducing his hours of work to one shift per week on account of his disability. The period of the detriment was found to span two working weeks only, and Driver FM awarded the applicant \$1,140 (plus interest to be calculated at 9.5%) in damages for economic loss. This amount represented an award of \$180 a day for eight days’ lost wages in the relevant fortnight.

The respondent in *Clarke v Catholic Education Office*¹⁰⁷ was found to have indirectly discriminated against a student in requiring him to receive teaching at one of their schools without the assistance of an Auslan interpreter.¹⁰⁸ Madgwick J awarded damages of \$20,000 (and interest of \$6,000) for the distress caused by the discrimination.

5.3 Apologies

There have been divergent views expressed as to the appropriateness of a court-ordered apology.

In *Creek v Cairns Post Pty Ltd*,¹⁰⁹ for example, although the complaint was not upheld, Kiefel J noted that a short apology would have been ordered had the complaint been made out, because it may have helped vindicate the applicant in the eyes of her community. Her Honour further noted that the failure of the respondent to acknowledge that it had acted for racist reasons, and the withholding of an apology would have been taken into account in

¹⁰⁴ [2003] FMCA 412.

¹⁰⁵ *Ibid* [56].

¹⁰⁶ [2002] FMCA 176.

¹⁰⁷ (2003) 202 ALR 340.

¹⁰⁸ See above 5.2.1(b).

¹⁰⁹ (2001) 112 FCR 352.

assessing the extent of the injury and corresponding compensation to redress it.¹¹⁰

In *Forbes v Commonwealth of Australia*,¹¹¹ Driver FM stated:

I accept that not all of the emotional wounds that [the applicant] has suffered have healed. She will benefit from achieving final closure of this aspect of her life. That closure is best achieved, in my view, by providing relief in the form of a declaration that the [respondent] discriminated against her and an order requiring the [respondent] to provide an apology.¹¹²

In *Cooke v Plauen Holdings*,¹¹³ the applicant's entitlement to an apology was taken into account by Driver FM in assessing the appropriate award of damages:

I have also taken into account in assessing what is an appropriate award of damages that Ms Cooke should receive an apology. She has received an oral expression of regret but she is entitled to a formal apology. An apology is frequently worth more to an applicant than money. In this case I am satisfied that a written apology would go a long way to compensating the applicant for the distress and loss of confidence that she suffered.¹¹⁴

In *Escobar v Rainbow Printing Pty Ltd (No 2)*,¹¹⁵ Driver FM found that the applicant was entitled to an apology. His Honour noted that the respondent had 'offered to provide an apology should liability be found',¹¹⁶ and ordered that the respondent provide the applicant with a written apology in terms to be agreed between the parties.

In *Jones v Toben*,¹¹⁷ however, Branson J expressed the view that it was not appropriate to 'seek to compel the respondent to articulate a sentiment that he plainly enough does not feel', citing with approval the view of Hely J in *Jones v Scully*¹¹⁸ that '*prima facie*, the idea of ordering someone to make an apology is a contradiction in terms'.

Similarly, in *Travers v New South Wales*,¹¹⁹ Raphael FM stated:

An apology is something that should be freely given and arise out of an understanding by one party that it was at fault in relation to its actions as they affected the aggrieved party. Whilst I would like to think that these reasons

¹¹⁰ Ibid 360-61 [35].

¹¹¹ [2003] FMCA 140

¹¹² Ibid [34]. His Honour also ordered an apology in *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd* [2003] FMCA 160, [95]. See also the decision of Raphael FM in *Oberoi v Human Rights and Equal Opportunity Commission* [2001] FMCA 34 in which an apology was ordered.

¹¹³ [2001] FMCA 91.

¹¹⁴ Ibid [43].

¹¹⁵ [2002] FMCA 122.

¹¹⁶ Ibid [43].

¹¹⁷ [2002] FCA 1150, [106].

¹¹⁸ (2002) 120 FCR 243, 308 [245].

¹¹⁹ (2001) 163 FLR 99.

indicate to the respondent why it was at fault and that so realising, it voluntarily expresses its apologies... I am not prepared to force it to do so.¹²⁰

In *Grulke v KC Canvas*,¹²¹ Ryan J declined to order an apology from a respondent who was found to have discriminated against the applicant on the basis of her sex. He stated:

In my view, having regard to the fact that the respondent here is not a natural legal person but is a corporation, and the fact that I have endeavoured to compensate for loss or damage suffered by the applicant by making a pecuniary award of damages, it is inappropriate to exercise the discretion reposed in the Court by additionally ordering the making of an apology.¹²²

In *Evans v National Crime Authority*,¹²³ in reference to the applicant's request for an apology from the respondent Raphael FM stated:

I do not believe there is much utility in forcing someone to apologise. An apology is intended to come from the heart. It cannot be forced out of a person. If a person does not wish to give one it is valueless. I suggested to the respondent that, subject to an appeal it may well feel after examining these reasons that its EEO procedures had failed in the particular circumstances of this case and that it should express its apology to the applicant. These cases are not just about the recovery of damages. They serve an educational purpose. In this case the educational purpose would include the respondent coming to a realisation that howsoever important the activities of the NCA may be, they should not be conducted in such a way that they breach both the contract entered into between the organisation and its staff and the SDA.¹²⁴

For jurisdictional reasons, Driver FM in *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd*¹²⁵ was unable to compel all three respondents to provide apologies to the applicant, even though her complaint was successfully made out. His Honour ordered that the first respondent apologise to the applicant, but found he lacked the jurisdiction to compel the second and third respondents to do the same, given that:

the complaint terminated by HREOC was limited to the complaint against the first respondent. Only the first respondent is identified in the notice of termination and the accompanying letter. Accordingly, as Ms Rispoli's complaint against the second and third respondents has not been terminated by HREOC, the Court has no jurisdiction to deal with her application insofar as it relates to those respondents.¹²⁶

¹²⁰ Ibid 116-17 [73]. See similar comments made by His Honour in *Evans v National Crime Authority* [2003] FMCA 375, [115] and *Carr v Boree Aboriginal Corp* [2003] FMCA 408, [14].

¹²¹ [2000] FCA 1415.

¹²² Ibid [4].

¹²³ [2003] FMCA 375.

¹²⁴ Ibid [115].

¹²⁵ [2003] FMCA 160.

¹²⁶ Ibid [71].

5.4 Other Remedies

A range of other forms of relief have been considered by the Courts.

Raphael FM in *Sheehan v Tin Can Bay Country Club*¹²⁷ ordered that the respondent club permit the applicant to attend its premises with his dog (an ‘assistance animal’) unleashed.

In *Song v Ainsworth Game Technology Pty Ltd*,¹²⁸ Raphael FM ordered that the applicant’s employment agreement be varied so that she would be permitted to take her lunch break from 2.55pm to 3.25pm during each working day. This arrangement would enable her to pick up her child from school each afternoon and transfer him to child care.

In *Jones v Toben*,¹²⁹ the complainant did not seek damages, but sought a declaration that the respondent had engaged in unlawful conduct by publishing anti-Semitic material on a website, and sought orders requiring the removal of vilificatory material from the internet and prohibiting its future publication and an apology.¹³⁰

In considering whether or not to make an order requiring the removal of the material and prohibiting its further publication, Branson J noted that futility is a factor to be taken into account when exercising a discretion to grant relief.¹³¹ In the present case there was a risk that the practical effect of an order might be undermined by others who may choose to publish the same material at another location on the World Wide Web or elsewhere. However, she found persuasive the approach of the Canadian Human Rights Tribunal in *Citron v Zündel (No.4)*¹³² which had found that there were a number of purposes to a remedy that might be awarded and that what others might choose to do once a remedy has been ordered should not unduly influence any decision. The effects of an order may be prevention and elimination of discriminatory practices, the symbolic value of the public denunciation of the actions the subject of the complaint, and the potential educative and preventative benefit that could be achieved by open discussion of the principles enunciated in the decision.¹³³

In the course of considering what relief was appropriate in the case, Branson J also considered the respondent’s characterisation of the proceedings as raising

¹²⁷ [2002] FMCA 95.

¹²⁸ [2002] FMCA 31.

¹²⁹ [2002] FCA 1150.

¹³⁰ See above 5.3.

¹³¹ [2002] FCA 1150, [108] – [110].

¹³² (2002) 41 CHRR D/274, [299] – [300].

¹³³ [2002] FCA 1150, [111].

important issues concerning free speech. Her Honour declined to be influenced by such considerations, stating:

The debate as to whether the RDA should proscribe offensive behaviour motivated by race, colour, national or ethnic origin, and the extent to which it should do so, was conducted in the Australian Parliament by the democratically elected representatives of the Australian people. The Parliament resolved to enact Part IIA of the *Racial Discrimination Act* which includes s 18C. Australian judges are under a duty, in proceedings in which reliance is placed on Part IIA of the *Racial Discrimination Act*, to interpret and apply the law as enacted by Parliament.¹³⁴

Her Honour made a declaration that the respondent had engaged in conduct rendered unlawful by Part IIA of the RDA and ordered that the respondent remove the relevant material or material with substantially similar content from the website and be restrained from publishing or republishing the material or other material with substantially similar content.¹³⁵

In *McGlade v Lightfoot*,¹³⁶ the primary relief sought by the applicant was a public declaration that the conduct of the respondent was unlawful by virtue of s 18C of the RDA. Carr J found that it:

would be fit to grant the declaration sought. It is a useful and appropriate way of recording publicly the unlawfulness of the making by the respondent of comments which received considerable publicity and were reasonably likely to offend and insult the relevant persons identified above.¹³⁷

The applicant had also sought an order that the respondent make a donation to the Aboriginal Advancement Council, submitting that s 46PO(4)(b) of the HREOC Act would be the source of the Court's power to make such an order. Although Carr J disagreed with the applicant's construction of s 46PO(4), he indicated that the court was not limited to the orders specified in s 46PO(4):

I do not think that is the case in this matter because the order sought is not sought for the purpose referred to in that sub-paragraph. However, the list of specified orders in s 46PO(4) is not exhaustive – see the use of the word "including".¹³⁸

His Honour nevertheless declined to make any order requiring a donation to the nominated body, on the basis that '[n]othing specific was put before me on behalf of the applicant to demonstrate why such an order would be a fit one,' and '[n]o authority was cited to me in which such an order had been made.'¹³⁹

¹³⁴ Ibid [107].

¹³⁵ Ibid [105], [113].

¹³⁶ (2002) 124 FCR 106.

¹³⁷ Ibid 123 [78].

¹³⁸ Ibid 123 [80].

¹³⁹ Ibid 123 [81].

Chapter 6

Procedure and Evidence

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Chapter 6

Procedure and Evidence

6.1 Introduction and General Procedural Overview

Following the transfer of HREOC's hearing function to the Federal Court and FMS,¹ the provisions governing the procedure for federal unlawful discrimination matters appear in Part IIB of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ('HREOC Act'). In very broad terms, that procedure is as follows:

- Written complaints alleging unlawful discrimination under the RDA, SDA or DDA are lodged with HREOC.² The Commission inquires into and attempts to conciliate such complaints.³ Responsibility for those functions is vested in the President of HREOC.⁴
- The President has powers to obtain information relevant to an inquiry⁵ and can direct the parties to attend a compulsory conference.⁶
- The President may terminate a complaint on the grounds set out in s 46PH, being:
 - (a) the President is satisfied that the alleged unlawful discrimination is not unlawful discrimination;
 - (b) the complaint was lodged more than 12 months after the alleged unlawful discrimination took place;
 - (c) the President is satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance;
 - (c) in a case where some other remedy has been sought in relation to the subject matter of the complaint—the President is satisfied that the subject matter of the complaint has been adequately dealt with;
 - (d) the President is satisfied that some other more appropriate remedy in relation to the subject matter of the complaint is reasonably available to each affected person;
 - (e) in a case where the subject matter of the complaint has already been dealt with by the Commission or by another statutory authority—the President is satisfied that the subject matter of the complaint has been adequately dealt with;

¹ With the commencement of the *Human Rights Legislation Amendment Act (No 1) 1999* (Cth) – see discussion in Chapter 1.

² Section 46P HREOC Act.

³ Section 11(aa) HREOC Act.

⁴ Section 8(6) HREOC Act.

⁵ Section 46PI HREOC Act.

⁶ Section 46PJ HREOC Act.

- (f) the President is satisfied that the subject matter of the complaint could be more effectively or conveniently dealt with by another statutory authority;
 - (g) the President is satisfied that the subject matter of the complaint involves an issue of public importance that should be considered by the Federal Court or the Federal Magistrates Court; or
 - (h) the President is satisfied that there is no reasonable prospect of the matter being settled by conciliation;⁷
- Upon receiving a notice of termination issued by the President, a complainant may make an application to the Federal Court or FMS alleging unlawful discrimination by one or more respondents to the terminated complaint.⁸ Readers should note that the rules of the Federal Courts and FMS impose certain procedural requirements in relation to the commencement of such applications.⁹
 - The application must be filed within 28 days of the date of issue of the termination notice,¹⁰ although this limitation period is subject to a discretion vested in the Court to allow further time (discussed in section 6.5 below).

Note also that the Race Discrimination Commissioner, Sex Discrimination Commissioner, Disability Discrimination Commissioner, Human Rights Commissioner and Aboriginal and Torres Strait Islander Social Justice Commissioner are given an *amicus curiae* function in relation to proceedings arising out of a complaint before the Federal Court or the FMS.¹¹

The remainder of this chapter discusses more specific procedural and evidentiary issues. The majority of these issues involve decisions of the Federal Court and FMS handed down after the transfer of the hearing function. However, some pre-transfer decisions remain relevant and are also discussed below.

6.2 Standard of Proof in Discrimination Matters

The complainant bears the onus of proof in establishing a complaint of unlawful discrimination. The standard of proof required to be met has been the subject of frequent discussion in the cases, predominantly in the context of

⁷ Note also the power to terminate a complaint under s 46PE in relation to complaints against the President, HREOC or a Commissioner.

⁸ See s 46PO(1) of the HREOC Act.

⁹ See O 81, r 5 of the *Federal Court Rules* and Part 41 of the *Federal Magistrates Court Rules 2001*.

¹⁰ See s 46PO(2).

¹¹ See s 46PV of the HREOC Act. That function has been exercised in the following matters: *Gardner v All Australia Netball Association Ltd* (2003) 197 ALR 28; *John Morris Kelly Country v Louis Beers* (DZ5 of 2003), decision reserved; *Access for all Alliance (Hervey Bay) Inc v Hervey Bay City Council* (BZ341 of 2002), decision reserved; *Ferneley v Boxing Authority of New South Wales* (2001) 115 FCR 306.

the RDA and SDA. In particular, the courts have considered the manner in which the test in *Briginshaw v Briginshaw*¹² (*'Briginshaw'*) should be applied. In *Briginshaw*, Dixon J stated:

when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitively developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequences of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.¹³

A key principle derived from this passage is that, in cases involving more serious allegations (or allegations which are more unlikely or carry more grave consequences), evidence of a higher probative value is required for a decision-maker to attain the requisite degree of satisfaction.¹⁴ It is clear from Dixon J's statement that there is no 'higher standard of proof'.¹⁵ Similarly, it would not appear to be strictly correct to speak of 'invoking', or 'resorting to', the 'principle in *Briginshaw*':¹⁶ the principle is to be applied in all cases.

The cases suggest that not all complaints made under the RDA, SDA or DDA are properly to be considered of such 'seriousness' as to require evidence of a 'higher persuasive value'.

A key issue, therefore, is what circumstances will increase the seriousness of an allegation of discrimination such that the court will require evidence of a higher degree of probative value in order to be satisfied that the applicant has made out his or her complaint.

¹² (1938) 60 CLR 336.

¹³ *Ibid* 361-62.

¹⁴ See, for example, *X v McHugh (Auditor-General of Tasmania)* (Unreported, HREOC, Sir Ronald Wilson, 8 July 1994), 9: 'any allegation requires that degree of persuasive proof as is appropriate to the seriousness of the allegation'. Extract at (1994) EOC 92-623.

¹⁵ See also *Rejzek v McElroy* (1965) 112 CLR 517, 521-22 (Barwick CJ). This terminology is, however, sometimes used: see, for example, *Sharma v Legal Aid Queensland* [2001] FCA 1699, [40].

¹⁶ As the Full Federal Court appears to do, for instance, in *Victoria v Macedonian Teachers' Association of Victoria* (1999) 91 FCR 47, 50-1.

6.2.1 Cases under the RDA

This issue was considered by HREOC in the context of the RDA in *D'Souza v Geyer*.¹⁷ The Commissioner considered earlier HREOC decisions on the application of the *Briginshaw* principle and stated:

... where an allegation is serious, one requires 'persuasive proof' of the complainant's allegation. Most allegations of racial discrimination are likely to be serious in nature and require the Commissioner hearing the matter to be persuaded by the evidence.¹⁸

A similar approach was taken in *Australian Macedonian Human Rights Committee Inc v Victoria*.¹⁹ The complaint related to a directive issued by the Victorian Government, requiring all departments and agencies to 'refer for the time being to the language that is spoken by people living in the Former Yugoslav Republic of Macedonia, or originating from it, as Macedonian (Slavonic)'. It was claimed that this impaired the recognition, enjoyment or exercise of a number of human rights and fundamental freedoms and accordingly constituted racial discrimination. Sir Ronald Wilson held:

Applying the test enunciated in *Briginshaw*... if a finding in support of the complainant means that the Government must be found to have deliberately discriminated against one section of the community in order to favour another section and therefore be deserving of wide condemnation for such a lack of probity in office, then such a finding would surely call for proof based on more than a mere balance of probabilities.²⁰

An application for review of this decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) was considered by Weinberg J in *Macedonian Teachers' Association of Victoria Inc v Human Rights and Equal Opportunity Commission*²¹ ('*Macedonian Teachers*'). The approach taken by HREOC was initially upheld by Weinberg J, who stated:

In my view, it was open to the Commissioner to conclude that the nature of the complaint made against the second respondent was such that, at least in its final form, it called for the application of the *Briginshaw* principles when making findings of fact. It is no badge of honour for any government to be found to have contravened a provision of an anti-discrimination statute. The fact that such a contravention may be found to have occurred without any intent on the part of that government to discriminate, and for laudatory motives, does not significantly diminish the gravity of any such finding.

As for the contention that the Commissioner erroneously construed the *Briginshaw* principle by treating it as though it sanctioned the adoption of a third standard of proof, mid way between the civil and criminal standards of

¹⁷ Unreported, HREOC, Commissioner Keim, 25 March 1996.

¹⁸ *Ibid* 18.

¹⁹ Unreported, HREOC, Sir Ronald Wilson, 8 January 1998.

²⁰ *Ibid* 7.

²¹ (1998) 91 FCR 8.

proof, I do not accept that this was what the Commissioner intended to convey when he said that ‘such a finding would surely call for proof based on more than a mere balance of probabilities’. In my view, this statement was no more than a convenient shorthand method of articulating the *Briginshaw* principle ...²²

His Honour cited with approval²³ the decision of Drummond J in *Ebber v Human Rights and Equal Opportunity Commission*²⁴ in which it was held that ‘a finding of unlawful conduct could only be made against the respondent if it was proved to the standard referred to in *Briginshaw*’.

Weinberg J’s application of the *Briginshaw* principle was, however, rejected by the Full Federal Court on appeal.²⁵ The Full Court cited Deane, Dawson and Gaudron JJ in *G v H*²⁶ in which their Honours had noted that due regard must be had to the nature of the issue involved because not every case involves issues of importance and gravity envisaged by *Briginshaw*. *G v H*²⁷ concerned the paternity of a child and it was held that the principle had no application. As to the present case, the Full Court stated:

In this case the complainants did not make, and did not need to make, any ‘serious allegations’ against the respondent, and they submitted to the Commission that it should confine itself in its determination to an examination of the effect of the directive given by the respondent in the terms of s9 of the Act without considering the motives of the government.

In the present case it is not necessary to make a finding of ‘deliberate’ discrimination against one section of the community in order to favour another section, and the probity of the Victorian government is not in issue. The mere finding that a government has contravened a provision of an anti-discrimination statute without considering the circumstances in which the contravention occurred is not, in our view, sufficient to attract the *Briginshaw* test. We disagree with his Honour’s conclusion that the absence of intention to discriminate does not significantly diminish the gravity of any such finding. As the first respondent submits, there are many examples of governments being held to have discriminated unlawfully against individuals or groups of individuals without resort to the principle in *Briginshaw*. They referred to the case of *Bacon v Victoria* (unreported, Supreme Court of Victoria, 7 November 1997, Beach J) where the issue was whether the education policy of the Victorian government was discriminatory. Beach J held that it was, but his Honour did not invoke the *Briginshaw* principle. That case was similar, in principle, to this one. No issue of fraud or impropriety was raised or needed to be determined.²⁸

²² Ibid 44.

²³ Ibid 43.

²⁴ (1995) 129 ALR 455.

²⁵ *Victoria v Macedonian Teachers’ Association of Victoria* (1999) 91 FCR 47. The Court otherwise upheld the decision of Weinberg J which had focused primarily on the meaning of the expression ‘based on’ race (see section 2.2 on the RDA) and dismissed the appeal.

²⁶ (1994) 181 CLR 387, 399.

²⁷ (1994) 181 CLR 387, 399.

²⁸ (1999) 91 FCR 47, 50.

In *Sharma v Legal Aid Queensland*²⁹ ('*Sharma*'), the applicant complained of racial discrimination in recruitment decisions made by the respondent. The applicant contended that the only explanation for the failure of his application for the positions was his race, as he was otherwise qualified adequately for them. Kiefel J noted, without reference to the Full Federal Court's decision in *Macedonian Teachers*,³⁰ that:

It was accepted by Counsel for the applicant that the standard of proof for breaches of the *Racial Discrimination Act 1975* is the higher standard referred to in *Briginshaw*...³¹

Nor was the decision in *Macedonian Teachers* referred to on appeal,³² the Full Court stating:

It was common ground at first instance that the standard of proof for breaches of the RDA is the higher standard referred to in *Briginshaw*... Racial discrimination is a serious matter, which is not lightly to be inferred: *Department of Health v Arumugam* [1988] VR 319, 331. No contrary argument was put on the hearing of the appeal, apart from the comment that there is no binding authority on this Court that *Briginshaw* should be applied in cases of this nature.³³

In *Batzialas v Tony Davies Motors Pty Ltd*³⁴ ('*Batzialas*'), McInnis FM echoed the views expressed in the Federal and Full Federal Courts in *Sharma* (although not referring to those authorities nor *Macedonian Teachers*), stating:

It should also be remembered that an allegation of racial discrimination is a serious matter, and I accept for the purpose of this Application that the appropriate test to be applied is the *Briginshaw* test.³⁵

The absence of any consideration by the Federal Court or the Full Federal Court in *Sharma* (or the FMS in *Batzialas*) of the reasoning of the Full Federal Court in the *Macedonian Teachers* leaves unresolved the issue of when the circumstances of a case under the RDA will be such as to require evidence of a higher probative value as contemplated by the '*Briginshaw* principle'.³⁶

²⁹ [2001] FCA 1699.

³⁰ *Victoria v Macedonian Teachers Association of Victoria* (1999) 91 FCR 47.

³¹ [2001] FCA 1699 [62].

³² *Sharma v Legal Aid (Qld)* [2002] FCAFC 196.

³³ *Ibid* [40].

³⁴ [2002] FMCA 243.

³⁵ *Ibid* [87].

³⁶ For discussion, see Jonathon Hunyor, 'Skin-deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25 *Sydney Law Review* 537.

6.2.2 Cases under the SDA

Discussion of the standard of proof required and the application of the *Briginshaw* principle under the SDA has taken place almost exclusively in cases involving allegations of sexual harassment.³⁷

In those cases, it has been accepted that not all allegations of sexual harassment will be of such ‘seriousness’ that the applicant is required to lead evidence of a ‘higher probative value’ in order to establish his or her complaint. In *Correia v Juergen Grundig*,³⁸ Sir Ronald Wilson stated that:

Although there may be those that would characterise the allegations in this case as being at the lower end of the scale of harassment, I do not believe it is helpful to engage in comparisons of that kind. Any level of harassment is demeaning and humiliating to a woman and is to be condemned. This is not to say that the standard of proof required of a complainant may not vary according to the seriousness attaching to the complaint:
Briginshaw v Briginshaw.³⁹

Sir Ronald also noted that he was mindful of the issues faced by complainants in proving allegations of sexual harassment, especially self-represented complainants:

I bear in mind the vulnerability of a woman in relating to an employer in a small office where there are seldom any witnesses to the attitudes and behaviour of the one toward the other and vice versa ... I bear in mind also that the task that confronts an unrepresented complainant in the presentation of her case is a daunting one. I have sought to ensure that the evaluation of the complainant’s evidence does not suffer by reason of that fact.⁴⁰

In *Patterson v Hookey*,⁴¹ Commissioner Rayner acknowledged that in cases of sexual harassment the evidence required to make out an allegation will necessarily vary given the breadth of the definition of ‘sexual harassment’ in the SDA, which covers ‘a very broad range of unwanted sexual conduct including a sexual advance or request for sexual favours and a statement of a sexual nature to or in the presence of a person.’⁴²

³⁷ In *Harris v Hingston* (Unreported, HREOC, Commissioner Nettlefold, 2 November 1992), 16, reference was made to *Briginshaw* in a case alleging discrimination on the basis of sex under s 14(2) of the SDA, but there was otherwise no discussion of its application.

³⁸ Unreported, HREOC, Sir Ronald Wilson, 31 July 1995.

³⁹ *Ibid* 8.

⁴⁰ *Ibid*. Compare, however, *Patterson v Hookey* (Unreported, HREOC, Commissioner Rayner, 9 December 1996), 5-6, in which Commissioner Rayner appeared to consider the ‘unobserved nature’ of the alleged incident of sexual harassment as a factor contributing to the ‘seriousness’ of the allegation.

⁴¹ Unreported, HREOC, Commissioner Rayner, 9 December 1996.

⁴² *Ibid* 5-6. Note, however, that the Commissioner in that matter suggests that the *Briginshaw* principle will only apply in cases of greater seriousness. As observed above, such an approach appears, with respect, to be incorrect.

Similarly, the approach of Raphael FM in *Font v Paspaley Pearls*⁴³ indicates that some allegations of sexual harassment should not be considered to be of such seriousness as to require the higher standard of evidence contemplated by *Briginshaw*.

6.2.3 Cases under the DDA

There has been little substantive consideration of the *Briginshaw* principle in cases under the DDA.

In *X v McHugh (Auditor-General of Tasmania)*,⁴⁴ Sir Ronald Wilson noted that the approach taken in *Briginshaw* was applicable to cases under the DDA, suggesting that ‘these principles may be described summarily as being that any allegation requires that the degree of persuasive proof as is appropriate to the seriousness of the allegation’.⁴⁵ Sir Ronald did not, however, expand upon the application of the *Briginshaw* principle in the case before him.⁴⁶

6.3 Interim Injunctions

6.3.1 Sections 46PP and 46PO(6) of the HREOC Act

Section 46PP of the HREOC Act empowers the FMS and the Federal Court to grant interim injunctions upon an application from HREOC, a complainant, respondent or affected person. Section 46PP provides:

- (1) At any time after a complaint is lodged with the Commission, the Federal Court or the Federal Magistrates Court may grant an interim injunction to maintain,
 - (a) the status quo, as it existed immediately before the complaint was lodged or,
 - (b) the rights of any complainant, respondent or affected person.
- (2) The application for the injunction may be made by the Commission, a complainant, a respondent or an affected person.

⁴³ [2002] FMCA 142, [121], [127]. It is again noted that while his Honour suggests that the *Briginshaw* principle will only apply in cases of greater seriousness, it is preferable to consider the principle as applicable in all cases, with only those more serious cases requiring a higher standard of evidence. See also *Dobrovsak v AR Jamieson Investments Pty Ltd* (Unreported, HREOC, Commissioner Keim, 15 December 1995), 16 [4]. Extract of decision at (1996) EOC 92-794. Other recent cases have confirmed that the ‘*Briginshaw* standard’ is applicable in cases involving sexual harassment, but have only done so in general terms: see *McAlister v SEQ Aboriginal Corporation* [2002] FMCA 109, [39]; *Wattle v Kirkland* [2001] FMCA 66, [34]; *Wattle v Kirkland (No.2)* [2002] FMCA 135, [45]; *Daley v Barrington* [2003] FMCA 93, [28].

⁴⁴ Unreported, HREOC, Sir Ronald Wilson, 8 July 1994. Extract at (1994) EOC 92-623.

⁴⁵ Unreported, HREOC, Sir Ronald Wilson, 8 July 1994, 9.

⁴⁶ See also, *Arrah v P & O Catering Services Pty Ltd* [2002] FMCA 27, [32] in which McInnis FM found it unnecessary to decide the ‘appropriate standard of proof’ which would apply in that case.

- (3) The injunction cannot be granted after the complaint has been withdrawn under section 46PG or terminated under section 46PE or 46PH.
- (4) The court concerned may discharge or vary an injunction granted under this section.
- (5) The court concerned cannot, as a condition of granting the interim injunction, require a person to give an undertaking as to damages.

The process required in making a decision as to whether or not to grant an interim injunction under s 46PP has been described as:

... not an easy one because clearly there is a duty to look at the background information, the evidence presented, to determine what the status quo is, whether it should be preserved by the granting of an interim injunction, and to also have regards to the rights of a respondent.⁴⁷

Furthermore, the consideration given to this process should be informed by the principles that apply at common law to the granting of interim relief, 'though in applying the principles to the exercise of the court's discretion under s 46PP, the court should not regard itself as constrained solely by those common law principles'.⁴⁸ The common law principles that have been adopted in s 46PP cases by the Federal Court and the Federal Magistrates Court include the requirements that there is a serious issue to be tried between the parties and that on the balance of convenience it is appropriate for the court to make the order.

The power conferred by s 46PP has been said by the Federal Court to be limited to:

the orders necessary to ensure the effective exercise of the powers of the Commission and the jurisdiction of the Court in the event of an application being made to the Court under the HREOC Act following the determination of a complaint.⁴⁹

After a complaint is terminated by the Commission and proceedings commenced in the Federal Court or FMS under s 46PO(1), an interim injunction may be granted by the relevant court under s 46PO(6), which provides:

The court concerned may, if it thinks fit, grant an interim injunction pending the determination of the proceedings.

⁴⁷ *Gardner v National Netball League Pty Ltd* (2001) 182 ALR 408, 410 [10] (McInnes FM).

⁴⁸ *Rainsford v Group 4 Correctional Services* [2002] FMCA 36, [35] (McInnes FM).

⁴⁹ *Li v Minister for Immigration & Multicultural Affairs* [2001] FCA 1414, [36] (Emmett J).

The power conferred by that section has been said by the Federal Court to be limited to:

circumstances where the injunction was necessary to ensure the effective exercise of the jurisdiction under s 46PO invoked in the proceeding.⁵⁰

As with injunctions granted under s 46PP, the court cannot, as a condition of granting an interim injunction under s 46PO(6) require a person to give an undertaking as to damages.⁵¹

Section 46PO(6) has received scant judicial attention as compared to s 46PP.⁵² However, many of the factors discussed in section 6.3.3 below would presumably apply to the exercise of the discretion conferred by s 46PO(6).

6.3.2 Duration of relief granted under s 46PP and the time period in which such relief must be sought

By reason of the combined operation of ss 46PP(1) and (3), an interim injunction can only be granted under s 46PP during the period between the lodging of a complaint and the termination⁵³ or withdrawal⁵⁴ of a complaint.

Some difference of opinion appears to have emerged in the courts as to whether the restrictions in s 46PP(3) mean:

- only that an **application** for an injunction under s 46PP must be made and determined prior to termination or withdrawal; or
- in addition, that the **actual order** must be limited so as to end upon termination or withdrawal.

In *Rainsford v Group 4 Correctional Services*⁵⁵ (*'Rainsford No.2'*), McInnis FM appeared to prefer the latter view, stating:

In the present case, I have noted that when an injunction is granted then it is only granted in accordance with 46PP(3) up until the date when a complaint is terminated. In the circumstances of this case there is no indication before this court as to when that might occur. Hence, it could hardly be said that any injunction this court might grant would be of a short-term duration. There is simply no guarantee of that fact.

⁵⁰ *Li v Minister for Immigration & Multicultural Affairs* [2001] FCA 1414, [35] (Emmett J).

⁵¹ See s 46PO(8) of the HREOC Act.

⁵² See, for an example of an unsuccessful application made under s 46PO(6), *Li v Minister for Immigration & Multicultural Affairs* [2001] FCA 1414.

⁵³ Under ss 46PE or PH of the HREOC Act.

⁵⁴ Under s 46PG of the HREOC Act.

⁵⁵ [2002] FMCA 36.

In contrast, Heerey J stated in *McIntosh v Australian Postal Corporation*⁵⁶ ('*McIntosh*') that the expression 'interim injunction' in s 46PP is:

used in the New South Wales sense so as to include what Victorian lawyers would call an interlocutory injunction, that is an injunction until the trial and determination of an action...⁵⁷

Note, however, that the injunction sought in that matter was expressed so as to operate 'until the Commission has completed an inquiry and conciliation process'.⁵⁸

It would be somewhat odd if the HREOC Act was construed so as to potentially leave an applicant who obtains relief under s 46PP unprotected for the period between the time of the termination of their complaint by HREOC and the time at which that person was able to approach the Federal Court or FMS for interim relief under s 46PO(6). The better approach might be seen to be that of Raphael FM in *Beck v Leichhardt Municipal Council*⁵⁹ where his Honour, having first noted the need to be 'mindful that the relief granted [under s 46PP] must not be indeterminate',⁶⁰ enjoined the respondent from terminating the applicant's employment until seven days following the termination of his complaint to HREOC. His Honour further ordered that:

The parties shall have liberty to apply to this court for reconsideration of these orders in the event of a significant change in circumstances, including any significant delay in the procedures before the Human Rights and Equal Opportunity Commission.⁶¹

That form of order may be seen as a satisfactory means of avoiding the perceived difficulties raised by McInnes FM in *Rainsford No.2* in the passage extracted above.

6.3.3 Relevant Factors

In *Gardner v National Netball League Pty Ltd*,⁶² the applicant sought an injunction, pending the 'determination' of her complaint before HREOC, to prevent the respondent from imposing a ban or any other limitation on her competing in the National Netball League for reasons relating to her pregnancy. McInnis FM concluded that 'on the balance of convenience' it was appropriate to grant the interim injunction given the medical evidence presented, the fact that the matter could not be resolved by damages alone and

⁵⁶ [2001] FCA 1012.

⁵⁷ *Ibid* [7].

⁵⁸ *Ibid* [1].

⁵⁹ [2002] FMCA 331.

⁶⁰ *Ibid* at [21].

⁶¹ *Ibid* at [21] – see order 3.

⁶² (2001) 182 ALR 408.

that it appeared that the respondent had given very little, if any, consideration to the SDA when it imposed the interim ban.⁶³

The Federal Court considered the issue of interim injunctions in an employment context in *McIntosh* where the applicant sought an injunction under s 46PP to prevent the respondent from terminating her employment until the determination of proceedings before HREOC.⁶⁴ Although Heerey J found there was an issue to be tried, he decided ‘on the balance of convenience’ not to grant an injunction.⁶⁵ Of fundamental importance to his Honour’s decision was a concession, made by the applicant, to the effect that the employment relationship had broken down and was unlikely to be restored, even if a finding on the subject matter of the complaint was made in the applicant’s favour. In those circumstances, his Honour found that the granting of an injunction under s 46PP would be unreasonable, stating:

[a]t common law it is firmly established that specific performance will not be granted for a contract of employment except in exceptional circumstances... [i]t is true, as senior counsel for the applicant puts it, that the [HREOC Act] ‘creates a broader concept’ ... s 46PP(1) must be taken to have been drafted in the light of the possibility that, following an inquiry and conciliation before the Commission, an employer and employee might resolve their differences and continue employment as before ... [b]ut unfortunately that is not the case in the present matter. I do not think it would be reasonable to impose on the respondent a term that the applicant return to work given it is common ground that the relationship has broken down.⁶⁶

His Honour also rejected an argument that the injunction should be granted so as to preserve the applicant’s ‘authority and status and reputation and that this would be important for the purpose of conciliation’⁶⁷ and did not consider it a legitimate consideration that the granting of the injunction may give the applicant ‘some leverage or bargaining advantage in relation to the conciliation’.⁶⁸

The FMS has indicated that it will be relevant to have regard to the effect that the granting of an interim injunction under s 46PP is likely to have on the business or operations of the respondent. In *Rainsford No.2*, the interim injunction sought would (if granted) have had the effect of requiring the respondent, the private entity that operated Port Phillip Prison, to deal with applications from the applicant (such as to gain access to rehabilitation

⁶³ Ibid 417 [56].

⁶⁴ See also *Heathcote v Telstra Corporation* [2003] FMCA 118 where the issue of interim injunctions in an employment context was considered by the FMS. In that case the applicant’s application for an interim injunction under s 46PP failed because: (i) the applicant had failed to properly articulate the injunctive relief sought; and (ii) the applicant had failed to satisfy the Court that the respondent intended to change the status quo.

⁶⁵ [2001] FCA 1012, [9].

⁶⁶ Ibid.

⁶⁷ Ibid [11].

⁶⁸ Ibid [12].

programs) in a particular manner. McInnis FM was of the view that such an injunction would ‘effectively pre-empt and seek to interfere with the proper management of the prison’⁶⁹ and should not be granted. His Honour expressly noted, however, that this ‘does not mean... that there will never be an occasion when such injunctive relief would not be granted’.⁷⁰

The decision in *AB v New South Wales Minister for Education and Training*⁷¹ focused on the importance of correctly understanding what the status quo was immediately before the applicant’s complaint to HREOC before granting an order for an interim injunction under s 46PP to preserve that state of affairs.⁷² Raphael ACFM confirmed that the type of injunction which could be ordered under s 46PP(1)(a) was restricted to one which preserved the status quo immediately before the relevant complaint is lodged with HREOC.⁷³

In that matter, the status quo was found to consist of an offer to the applicant of a place at the Penrith High School subject to his complying with the condition that prior to enrolment he be an Australian citizen or permanent resident. The applicant was a 12-year-old boy who came to Australia in March 1995. He was the holder of a Bridging E Visa whilst awaiting the outcome of a substantive visa application that would give him permanent residency in Australia. The applicant had lodged a complaint with HREOC alleging a breach of the RDA. The applicant sought an interim injunction under s 46PP firstly, preventing the respondent from withdrawing the place offered at Penrith High School pending the determination of his HREOC complaint and secondly, directing the respondent to allow the applicant to attend Penrith High School, pending the determination of his HREOC complaint. Raphael ACFM held that the applicant was seeking an injunction which would have the effect of holding open a place to a person who did not comply with the condition that prior to enrolment they be an Australian citizen or permanent resident. Raphael ACFM held that that was not the status quo and noted that s 46PP ‘injunctions exist to prevent rights from being taken away from persons who have made a complaint to HREOC. They do not exist to create rights.’⁷⁴ Accordingly, his Honour declined to grant the injunction on the basis that the applicant could not fulfil the condition and to grant the order sought would be doing more than preserving the status quo.

In *Hoskin v State of Victoria (Department of Education and Training)*,⁷⁵ the FMS had cause to consider the types of orders that could properly be

⁶⁹ [2002] FMCA 36, [39].

⁷⁰ *Ibid* [40].

⁷¹ [2003] FMCA 16.

⁷² This issue was also considered in *McIntosh v Australian Postal Corporation* [2001] FCA 1012 and *Beck v Leichhardt Municipal Council* [2002] FMCA 331.

⁷³ [2003] FMCA 16, [10].

⁷⁴ *Ibid* [15].

⁷⁵ [2002] FMCA 263.

categorised as interim injunctions within the meaning of s 46PP. In that case, the application was expressed to be for ‘interim orders sought pursuant to section 46PP’. The orders sought by the applicant were, inter alia, that the respondent provide to the applicant (or his lawyer) all documents supporting or relating to the decision to place the applicant on sick leave in August 2002 and the decision to maintain that position in October 2002. The applicant stated that in making that application he relied solely upon s 46PP(1)(b). Walters FM concluded that the orders sought by the applicant could not properly be categorized as interim injunctions and nor did they ‘maintain’ any relevant ‘rights’ of the applicant.⁷⁶ His Honour also stated:

In my opinion, the use of the word ‘maintain’ in section 46PP(1) emphasizes the temporary nature of the interim injunction referred to in the section and imports a requirement (at least in so far as section 46PP(1)(b) is concerned) that a pre-existing ‘right’ of a complainant, respondent or other affected person must have been adversely affected, or, alternatively, is likely to be adversely affected in the foreseeable future. The ‘rights’ of the complainant, respondent or other affected person ... must, in my view, be both continuing and substantive.⁷⁷

Walters FM concluded that the orders, if they were to be granted, would do no more than operate to compel the respondent to perform a single, finite act – namely the production of the relevant documents. Accordingly, he dismissed the application concluding that the orders sought were not necessary to ensure the effective exercise of HREOC’s powers.⁷⁸

As noted above, in making a decision as to whether or not to grant an injunction under s 46PP, the courts have held that consideration should be given to the principles that apply at common law to the granting of interim relief. Those principles include the requirement to consider whether there is an arguable case and in the event there is, the requirement to consider the balance of convenience.⁷⁹ *De Alwis v Hair and Anor*⁸⁰ is an example of an application for injunctive relief under s 46PP that failed on the basis that there was ‘no arguable case’. The Applicant had made a complaint to HREOC under the DDA which provided the initial basis upon which the applicant sought an interim injunction under s 46PP. Bryant CFM considered in some detail the application made by the applicant to HREOC under the DDA and concluded that there was no arguable ground by reason of which HREOC could ‘grant relief’ or, if the matter was terminated by HREOC, that there was no arguable basis on which the Court could grant relief to the applicant.⁸¹ Accordingly, Bryant CFM concluded that there was no arguable case and

⁷⁶ Ibid [60].

⁷⁷ Ibid [53].

⁷⁸ Ibid [59], [60].

⁷⁹ See for example *Rainsford v Group 4 Correctional Services* [2002] FMCA 36.

⁸⁰ [2002] FMCA 357

⁸¹ Ibid [18].

therefore no basis upon which she could exercise her discretion to grant an injunction.⁸²

6.4 Applications for Summary Dismissal

The sources of power for the FMS⁸³ and Federal Court⁸⁴ to summarily dismiss a matter are in similar terms, empowering the FMS and Federal Court to order that a matter be stayed or dismissed if it appears in relation to the proceeding or claim for relief that:

- no reasonable cause of action is disclosed; or
- the proceeding is frivolous or vexatious; or
- the proceeding is an abuse of the process of the Court.

6.4.1 Principles Applied

(a) *Rationale underlying the exercise of the power*

The rationale behind exercising the power to summarily dismiss is that a matter should not be permitted to proceed if it is established that ‘the proceedings are so untenable that they could not possibly succeed’⁸⁵ and that ‘no reasonable cause of action of unlawful discrimination is shown’.⁸⁶

Lehane J in *Travers v New South Wales*⁸⁷ affirmed the view of Sir Ronald Wilson in the HREOC decision of *Assal v Department of Health, Housing & Community Services*⁸⁸ that:

it is in the public interest, as well as in the interests of both parties, that the hearing of a complaint which is clearly shown to be lacking in substance should be summarily terminated. Certainly, it is no kindness to a complainant to shrink from the exercise of the power ... in circumstances where that exercise is clearly warranted.⁸⁹

⁸² Ibid [19].

⁸³ Rule 13.10 of the *Federal Magistrates Court Rules 2001*.

⁸⁴ Order 20, r 2 of the *Federal Court Rules*.

⁸⁵ *Parker v Swan Hill Police* [2000] FCA 1688, [10].

⁸⁶ *Paramasivam v Shier* [2001] FCA 545, [19].

⁸⁷ [2000] FCA 1565.

⁸⁸ Unreported, HREOC, Sir Ronald Wilson, 26 September 1990. Extract at [1992] EOC 92-409.

⁸⁹ Unreported, HREOC, Sir Ronald Wilson, 26 September 1990, 4.

Lehane J added:

That is especially so, perhaps, in this Court where an unsuccessful litigant, if proceedings are protracted, may face what can be the considerable burden of a costs order.⁹⁰

(b) Exercise ‘exceptional caution’

The High Court has said that a case must be:

very clear indeed to justify the summary intervention of a court to prevent a plaintiff submitting his case for determination in the appointed manner by the court with or without the jury... once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it, then it is not competent for the Court to dismiss the action as frivolous and vexatious and an abuse of process.⁹¹

In addition, the courts have emphasized that the power to summarily dismiss a matter must be exercised with ‘exceptional caution’⁹² and ‘sparingly invoked’.⁹³ In particular, the power should be used with great care when the litigant is unrepresented.⁹⁴ It has been noted, however, that:

whilst circumspection is appropriate, if the evidence before the Court establishes that if the matter were to go to trial in the ordinary way the application must fail then a case for summary dismissal of the proceedings is made out.⁹⁵

(c) Onus/material to be considered by the court

The courts have made clear that the onus in a summary dismissal application is on the respondent, who must establish ‘a high measure of satisfaction in the Court that the proceedings are of a character that they should be dismissed’.⁹⁶

In determining the issue of whether there is an arguable case, the FMS has held that it is not limited to considering the arguments put before it by the

⁹⁰ [2000] FCA 1565, [19].

⁹¹ *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62, 91. Cited in *Stokes v Royal Flying Doctor Service (No 2)* [2003] FMCA 177, [13]; *Firew v Busways Trust (No 2)* [2003] FMCA 317, [17].

⁹² *Paramasivam v Grant* [2001] FCA 882, [14], applying *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, 129.

⁹³ *Chung v University of Sydney* [2001] FMCA 94, [7], upheld on appeal to the Federal Court in *Chung v University of Sydney* [2002] FCA 186, [45]. See also *Taylor v Morrison* [2003] FMFA 79, [5] applying *General Steel Industries Inc v Commissioner for Railways* (1964) 112 CLR 62 at 91.

⁹⁴ *Ibid* [9].

⁹⁵ *Paramasivam v Grant* [2001] FCA 882, [14], applying *Webster v Lampard* (1993) 177 CLR 598.

⁹⁶ *Paramasivam v Wheeler* [2000] FCA 1559, [8].

party defending the application but rather will ‘independently consider whether an arguable case based on the material could be made out’.⁹⁷

(d) Examples of matters where the power has been exercised

The following are examples of cases in which the FMS and Federal Court have summarily dismissed matters where:

- the matter complained of did not involve the provision of a service for the purposes of s 24 of the DDA;⁹⁸
- it was found that the DDA did not bind the Crown in right of the State in the manner suggested by the complainant;⁹⁹
- the subject matter of the application before the FMS was different from the complaint that was made to HREOC and terminated by the President;¹⁰⁰
- there was no casual nexus between the alleged acts of discrimination and the complainant’s race or disability;¹⁰¹
- the claims made by the applicant were vague and general and failed to show a case to answer;¹⁰²
- the respondent was not the subject of the complaint to HREOC;¹⁰³
- the applicant failed to attend the hearing of the application for summary dismissal and the Court was satisfied that the applicant was aware of the hearing date;¹⁰⁴ and
- a deed of release previously entered into by the parties acted as a bar to the employees claim of unlawful discrimination.¹⁰⁵

6.5 Applications for Extension of Time

Section 46PO(2) of the HREOC Act provides:

The application [alleging unlawful discrimination, made to the Federal Court or FMS under section 46PO(1) of the HREOC Act] must be made within 28 days after the date of the issue of the notice under s46PH(2), or within such further time as the court concerned allows.

⁹⁷ *Chung v University of Sydney* [2001] FMCA 94, [14]; upheld on appeal to the Federal Court in *Chung v University of Sydney* [2002] FCA 186, [45].

⁹⁸ *Vintila v Federal Attorney General* [2001] FMCA 110.

⁹⁹ *Rainsford v Victoria* [2001] FMCA 115.

¹⁰⁰ *Soreng v Victorian State Director of Public Housing* [2002] FMCA 124.

¹⁰¹ *Chung v University of Sydney* [2001] FMCA 94.

¹⁰² *Rana v University of South Australia* [2003] FMCA 525, [15]; *Hassan v Hume* [2003] FMCA 476, [23], [28]; *Crocker v Sydney Institute of TAFE* [2003] FMCA 181, [14]-[16], [18]; *Jandruwanda v University of South Australia (No 2)* [2003] FMCA 233, [13]-[15].

¹⁰³ *Taylor v Morrison* [2003] FMCA 79, [8]-[9]; *Jandruwanda v Regency Park College of TAFE* [2003] FCA 1455; *Jandruwanda v University of South Australia* [2003] FMCA 205.

¹⁰⁴ *Firew v Busways Trust (No 2)* [2003] FMCA 317, [12]-[13].

¹⁰⁵ *Dean v Cumberland Newspaper Group* [2003] FMCA 561.

6.5.1 Relevance of Nature of Jurisdiction

It is accepted that s 46PO(2) gives a court a discretion as to whether or not to grant an extension of time. In *Lawton v Lawson*¹⁰⁶ Brown FM noted that:

the discretion granted by section 46PO(2) of the HREOC Act does not express any qualifications or set any criteria for the exercise of the discretion.

Accordingly, I bear in mind that the Act itself deals with matters pertaining to human rights and discrimination. Accordingly, there exist strong public policy reasons, in my view, that the court should, if possible, entertain bona fide claims made pursuant to the Act and other related Acts, such as the SDA.¹⁰⁷

McInnis FM in *Phillips v Australian Girls' Choir Pty Ltd*¹⁰⁸ emphasised the difference between the principles to be applied in an application for an extension of time for applications filed under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and those which apply in human rights applications:

It is relevant to consider that in the case of human rights applications there may well be different considerations which apply, bearing in mind the remedial and/or beneficial nature of the human rights legislation which unlike ADJR applications goes beyond the mere judicial review of an administrative decision and deals instead with fundamental human rights. In most of the claims made pursuant to that legislation, it is unlikely that an argument would be entertained that strict adherence to the time limit should be observed in order to assist the proper administration of government departments. Further, the wider issue of a degree of certainty in time limits for the public benefit may also have less weight in relation to claims made under the human rights legislation compared with those claims made for judicial review of administrative actions.¹⁰⁹

6.5.2 Principles to be Applied

McInnis FM in *Phillips v Australian Girls' Choir Pty Ltd*¹¹⁰ formulated a list of relevant principles in relation to the exercise of the Court's discretion when considering an extension of time in a human rights application (based upon the principles set out by Wilcox J in *Hunter Valley Developments Pty Ltd v Cohen*¹¹¹):

1. There is no onus of proof upon an applicant for extension of time though an application has to be made. Special circumstances need not be shown, but the court will not grant the application unless positively satisfied it is proper to do so. The 'prescribed period' of 28 days is not

¹⁰⁶ [2002] FMCA 68.

¹⁰⁷ *Ibid* [30], [31].

¹⁰⁸ [2001] FMCA 109.

¹⁰⁹ *Ibid* [8].

¹¹⁰ [2001] FMCA 109, [10].

¹¹¹ (1984) 3 FCR 344.

to be ignored (*Ralkon v Aboriginal Development Commission* (1982) 43 ALR 535 at 550).

2. It is a prima facie rule that the proceedings commenced outside the prescribed period will not be entertained (*Lucic v Nolan* (1982) 45 ALR 411 at 416). It is not a pre-condition for success in an application for extension of time that an acceptable explanation for delay must be given. It is to be expected that such an explanation will normally be given as a relevant matter to be considered, even though there is no rule that such an explanation is an essential pre-condition (*Comcare v A'Hearn* (1993) 45 FCR 441 and *Dix v Crimes Compensation Tribunal* (1993) 1 VR 297 at 302).
3. Action taken by the applicant other than by making an application to the court is relevant in assessing the adequacy of the explanation for the delay. It is relevant to consider whether the applicant has rested on his rights and whether the respondent was entitled to regard the claim as being finalised (see *Doyle v Chief of General Staff* (1982) 42 ALR 283 at 287).
4. Any prejudice to the respondent, including any prejudice in defending the proceeding occasioned by the delay, is a material factor militating against the grant of an extension (see *Doyle* at p 287).
5. The mere absence of prejudice is not enough to justify the grant of an extension (see *Lucic* at p 416).
6. The merits of the substantial application are properly to be taken into account in considering whether an extension of time should be granted (see *Lucic* at p 417).
7. Considerations of fairness as between the applicant and other persons otherwise in like position are relevant to the manner of exercise of the court's discretion (*Wedesweiller v Cole* (1983) 47 ALR 528).¹¹²

These principles have found approval with the Federal Court.¹¹³

However, the Federal Court has not endorsed a suggestion made by the FMS that one of the matters to be considered is the 'balance of convenience'.¹¹⁴ In *Low v Commonwealth of Australia*,¹¹⁵ Marshall J considered an appeal against the summary dismissal of the application by the FMS on the basis that it had been filed out of time under s 46PO(2) of the HREOC Act. His Honour quoted from the decision at first instance, where Driver FM had said:

In my view, the Court should grant an extension of time where there is a reasonable explanation for the delay in filing the application for relief, where the balance of convenience as between the parties favours the granting of an extension of time and where the application discloses an arguable case.¹¹⁶

¹¹² [2001] FMCA 109, [10].

¹¹³ *Pham v Commonwealth of Australia* [2002] FCA 669, [11].

¹¹⁴ *Gardner v National Netball League Pty Ltd* (2001) 182 ALR 408, 417 [56].

¹¹⁵ [2001] FCA 702.

¹¹⁶ *Ibid* [11].

Marshall J then stated:

Save for the reference to ‘balance of convenience’ I agree with His Honour’s approach. I believe a more appropriate substitute for balance of convenience would be ‘in the interests of justice’. However, it should be acknowledged that the prima facie position is that applications should be lodged within time. Furthermore, as a precondition to granting an application for an extension of time there should be some acceptable explanation for the delay.¹¹⁷

These principles were applied by Raphael FM in *Saddi v Active Employment*.¹¹⁸

6.5.3 Examples of where Extension of Time has been Granted

The FMS and the Federal Court have granted extensions of time for the filing of an application under s 46PO(2) in the following circumstances:

- the applicant had provided a reasonable explanation for her delay, the delay was not of great magnitude (eight days) and the merits of the applicant’s claims against the respondent demonstrated that the applicant’s case was arguable;¹¹⁹
- the applicant lived in a remote location, had told the respondent she would be pursuing litigation and the applicant’s case could not be said to be lacking merit;¹²⁰
- the applicant, who had a disability, was under the age of 18 years, not familiar with the legal process and had an arguable case;¹²¹ and
- the applicant was uncertain as to whether his barrister would be able to continue acting for him (as that barrister had been unable to procure a pro bono instructing solicitor), there was no evidence that the respondent would be prejudiced by the delay and the applicant had an arguable case in relation to one of his five allegations.¹²²

6.5.4 Extension of Time for Filing Appeals

In *Horman v Distribution Group Limited*,¹²³ Emmett J considered an application for leave to file and serve a notice of appeal out of time. His Honour stated that the delay in filing the applicant’s notice of appeal was due to miscommunication between the applicant’s Senior and Junior Counsel. His Honour stated that the events surrounding the appeal ‘indicate a sorry state of

¹¹⁷ Ibid.

¹¹⁸ [2001] FMCA 73.

¹¹⁹ *Lawton v Lawson* [2002] FMCA 68.

¹²⁰ *Creek v Cairns Post Pty Ltd* [2001] FCA 293.

¹²¹ *Phillips v Australian Girls’ Choir Pty Ltd* [2001] FMCA 109.

¹²² *Rainsford v Victoria* [2002] FMCA 266, [55], [110].

¹²³ [2002] FCA 219.

affairs so far as the legal representation of the applicant is concerned.’¹²⁴ His Honour said the circumstances went ‘well beyond error’, suggesting rather ‘a lack of diligence on the part of the lawyers representing the applicant’.¹²⁵

Emmett J found that it was not just in all the circumstances to extend the time limit to serve and file the notice of appeal. Of particular concern to his Honour was the absence of any attempt on the part of those advising the applicant to intimate to the respondent an intention to appeal. Nevertheless, his Honour went on to state:

[I]f I were satisfied that there were some reasonable prospect of success on appeal and of the bona fides of the applicant in seeking leave to file the notice of appeal out of time, it may have been appropriate to grant an indulgence to the applicant’s lawyers.¹²⁶

In *Kennedy v ADI Ltd*,¹²⁷ Marshall J refused to grant the applicant leave to file and serve a notice of appeal out of time on the basis that the applicant had not adduced an acceptable reason for her delay, the length of the delay was not short and it was not in the interests of justice for leave to be granted as the respondent would be forced to defend a proceeding with ‘negligible’ prospects of success.¹²⁸

However his Honour observed that, ‘although ordinarily there should be some acceptable reason for the delay’:

there may ... be circumstances in which it will be in the interests of justice to extend time despite the lack of an acceptable reason for the delay ... As was said by a Full Court *WAAD v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 399 at [7]: ‘where the delay is short and no injustice will be occasioned to the respondent, justice will usually be done if the extension of time is granted’.¹²⁹

In *Jandruwanda v University of South Australia*,¹³⁰ Selway J granted the applicant an extension of time in which to file a notice of motion seeking leave to appeal from a decision summarily dismissing the applicant’s claim. Selway J took into account that the applicant was unrepresented and may not have been aware that it was necessary to seek leave in order to appeal from the Federal Magistrate’s summary dismissal decision.¹³¹

¹²⁴ *Ibid* [22].

¹²⁵ *Ibid* [24].

¹²⁶ *Ibid* [25].

¹²⁷ [2002] FCA 1603.

¹²⁸ *Ibid* [11], [13].

¹²⁹ *Ibid* [11]-[12].

¹³⁰ [2003] FCA 1456.

¹³¹ *Ibid* [13]-[14].

6.6 Application for Suppression Order

Section 61 of the *Federal Magistrates Act 1999* (Cth) provides:

The Federal Magistrates Court may, at any time during or after the hearing of a proceeding in the Federal Magistrates Court, make such order forbidding or restricting:

- (a) the publication of particular evidence; or
- (b) the publication of the name of a party or witness; or
- (c) the publication of information that is likely to enable the identification of a party or witness; or
- (d) access to documents obtained through discovery; or
- (e) access to documents produced under a subpoena;

as appears to the Federal Magistrates Court to be necessary in order to prevent prejudice to:

- (f) the administration of justice; or
- (g) the security of the Commonwealth.

In *C.C. v Djerrkura*,¹³² the applicant had filed an application alleging she had been the subject of sexual harassment by the then-Chair of the Aboriginal and Torres Strait Islander Commission, and sought to prevent her name being published in the media or herself being identified. Brown FM held that it is an exceptional course to restrain the publication of the identity of a party to proceedings,¹³³ referring to *Computer Interchange Pty Ltd v Microsoft Corporation*.¹³⁴ He also referred¹³⁵ to *TK v The Australian Red Cross Society*,¹³⁶ in which the applicant acquired HIV from the contamination of the blood supply, and the similar case of *E v The Australian Red Cross Society*,¹³⁷ as well as the matter of *A v The Minister for Immigration and Ethnic Affairs*.¹³⁸

The applicant argued that the orders sought provided a proper balance between the public's right to know about the nature and content of these proceedings and the particular susceptibility of the applicant. Brown FM accepted, on the basis of the evidence, before him, that the applicant may

¹³² [2003] FMCA 372. This matter was previously considered in *CC v DD* [2002] FMCA 221, in which Brown FM made interim ex parte orders under s 61 forbidding publication of the name of the applicant and material that might tend to identify the applicant. His Honour also stated that he was troubled by the position of one of the respondents who had not been served with the application and made an interim order suppressing publication of that respondent's name.

¹³³ *Ibid* [42].

¹³⁴ (1999) 88 FCR 438.

¹³⁵ [2002] FMCA 372, [45]-[47].

¹³⁶ (1989) 1 WAR 335.

¹³⁷ (1991) 27 FCR 310.

¹³⁸ (1994) 54 FCR 327.

suffer harm greater than the normal embarrassment, discomfort and general unpleasantness associated with such proceedings and the media coverage of them. He held that there was a real risk that if her name was published and widely disseminated, and her identity generally known, she would desist from the proceedings.¹³⁹

In the circumstances, Brown FM ordered that identifying details of the applicant be forbidden to be published in any form of media publication in connection with the proceedings, or in relation to the circumstances giving rise to these proceedings.

6.7 Scope of Applications under s 46PO of the HREOC Act to the FMS and Federal Court

6.7.1 Relationship between Application and Terminated Complaint

Section 46PO(3) of the HREOC Act places limitations, related to the terminated complaint, upon the nature and scope of applications that may be made to the Federal Court and FMS. The section provides that:

- (3) The unlawful discrimination alleged in the application:
 - (a) must be the same as (or the same in substance as) the unlawful discrimination that was the subject of the terminated complaint; or
 - (b) must arise out of the same (or substantially the same) acts, omissions or practices that were the subject of the terminated complaint.

In *Charles v Fuji Xerox Australia Pty Ltd*,¹⁴⁰ the Court heard an interlocutory application concerning the interpretation of s 46PO of the HREOC Act. Katz J held that s 46PO(3) is only incidentally concerned with those allegations of fact which can be made in an application under s 46PO(1) of the HREOC Act.¹⁴¹ His Honour said that the section is primarily concerned, not with such allegations of fact, but rather with the legal character which those allegations can be claimed to bear.¹⁴² His Honour went on to explain the operation of paragraphs (a) and (b) of s 46PO(3) in the following terms:

Paragraph (a) of subs 46PO(3) of the [HREOC Act] proceeds on the basis that the allegations of fact being made in the proceeding before the Court are the same as those which were made in the relevant terminated complaint. The provision naturally permits the applicant to claim in the proceeding that those facts bear the same legal character as they were claimed in the complaint to

¹³⁹ [2003] FMCA 372, [50]-[51].

¹⁴⁰ (2000) 105 FCR 573.

¹⁴¹ *Ibid* 580 [37].

¹⁴² *Ibid*.

bear. However, it goes further, permitting the applicant to claim in the proceeding as well that those facts bear a different legal character from that they were claimed in the complaint to bear, provided, however, that the legal character now being claimed is not different in substance from the legal character formerly being claimed.

Paragraph (b) of subs 46PO(3) of the [HREOC Act], on the other hand, permits the applicant to allege in the proceeding before the Court different facts from those which were alleged in the relevant terminated complaint, provided, however, that the facts now being alleged are not different in substance from the facts formerly being alleged. It further permits the applicant to claim that the facts which are now being alleged bear a different legal character than the facts which were alleged in the complaint were claimed to bear, even if that legal character is different in substance from the legal character formerly being claimed, provided that that legal character ‘arise[s] out of’ the facts which are now being alleged.¹⁴³

His Honour also held that a construction of the sub paragraphs of s 46PO(3) does not permit an applicant to rely on acts of discrimination which occur after the complaint has been lodged with HREOC.¹⁴⁴ His Honour said that conclusion was consistent with ‘the policy of the [HREOC Act] in ensuring that there exists an opportunity for the attempted conciliation of complaints before they are litigated’.¹⁴⁵

The provisions of s 46PO(3) were further considered in *Travers v New South Wales*,¹⁴⁶ in which Lehane J held that an application to the Federal Court cannot include allegations of discrimination which were not included in the complaint made to HREOC. Nevertheless, his Honour noted that:

the terms of s46PO(3) suggest a degree of flexibility (‘or the same in substance as’, ‘or substantially the same’) and a complaint, which usually will not be drawn by a lawyer, should not be construed as if it were a pleading.¹⁴⁷

Lehane J also observed that the initial complaint may be quite brief and the details later elicited during investigation.¹⁴⁸ Although it was unnecessary for his Honour to express a final view on the issue, his Honour indicated that he disagreed with a submission put by the respondent to the effect that the term ‘complaint’ (in the context of s 46PO(3)) was limited to the initial letter of complaint to HREOC. His Honour appeared to prefer the contrary submission put by the applicant, stating:

¹⁴³ Ibid 580-81 [38]-[39].

¹⁴⁴ Ibid 582 [43].

¹⁴⁵ Ibid 581-82 [42].

¹⁴⁶ [2000] FCA 1565.

¹⁴⁷ Ibid [8].

¹⁴⁸ Ibid.

it may be that the ambit of the complaint is to be ascertained, for the purpose of s 46PO(3), not by considering its initial form but by considering the shape it had assumed at its termination.¹⁴⁹

In *Bender v Bovis Lend Lease Pty Ltd*,¹⁵⁰ the respondent sought an interim order striking out certain paragraphs of an affidavit supporting the applicant's claim of sexual harassment, on the basis that the discrimination alleged in the paragraphs did not form part of the complaint to HREOC and therefore breached s 46PO(3). McInnis FM held that the Court has a discretion to at least consider whether to strike out certain parts of an affidavit prior to hearing as it is important to ensure that the applicant complies with the requirements of s 46PO(3). Considering this matter at an early stage, as opposed to leaving it to trial ensures that 'issues are properly identified consistent with the obligations of the Court in considering the unlawful discrimination alleged in this application compared with the discrimination which was the subject of the terminated complaint.'¹⁵¹

In *Jandruwanda v Regency Park College of TAFE*,¹⁵² Selway J granted summary dismissal as there was no jurisdiction to hear an application against Regency Park College of TAFE when the initial complaint to HREOC was made against the University of South Australia.¹⁵³ Similarly, in *Jandruwanda v University of South Australia*,¹⁵⁴ Raphael FM granted a summary dismissal in respect of the second and third respondents as the applicant had not made a complaint to HREOC about their conduct.¹⁵⁵

In *Stokes v Royal Flying Doctor Service*,¹⁵⁶ Mr Stokes lodged a complaint with HREOC on behalf of the Ninga Mia Christian Fellowship and the Wongutha Birni Aboriginal Corporation. When the matter came to the Federal Magistrates Court, McInnis FM permitted Mr Stokes to amend the application by replacing the Fellowship and Corporation as the applicants with Mr Stokes and other named individuals. McInnis FM stated that the amendment 'does no more than to identify, with greater specificity, the individuals who are now said to be part of the group which is said to be the subject of the complaint for discrimination.'¹⁵⁷ He commented that it would be 'unduly technical in my view and inappropriate to impose, in a matter of this kind, particularly arising out of human rights legislation, an unduly technical interpretation of either corporate identity or identity of the group.'¹⁵⁸

¹⁴⁹ Ibid.

¹⁵⁰ (2003) 175 FLR 446.

¹⁵¹ Ibid 452-53 [21].

¹⁵² [2003] FCA 1455.

¹⁵³ Ibid [10]-[11].

¹⁵⁴ [2003] FMCA 205.

¹⁵⁵ Ibid [4].

¹⁵⁶ [2003] FMCA 164.

¹⁵⁷ Ibid [28].

¹⁵⁸ Ibid [19].

6.7.2 Validity of Termination Notice

In *Speirs v Darling Range Brewing Co Pty Ltd*,¹⁵⁹ two of the respondents sought an order that the proceedings against them be summarily dismissed on the ground that a termination notice issued by HREOC was invalid and/or a nullity. While the initial complaint to HREOC raised allegations against those persons, the President's notice of termination did not refer to those persons as respondents to the complaint. The President of HREOC subsequently issued a second notice of termination which did name those persons as respondents.

The two respondents submitted that the second notice was a nullity and that accordingly the Court did not have jurisdiction to hear and determine the claims made against them. McInnes FM accepted that submission. His Honour's reasons were as follows:

In my view there does not appear to be any power given to HREOC in the legislation to issue a further termination notice arising out of the same complaint. Once issued and respondents named then those respondents so named who were given an opportunity to participate in the procedure and the opportunity to at least conciliate the complaint before litigation means that in the circumstance of the present case the denial to the respondents of that opportunity itself would demonstrate a flaw in the process followed by HREOC in this instance. It is not possible in my view for HREOC to simply retrospectively issue a further notice in circumstances where the purported respondents to that notice have not in truth and in fact been able to participate in the conciliation process which the President is bound to follow in accordance with the provisions of the HREOC Act to which I have referred.

There is also no provision in my view for HREOC to issue an amended notice of termination and this is particularly so after the time has elapsed for the first notice to be revoked pursuant to s 46PH(4) of the HREOC Act. It would be unusual if a further notice could be issued after proceedings had been commenced in the Federal Court arising out of the same complaint and in circumstances where in s 46PF(4) the legislature provides that a complaint cannot be amended after it has been terminated by the President under s46PH. Therefore to issue a second notice simply at the request of solicitors for the complainant in circumstances where all that has been requested is the naming of further respondents who had not been given an opportunity to participate in the inquiry effectively amounts to an amendment of the termination notice to include other parties. If the termination notice itself cannot be revoked then it is difficult to see how either an amendment can occur or a further notice issued once Court proceedings have been commenced in relation to the complaint.¹⁶⁰

¹⁵⁹ [2002] FMCA 126.

¹⁶⁰ Ibid [36], [37].

6.7.3 Pleading Claims in Addition to Unlawful Discrimination Claim

In *Thomson v Orica Australia Pty Ltd (No.2)*¹⁶¹ an issue arose as to whether a claim for damages for breach of contract was being pursued by the applicant in addition to the unlawful discrimination claim.

It had not been explicitly stated in the points of claim filed by the applicant that the applicant was arguing the case on any other basis than a breach of the SDA. However at the close of evidence, in answer to a question by Allsop J, counsel for the applicant stated that if no breach of the SDA was found by the Federal Court, her client made a claim for damages for repudiation of the contract of employment.

In subsequently filed written submissions, Counsel for the respondent submitted that the matter had always been ‘in the context of Commonwealth legislation’¹⁶² and that the respondent was ‘seriously disadvantaged’¹⁶³ by the perceived shift in the case presented by the applicant. The respondent further contended that if the applicant had specified at the outset that she was seeking damages for breach of contract, the approach of the respondent would have been different in a number of ways.

Allsop J stated he had ‘real difficulty’¹⁶⁴ in seeing what further evidence may have been led, or what further cross-examination of the applicant may have taken place, in the context of an allegation of repudiation in contract and an associated claim for damages as against an allegation of repudiation of the employment contract in the context of the SDA. However, his Honour made orders allowing for the respondent to seek further and better particulars of the points of claim, for additional evidence to be filed by the applicant and for further cross examination.

6.8 Dismissal of Application due to Non-Appearance of Applicant

Order 32, r 2(1) of the *Federal Court Rules* provides:

If, when a proceeding is called on for trial, any party is absent, the Court may:

- (a) order that the trial be not had unless the proceeding is again set down for trial, or unless such other steps are taken as the Court may direct;

¹⁶¹ [2001] FCA 1563.

¹⁶² *Ibid* [26].

¹⁶³ *Ibid* [33].

¹⁶⁴ *Ibid* [32], [33].

- (b) adjourn the trial;
- (c) if the party absent is an applicant or cross-claimant dismiss the action or the cross-claim; or
- (d) proceed with the trial generally or so far as concerns any claim for relief in the proceeding.

In *Pham v University of Queensland*,¹⁶⁵ Drummond, Marshall and Finkelstein JJ upheld the decision of Heerey J¹⁶⁶ dismissing Mr Pham's application pursuant to O 32, r 2(1)(c) of the *Federal Court Rules* when he failed to attend at his trial. The appellant argued that, notwithstanding his failure to appear, there was an incorrect exercise of the discretion to terminate the action because there was no evaluation by the trial judge of the merits of his case, something that the trial judge could have done by referring to the evidence filed by the parties, including the appellant, in accordance with the directions given.

The Full Court rejected that argument, stating that O 32, r 2(1)(c) does not require the trial judge, confronted with the non-appearance of an applicant at trial, to embark upon any investigation of the merits of the absent applicant's claim. Their Honours stated that the procedure available under O 32, r 2(1)(c) should be contrasted with that under O 10, r 7(1)(a) which empowers the Court, if a party fails to comply with an order of the Court directing that a party take a step in a proceeding, to dismiss the proceeding if the default in complying with that order is a default by an applicant. That procedure can be invoked at any stage of an action, even before pleadings have been closed, and it has been held that where a respondent seeks to dismiss an action under that particular rule the respondent has the obligation of going into the merits of the case.¹⁶⁷

6.9 Interaction between the FMS and the Federal Court: Transfers and Appeals

6.9.1 Transfer of Matters between the Federal Court and FMS

In *Charles v Fuji Xerox Australia Pty Ltd*,¹⁶⁸ Katz J ordered that the matter be transferred from the Federal Court to the FMS. His Honour was satisfied the FMS had the resources to deal with the matter and that it would be heard more quickly than in the Federal Court. Further, the parties would have a reduced exposure to costs in the FMS.

¹⁶⁵ [2002] FCAFC 40.

¹⁶⁶ *Pham v University of Queensland* [2001] FCA 1044.

¹⁶⁷ [2002] FCAFC 40, [27].

¹⁶⁸ (2000) 105 FCR 573.

Similarly, in *Travers v New South Wales*,¹⁶⁹ the parties consented to the transfer of the matter from the Federal Court to the FMS. The Federal Court was satisfied that the resources of the FMS were sufficient to hear and determine the matter.

In *Nizzari v Westpac Financial Services*,¹⁷⁰ Driver FM ordered that the matter be transferred from the FMS to the Federal Court. In his decision, Driver FM observed that:

The mere fact that issues of importance are raised does not necessarily mean that the matter should be transferred to the Federal Court.¹⁷¹

However, his Honour was satisfied that the issues raised by the respondent were issues of significance that should be ‘dealt with by a superior court at first instance’¹⁷² and further noted that the matter would be heard more quickly if it was transferred to the Federal Court.¹⁷³

6.9.2 Conduct of Appeal to Federal Court from FMS

In *Low v Commonwealth of Australia*,¹⁷⁴ Marshall J stated:

An appeal from a judgment of the Federal Magistrates Court is not conducted de novo, nor is it an appeal in the strict sense. Like appeals from judgments of single judges of this Court, it is conducted as a re-hearing of the initial application in the sense that the parties are able to supplement the evidence before the Court at first instance by seeking to adduce additional material which may be admitted into evidence, having regard to the dictates of justice in the particular circumstances. The Court is also able to draw inferences of fact based on the evidence before the primary judge.¹⁷⁵

6.10 Relevance of Other Complaints to HREOC

6.10.1 ‘Repeat Complaints’ to HREOC

Raphael FM in *McKenzie v Department of Urban Services & Canberra Hospital*¹⁷⁶ considered whether or not a person could bring a case before the FMS if the subject matter of the complaint was a ‘repeat’ complaint. The applicant had made complaints to HREOC in 1997 and 1998, which were dismissed on the basis that there was no evidence or no sufficient evidence of discrimination. The applicant made an application for an order of review

¹⁶⁹ [2000] FCA 1565.

¹⁷⁰ [2003] FMCA 255.

¹⁷¹ Ibid [8].

¹⁷² Ibid [12].

¹⁷³ Ibid.

¹⁷⁴ [2001] FCA 702.

¹⁷⁵ Ibid [3]. See also, *Chung v University of Sydney* [2002] FCA 186, [40].

¹⁷⁶ (2001) 163 FLR 133.

pursuant to s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) in relation to the dismissal but subsequently discontinued the proceedings. The applicant then made a further complaint to HREOC in November 1999 which was terminated by HREOC on the basis that, amongst other things, the complaint had already been dealt with. The applicant subsequently made an application to the FMS under s 46PO of the HREOC Act.

The respondent argued that the applicant was estopped from hearing the matter by virtue of the fact that it had already been dealt with by HREOC. His Honour considered a number of authorities on the issue of estoppel and *res judicata* in relation to administrative decisions.¹⁷⁷ His Honour concluded that there was nothing to prevent the applicant from having her case heard pursuant to s 46PO of the HREOC Act. His Honour found:

It may be argued against this finding that it will open the floodgates to applicants who were unhappy about previous decisions of the Commission not to grant them an inquiry into their complaint. Such a person would make a further application to the Commission which would make a finding that it would not proceed because the events in question took place more than twelve months prior thereto and had already been the subject of consideration. That decision would have the effect of terminating the complaint, and upon receipt of the notice of termination the Applicant could proceed to this Court. Although this Court could make an order under s 46PO(4)(f), it could not do so until after it had made a finding of unlawful discrimination, and would therefore be obliged to hear the complaint in its entirety. I was not provided with any authority, either in support of the proposition put by Ms Donohue or by Ms Winters as to why, if I made the finding which I have made, the consequences would not be as I have outlined. I can find no authority either, and it may well be that the Act needs to be amended by the addition of a section similar to s 111(1) of the *Anti-Discrimination Act* (NSW), to prevent a spate of hearings in cases where the Respondent has reasonably thought that its involvement was at an end some considerable time ago.¹⁷⁸

6.10.2 Evidence of Other Complaints to HREOC

In *Paramasivam v Jureszek*,¹⁷⁹ the respondent attempted to adduce evidence relating to other complaints made by the applicant of racial discrimination by a number of other parties in differing circumstances. Gyles J refused to admit that material, on the basis that it was not probative of any issue in the case, particularly given that the applicant's credit was not in issue. His Honour also indicated that, even if the applicant's credit had been in issue, he would have

¹⁷⁷ *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589; *Yat Tung Investment Co Ltd v Doo Heng Bank* [1975] AC 581; *Stuart v Sanderson* (2000) 100 FCR 150; *Midland Metals Overseas Ltd v Comptroller General of Customs* (1991) 30 FCR 87.

¹⁷⁸ (2001) 163 FLR 133, 153-54 [84].

¹⁷⁹ [2001] FCA 704.

been reluctant to admit that material, given that the circumstances in which propensity evidence can be given are limited. To be of any value the Court would have to examine the bona fides and merits of each complaint. The mere fact that a court or another regulatory authority had rejected those complaints would not establish any relevant fact in the proceedings.

6.11 Presumptions in Discrimination Proceedings:

In the case of *Wattle v Kirkland*,¹⁸⁰ Raphael FM stated that in:

Considering whether or not to accept the applicant's evidence I started from the base that a person was unlikely to make up and bring to prosecution allegations of this nature against a businessman of some profile in a small country town. There is nothing novel about this assumption and it is one that can be easily rebutted if the complainant is shown to have a motive for making his or her complaints. In this case the respondent has attempted to show as a motive the dismissal of the applicant. The difficulty which I have in accepting this submission is that the applicant attended upon her doctor and complained of sexual harassment before she was dismissed. Furthermore, the evidence relating to the unsatisfactory nature of the applicant's driving put forward as a reason for her dismissal was only put forward very late in the day and not contained in any of the original affidavits.¹⁸¹

The respondent appealed this decision and Dowsett J allowed the appeal¹⁸² on the basis that the Federal Magistrate had erred in applying a presumption that one party is unlikely to invent and bring to prosecution the allegations in question unless they are justified. His Honour stated that:

It is clear ... that a relevant tribunal cannot start with the presumption that one party is unlikely to make up and bring to prosecution the allegations in question unless they are justified. The magistrate was obliged to determine which evidence was to be accepted in the case. That obligation could not be discharged by making an assumption of that kind and placing the onus of rebutting it upon the other party. In this respect the magistrate has misunderstood his function. The matter should be remitted to the Magistrates Court for re-hearing. Clearly enough the re-hearing should be by another magistrate.¹⁸³

The re-hearing took place before Driver FM who held that the first respondent sexually harassed the applicant, and both respondents discriminated against the applicant, contrary to the SDA.¹⁸⁴

¹⁸⁰ [2001] FMCA 66.

¹⁸¹ *Ibid* [35]. See also *McAlister v SEQ Aboriginal Corporation* [2002] FMCA 109, [70], in which Rimmer FM appeared to apply a similar presumption.

¹⁸² *Kirkland v Wattle* [2002] FCA 145.

¹⁸³ *Ibid* [5].

¹⁸⁴ *Wattle v Kirkland (No.2)* [2002] FMCA 135.

6.12 Miscellaneous Procedural and Evidentiary Matters

6.12.1 Request for Copy of Transcript

*Dranichnikov v Department of Immigration and Multicultural Affairs*¹⁸⁵ involved an application to the FMS in relation to a transcript.

The applicant had earlier been unsuccessful in unlawful discrimination proceedings in the FMS, from which she appealed to the Federal Court. The applicant then contacted a Registrar of the FMS and requested production of a transcript of the original hearing before the FMS (at no charge to the applicant). That request was refused, it being noted that no reasonable basis for providing transcripts at the FMS' expense had been provided by the applicant.

The applicant applied to the FMS for review of that decision and another earlier similar decision. Although the Department of Immigration and Multicultural Affairs was named as the respondent, Baumann FM excused the Department's attendance, as the proper respondent was the Registrar.

The applicant's application for review was dismissed. Baumann FM held that the decision to refuse to provide the transcript made by the Registrar was not a decision made pursuant to any delegated power in s 102 of the *Federal Magistrates Court Act 1999* (Cth).¹⁸⁶ As a result, his Honour found that the decision was not reviewable under the relevant review provisions.¹⁸⁷

His Honour noted that it is the policy of the FMS to provide a copy of the transcript without charge where an appellant can indicate that hardship would be suffered if required to pay for the transcript.

6.12.2 Unrepresented Litigants

In *Barghouthi v Transfield Pty Ltd*,¹⁸⁸ Hill J considered the duty of the Federal Court when dealing with an unrepresented litigant. The proceedings before Hill J involved an appeal brought by an unrepresented appellant (Mr Barghouthi) from a decision of the FMS. The FMS had dismissed Mr Barghouthi's application alleging unlawful discrimination. Whilst finding that most of the appellant's submissions, both orally and in writing, were 'quite

¹⁸⁵ [2002] FMCA 72.

¹⁸⁶ *Ibid* [8]-[11]. Section 102 lists all of the powers of the FMS which may be exercised by a Registrar. The provision of a transcript to a party does not form part of that list.

¹⁸⁷ Section 104(2) of the *Federal Magistrates Act 1999* (Cth) provides that a party to proceedings in which a Registrar has exercised any of the powers under s 102 may apply to the Federal Magistrates Court for review of that exercise of power.

¹⁸⁸ (2002) 122 FCR 19.

unhelpful',¹⁸⁹ not touching on the legal issues relevant to the appeal, his Honour stated:

... This does not, however, mean that the appellant can have no chance of success in these proceedings.

Whilst this Court has a duty not to intervene in matters involving unrepresented litigants to such an extent that the impartial function of the Judge is compromised, a judge may intervene to protect the rights of an unrepresented litigant and to ensure that the proceedings are fair and just: see *Awan v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 594 per North J at [64], and *Minogue v Human Rights and Equal Opportunity Commission* (1999) 84 FCR 438 per Sackville, North and Kenny JJ at [29].¹⁹⁰

In considering Mr Barghouthi's submissions, Hill J conducted an assessment of whether the Federal Magistrate had made any errors of law that would require the appeal to succeed. The Federal Magistrate had found that there was no evidence which satisfied him that Mr Barghouthi was dismissed from his employment. Hill J disagreed with that conclusion, finding that there had in fact been a constructive dismissal, a conclusion that could only be reached 'by looking at all of the circumstances of the case'.¹⁹¹ On that basis the appeal was allowed. The respondent was declared to have unlawfully dismissed the appellant and was required to pay compensation to the appellant the equivalent to one week's salary.

6.12.3 Consideration of Fresh Evidence out of Time

In *Hagan v Trustees of the Toowoomba Sports Ground Trust*,¹⁹² the Federal Court on appeal declined to receive fresh evidence because it was not filed within the time prescribed by O 36, r 6 of the *Federal Court Rules*. No explanation was given for the late filing of the evidence and the Full Court was not satisfied that the further evidence would have made any difference to the outcome. The Federal Court held that although s 46PR provides that the Court is not bound by technicalities or legal forms, the principles relating to the reception of fresh evidence are designed to aid the administration of justice. Section 46PR was therefore of no use to the appellant in this circumstance.

¹⁸⁹ Ibid 23 [11].

¹⁹⁰ Ibid 23 [11], 23-4 [12].

¹⁹¹ Ibid.

¹⁹² (2000) 105 FCR 56.

6.12.4 Statements made at HREOC conciliation

In *Bender v Bovis Lend Lease Pty Ltd*,¹⁹³ the Court had to consider whether the applicant could rely upon affidavit evidence referring to statements made during a HREOC conciliation. McInnis FM concluded that to permit the applicant to rely upon such evidence would be ‘inconsistent with the spirit and intent of the HREOC Act’ and would:

set an unfortunate precedent in relation to the conduct of conciliation proceedings to the extent that parties participating as directed in compulsory conference would be less likely to openly contribute to the course of the discussion if it were thought that subsequently affidavit material would be lodged in Court reciting the negotiations and or discussions.¹⁹⁴

Compulsory conciliation should be held in private. Also, as the President is prohibited from reporting to the court anything said in the course of conciliation proceedings, it would be ‘somewhat artificial and inconsistent’¹⁹⁵ to allow parties to refer to what may or may not have been said during a conciliation conference at a subsequent court hearing.

¹⁹³ (2003) 175 FLR 446.

¹⁹⁴ *Ibid* 455 [34].

¹⁹⁵ *Ibid* 455-56 [33].

Chapter 7

Costs Awards

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Chapter 7

Costs Awards

7.1 Introduction

In the absence of legislative provisions to the contrary, both the FMS and the Federal Court have discretionary powers to award costs in all proceedings before them.¹ They generally exercise those powers pursuant to the principle that costs follow the event.² Under that principle, an unsuccessful party to a piece of litigation is ordinarily ordered to pay the costs of the successful party. However, the FMS and Federal Court may, in appropriate circumstances, deal with the issue of costs in some other fashion. For example, it has been recognised that the application of the principle that costs follow the event may be inappropriate where:

- the successful party only succeeds in a portion of her or his claim;³
- the costs of the litigation have been increased significantly by reason of the need to determine issues upon which the successful party has failed;⁴
- the successful party has unreasonably or unnecessarily commenced, continued or encouraged the litigation or has acted improperly;⁵ or
- the character and circumstances of the case make it inappropriate for costs to be ordered against the unsuccessful party.⁶

¹ See s 43 of the *Federal Court Act 1976* (Cth) and s 79 of the *Federal Magistrates Act 1999* (Cth).

² See *Hughes v Western Australian Cricket Association (Inc)* (1986) ATPR 40-748, 48-136. As will be discussed below, there was initially some doubt as to whether the principle that costs follow the event applied to Federal unlawful discrimination matters. However, it now appears clear that that principle does apply.

³ *Forster v Farquhar* (1893) 1 QB 564 (cited with approval in *Hughes v Western Australian Cricket Association (Inc)* (1986) ATPR 40-748, 48-136). In those circumstances, it may be reasonable for the successful party to bear the expense of litigating that portion upon which they have failed. Note, however, *McBride v Victoria* [2003] FMCA 313, [8] in which McInnis FM suggests that it may be artificial in human rights claims to divide the issues into discrete events as often the complaint arises out of a course of conduct.

⁴ *Cretazzo v Lombardi* (1975) 13 SASR 4 (cited with approval in *Hughes v Western Australian Cricket Association (Inc)* (1986) ATPR 40-748, 48-136). In those circumstances, the successful party may not only be deprived of the costs of litigating those issues, but may also be required to pay the other party's costs of them.

⁵ *Ritter v Godfrey* (1920) 2 KB 47 (cited with approval in *Hughes v Western Australian Cricket Association (Inc)* (1986) ATPR 40-748, 48-136). See also *Jamal v Secretary Department of Health* (1988) 13 NSWLR 252, 271.

⁶ In *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 the majority of the Full Federal Court (Black CJ and French J) considered it appropriate to make no orders for costs against the two unsuccessful respondents. Their Honours had particular regard to the fact that the proceedings raised novel and important questions of law concerning alleged deprivations of liberty, the executive power of the Commonwealth, the operation of the *Migration Act 1958* (Cth) and Australia's obligations under international law. Other relevant factors listed included that there was no potential for the unsuccessful parties to make financial gain from bringing their actions and that their legal representation was provided on a pro-bono basis.

The Federal Court also has the power pursuant to O 62A of the *Federal Court Rules* to, by its own motion or on application of the parties, specify the maximum costs that may be recovered on a party-party basis.⁷ The limit set for recoverable costs under this order applies to both parties.⁸ It has been stated that the order is intended to address a concern that ‘the cost of litigation, particularly for persons of ordinary means, places access to the civil courts beyond their reach and thus effectively denies them justice’.⁹ The order has been held to be particularly relevant where there is a public interest aspect to the litigation.¹⁰

It does not appear that O 62A has been raised in the context of the unlawful discrimination jurisdiction. An application for the order was made to the Federal Court prior to the commencement of the *Human Rights Legislation Amendment Act (No 1) 1999* (Cth) (‘HRLA Act’) in the context of judicial review of a HREOC decision.¹¹ One of the reasons for the order not being granted in that case was that it was sought in terms that would result in only the costs payable by the applicant being limited and not those payable by the respondent.

The corresponding provision in the FMS is r 21.02(2)(a) of the *Federal Magistrates Court Rules 2001* (Cth). Rule 21.02(2)(a) has been applied on the motion of the Court in a number of cases.¹²

7.2 Relevance of Nature of the Jurisdiction

In the first year following the transfer of the federal unlawful discrimination jurisdiction to the FMS and Federal Court, there was an acceptance by some Federal Magistrates that the jurisdiction presented a set of particular circumstances that may warrant a departure from the application of the traditional ‘costs follow the event’ rule.

That approach is exemplified by Raphael FM’s decision in *Tadawan v South Australia*¹³ (‘*Tadawan*’). On one view, his Honour appeared to suggest that

⁷ ‘Party-party’ costs are those reasonable costs incurred in the conduct of litigation.

⁸ *Maunchest Pty Ltd v Bickford* (Unreported, Queensland Supreme Court, Drummond J, 7 July 1993).

⁹ *Sacks v Permanent Trustee Australia Limited* (1993) 45 FCR 509, 511.

¹⁰ *Woodlands v Permanent Trustee Co Ltd* (1995) 58 FCR 139, 146-48.

¹¹ *Muller v Human Rights and Equal Opportunity Commission* [1997] 634 FCA.

¹² See *Barghouthi v Transfield Services* [2001] FMCA 113; *Escobar v Rainbow Printing Pty Ltd (No.3)* [2002] FMCA 160; *Chung v University of Sydney* [2001] FMCA 94; *Miller v Wertheim* [2001] FMCA 103. In *Font v Paspaley Pearls* [2002] FMCA 142, Raphael FM reserved on the issue of costs so that it could be heard at a later time but indicated that he was minded to limit costs under r 21.02(2)(a): [172]-[173]. There was ultimately no decision as to costs in this matter and it is understood that the parties resolved the issue of costs between themselves.

¹³ [2001] FMCA 25.

the nature of the unlawful discrimination jurisdiction was such that it warranted a departure from the usual costs principles:

The Court has accepted that these matters were normally considered to be ‘no costs’ matters, as evidenced by the practice of state tribunals and the fact that there was no power in HREOC to award costs. The Court has recognised that where proceedings are brought a successful party should not have the benefit of his or her victory lost in costs. The Court is also anxious not to discourage litigants from bringing claims which may well have merit because of the fear of an adverse costs order in the event that the applicant is unsuccessful. On the other hand, the Court can use its powers in relation to costs to discourage unmeritorious claims.

Although the applicant has not succeeded in this case the Court is of the view that her claim was justifiable. It was brought against the background of poor communication, which I have attempted to discuss in some detail. I believe that this is a case where the court should acknowledge the ‘no cost’ nature of the jurisdiction and make no order.¹⁴

Similarly in *McKenzie v Department of Urban Services and Canberra Hospital*,¹⁵ Raphael FM stated:

Anti-Discrimination matters are generally considered to be a type of dispute which do not attract orders for costs. There was no provision for costs in the inquiry system previously operated by HREOC. In state tribunals there is provision to award costs but this is not often done.¹⁶

His Honour’s approach was adopted by other members of the FMS. In *Ryan v The Presbytery of Wide Bay Sunshine Coast*,¹⁷ Baumann FM stated:

Whilst I have the power to award costs, the nature and intent of anti-discrimination legislation could be thwarted if citizens were unreasonably inhibited from prosecuting bona fide, even ultimately unsuccessful claims.¹⁸

Baumann FM went on to make the following conditional costs order, which reflected a long history of litigation in a number of fora between the applicant and respondent:

On the undertaking given by the applicant to the Court as set out in the undertaking signed by him, that application number BZ76 of 2001 in this Court be discontinued, and the applicant be ordered to pay costs of \$10,000.00. The execution of such order for costs be stayed unless the applicant breaches his undertaking given to the Court.¹⁹

An arguably more conventional (but still flexible) approach to the issue of costs in the first year of the FMS’ jurisdiction appeared in the decision of

¹⁴ Ibid [62], [63].

¹⁵ (2001) 163 FLR 133.

¹⁶ Ibid 156 [95].

¹⁷ [2001] FMCA 12.

¹⁸ Ibid [20].

¹⁹ Ibid [2].

Driver FM in *Xiros v Fortis Life Assurance Ltd*,²⁰ where his Honour made the following comments regarding the nature of the power to make orders as to costs:

Ordinarily, in this jurisdiction as in others, costs follow the event. But there is no absolute rule to that effect. There is a general principle that, in civil non jury trials, in the absence of special circumstances, a successful party has a reasonable expectation of obtaining an order for costs in its favour unless, for some reason connected with the case, a different order is specifically warranted: *Donald Campbell & Co v Pollack* [1927] AC 732 at 812, cited by McHugh J in *Latoudis v Casey* (1990) 170 CLR 534 at 569. A departure from that general principle cannot be arbitrary or idiosyncratic, but there is no right to an order for costs, notwithstanding success in litigation: *Donald Campbell & Co v Pollack* op cit at 811 ...²¹

Later cases, however, indicated that *Tadawan* should not be considered as authority for the principle that the issue of costs in the unlawful discrimination jurisdiction should be considered differently from other jurisdictions. In *Minns v New South Wales (No.2)*,²² Raphael FM stated:

The decision in *Tadawan* was always meant to be one made on its own facts and it has not been universally followed in the Federal Magistrates Court. To the extent that it may be considered a precedent for the non-imposition of costs orders in ‘deserving cases’ this should no longer continue. I am satisfied that the superior courts have now made it clear what the law should be in relation to such applications in the anti-discrimination area and I am content to follow them.²³

In reaching this conclusion, Raphael FM cited the decision of Drummond J in *Sluggett v Human Rights and Equal Opportunity Commission*²⁴ (‘*Sluggett*’). However, it can be noted that *Sluggett* was not an application brought under s 46PO of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (‘HREOC Act’). It was an application for review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) of a decision of HREOC before the transfer of jurisdiction to the Federal Court and FMS, and may therefore be distinguishable. Indeed, Drummond J made clear that he was not deciding the correctness or otherwise of the *Tadawan* line of authority, stating:

It is unnecessary to decide whether the application by the Federal Magistrates Court of such a policy in human rights cases in exercising its statutory discretion as to costs is consistent with the statutory power. The proceeding in this Court is for judicial review under the *Administrative Decisions (Judicial Review) Act* of a decision by the Commission on the applicant’s complaint, a decision given, moreover, after an exhaustive hearing on the

²⁰ (2001) 162 FLR 433.

²¹ *Ibid* 440-41 [20].

²² [2002] FMCA 197.

²³ *Ibid* [13].

²⁴ [2002] FCA 1060.

merits. Even if it were appropriate to adopt the approach of the Federal Magistrates Court with respect to costs in hearings on the merits in human rights cases brought to the Court under s 46PO the *Human Rights and Equal Opportunity Commission Act*, I do not think that applications to this Court under the *Administrative Decisions (Judicial Review) Act* for review of decisions by the Commission should be regarded as a class of case calling for a special rule as to costs.²⁵

In *Paramasivam v Wheeler*,²⁶ Moore J appeared prepared to contemplate that special considerations might apply to the issue of costs for federal unlawful discrimination claims by reason of the nature of the jurisdiction. His Honour stated:

An application has been made for an order that the applicant pay the costs of the respondent in each of the proceedings. I am conscious of the fact that the applicant represented herself and, as I indicated a moment ago, holds a genuine belief about the conduct of the people against whom these proceedings have been brought. In the ordinary course successful respondents are entitled to their costs, though in this area of the Court's jurisdiction special considerations may arise in some cases that might warrant some departure from the normal rule.²⁷

His Honour decided that it was appropriate that a costs order be made in that matter. However he went on to say:

Having so ordered, however, I would invite the parties for whose benefit the order is made to give consideration as to whether, in the circumstances, it is appropriate that all or, indeed, any of the costs ought to be recovered.²⁸

The Full Court referred to (but expressly declined to decide upon) the issue in *Hagan v Trustees of the Toowoomba Sports Ground Trust*²⁹ where the appellant argued that costs should not be awarded as he was not receiving Legal Aid and the proceedings concerned a public rather than a private right. The Full Court stated:

This is not an appropriate case in which to consider whether there should be some departure in human rights litigation from the ordinary principles governing the court's discretion to order payment of costs. In our view, this appeal should be dismissed with costs because the appeal was without merit, having no realistic prospects of success.³⁰

However, in a number of decisions, the Federal Court has made brief statements which appear to indicate that costs will generally be awarded in

²⁵ Ibid [7].

²⁶ [2000] FCA 1559.

²⁷ Ibid [9].

²⁸ Ibid [10].

²⁹ (2000) 105 FCR 56.

³⁰ Ibid 61 [31].

favour of the successful party in federal unlawful discrimination matters. By way of example, in *Tate v Rafin*,³¹ Wilcox J stated:

Generally speaking, it may be expected an order will be made in favour of the successful party.³²

His Honour nevertheless went on to decide that it was appropriate to make no order for costs by reason of the respondent's conduct.³³

Similarly, Keifel J appeared to indicate in *Creek v Cairns Post Pty Ltd*³⁴ that the principle that costs follow the event should be applied in federal unlawful discrimination matters in the absence of an express legislative provision to the contrary.³⁵

There have been a number of other decisions indicating that the principle that costs follow the event will be applied to the unlawful discrimination jurisdiction.³⁶ By way of example, in *Ball v Morgan*,³⁷ McInnis FM stated:

In my view the general principle in relation to costs is that the costs should follow the event. I see no reason for departing from that general principle in human rights applications though I acknowledge the cases to which I have been referred by the applicant's counsel provide at least some examples of circumstances where a court has been prepared to exercise its discretion in favour of unsuccessful applicants by not awarding costs.

... In my view in the absence of any amendment to legislation which would seek to interfere with the ordinary discretion exercised by a court in the award of costs it should be stated that in the normal course of events costs follow the event. I can see no legislative or legal basis which would support the proposition that there is any need in human rights matters to alter the law applicable to this court by adopting the practice of the state tribunal or indeed to have regard to the fact that the Commission does not have power to award costs. Unfortunately I therefore find that I am unable to agree with the conclusion in relation to costs set out by the Learned Federal Magistrates in the *Tadawan* Decision and the *Ryan* Decision.

It is not appropriate for courts to exercise a discretion in relation to costs on the basis that it may or may not discourage applicants from making claims. That is a matter for Parliament to decide and if necessary legislation can be amended which, subject to any Constitutional challenge, may direct the court

³¹ [2000] FCA 1582.

³² *Ibid* [71].

³³ See 7.3.6 below.

³⁴ [2001] FCA 1150.

³⁵ Her Honour stated: 'Neither the *Racial Discrimination Act 1975* nor the *Human Rights and Equal Opportunity Commission Act 1986* provide that costs are not to be awarded in cases of this kind. The applicant was unsuccessful in her application', *ibid* [1]. Her Honour nevertheless went on to order that the applicant pay only one half of the respondent's costs: see 7.3.6 below.

³⁶ See, for example: *Li v Minister for Immigration & Multicultural Affairs* [2001] FCA 1414, [57]; *Paramasivam v Wheeler* [2001] FCA 231, [24]; *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd (No 2)* [2003] FMCA 516.

³⁷ [2001] FMCA 127.

in relation to the issue of an award of costs in human rights applications. In the absence of that legislation as indicated I do not believe there is any need to depart from the normal principles which apply.³⁸

There may, nevertheless, be other features peculiar to federal discrimination matters which warrant a particular approach to costs. For example, in *McBride v Victoria (No.2)*,³⁹ the respondent argued that costs should be apportioned to reflect the fact that the applicant was successful in only one of seven claims of unlawful discrimination. In ordering the respondent pay 50 per cent of the applicant's costs, McInnis FM stated:

The nature of a human rights claim very often includes complaints that arise out of what are considered to be a series of events in the course of employment, more often than not in circumstances of this kind where an applicant is aggrieved by what is perceived by the applicant to be conduct in breach of the relevant human rights legislation. Although analysed and presented as discrete events, there is an element of continuity, at least in the perception of the applicant, and it is somewhat artificial, in my view, to divide the issues exactly in the way proposed by the respondent, that is, to apportion costs on a six-seventh or one-seventh basis.

Nevertheless, it is also relevant in the discretion of the court to look at the substantial outcome, and I accept that ultimately the applicant, though successful, has not been successful in all aspects of the claim, in particular has not succeeded in establishing that her current condition is attributable to the alleged contraventions of the Disability Discrimination Act.⁴⁰

7.3 Factors Considered in Exercising Discretion as to Costs Orders

The issues that have been identified as relevant to the discretion to order costs include:

- whether there is a public interest element to the complaint;
- whether the applicant is unrepresented and not in a position to assess the risk of litigation;
- the principle that the successful party should not lose the benefit of their victory because of the burden of their own legal costs;
- the principle that the courts should not discourage litigants from bringing meritorious claims and should be slow to award costs at an early stage;
- the principle that the courts will discourage unmeritorious claims and will not award costs where the trial is prolonged by either party; and
- the principle that self-represented applicants are not entitled to any legal costs.

³⁸ Ibid [87]-[91].

³⁹ [2003] FMCA 313.

⁴⁰ Ibid [8]-[9].

Each of these matters will be considered in turn.

7.3.1 Where There is a Public Interest Element to the Complaint

In *Xiros v Fortis Life Assurance Ltd*,⁴¹ Driver FM declined to award costs to the respondent after dismissing the application. His Honour stated:

A further circumstance that may warrant a departure from the general principle is where the proceedings contain a significant public interest element: *Oshlack v Richmond River Council* (1998) 152 ALR 83. All human rights proceedings contain some element of public interest in that the legislation is remedial in character, addressing the public mischief of discrimination. But the legislation confers private rights of action for damages. There will be many human rights proceedings where no sufficient public interest element can be shown: *Physical Disability Council of NSW v Sydney City Council* [1999] FCA 815.

In the present case, the proceedings have called for the interpretation and application of s46(2) of the DDA, a provision on which I have found no previous judicial consideration.

The decision of this Court will have some precedent value and will have implications for other insurance policies; and possibly a large number of similar policies. The proceedings therefore contain a public interest element of substance.⁴²

Wilcox J commented as follows in *Ferneley v The Boxing Authority of New South Wales*:⁴³

Although the applicant fails, it is not clear to me that she should be required to pay the respondents' costs. Her case in relation to s 22 was arguable. Her argument in relation to s 42, which was disputed by the respondents, is correct. Perhaps more importantly, the case has served the public interest in clarifying important issues of discrimination law.⁴⁴

However, not every case with a public interest element will avoid the application of the principle that costs follow the event. This was made clear by Raphael FM in *Minns v New South Wales (No.2)*,⁴⁵ where his Honour stated:

There must be a public interest in the subject of the proceedings and once some exclusively personal benefit is sought the prospects of the proceedings having the necessary quality of public interest is much diminished. Thus in

⁴¹ (2001) 162 FLR 433.

⁴² *Ibid* 441 [24], [25]. See similar views expressed in *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2002] FMCA 71, [5]; *Chau v Oreanda Pty Ltd* [2001] FMCA 114; *Gibbs v Wanganeen* (2001) 162 FLR 333; *Murphy v Loper* [2002] FMCA 310. In *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd (No 2)* [2003] FMCA 516, [4], Driver FM noted that there were, in that matter, no issues of public interest that would indicate a departure from the general principle that costs follow the event, nor had the conduct of the applicant disentitled her to an order for costs.

⁴³ (2001) 115 FCR 306.

⁴⁴ *Ibid* 326 [97].

⁴⁵ [2002] FMCA 197.

Ruddock v Vadarlis (No. 2) [(2001) 115 FCR 229] the public interest was the liberty of individuals who were unable to take action on their own behalf to determine their rights. In *Kent v Cavanagh* (1973) 1 ACTR 43 it was the erection of a communications tower on Black Mountain in Canberra. In *Oshlack v Richmond River Council* [(1998) 193 CLR 72] the subject was a land development at Evans Head. These were cases in which the usual rule as to costs did not apply but in *De Silva v Ruddock, Physical Disability Council of NSW v Sydney City Council* [[1998] 311 FCA] and *Sluggett v HREOC* [[2002] 123 FCR 561] the claims were more personal to the applicants and the appeal to the public interest exception was unsuccessful.⁴⁶

His Honour also appeared to express views at odds with those expressed by Driver FM in *Xiros v Fortis Life Assurance Ltd*,⁴⁷ stating:

if public interest is to be used to mitigate the normal order for costs then that public interest must go further than mere precedent value.⁴⁸

7.3.2 Where the Applicant is Unrepresented and Not in a Position to Assess the Risk of Litigation

Driver FM's discussion of the public interest element of *Xiros v Fortis Life Assurance Ltd*⁴⁹ was considered in 7.3.1 above. His Honour also identified the following matter as being relevant to the exercise of the discretion to award costs in that case:

Another circumstance that may warrant a departure from the general principle is where the unsuccessful party is unrepresented and was not in a position to make a proper assessment of the strength or weakness of his case, and, hence, the risk associated with the litigation. Mr Xiros had the benefit of legal assistance for his complaint to HREOC but he was unrepresented in these proceedings. The issue to be resolved was a technical one: whether there was a sufficient actuarial basis for the exclusion from benefits in the insurance policy of HIV/AIDS derived conditions, an issue on which the respondent bore the onus of proof. That issue could only be resolved by the pursuit of the present application to this Court, and Mr Xiros was not in a position to make a reliable assessment of his prospects of success.⁵⁰

In *Hassan v Smith*⁵¹ Raphael FM noted that the applicant was self-represented and that he had brought the proceedings out of deeply held beliefs. His Honour also noted that 'in this jurisdiction of the Federal Magistrates Court discretion may be exercised more leniently in favour of unsuccessful

⁴⁶ Ibid [13].

⁴⁷ (2001) 162 FLR 433.

⁴⁸ [2002] FMCA 197, [13]. Note, however, his Honour did not expressly refer to Driver FM's decision in *Xiros v Fortis Life Insurance* (2001) 162 FLR 433.

⁴⁹ (2001) 162 FLR 433.

⁵⁰ Ibid 441 [23].

⁵¹ [2001] FMCA 58.

applicants'.⁵² However, Raphael FM ordered that the unsuccessful applicant pay the respondent's costs as his Honour was of the view that the applicant had been aware of the problems that his case faced and had wished to continue the matter so as 'to have his day in court'.⁵³

7.3.3 The Successful Party Should Not Lose the Benefit of Their Victory Because of Their Legal Costs

The relevance of this factor appears to be closely associated with the suggestion that the principle that costs follow the event should not be too readily applied to Federal unlawful discrimination matters.⁵⁴ While that approach may have benefited unsuccessful applicants, it stood to render futile the claims of applicants whose awards of compensation might be 'swallowed up' by legal fees. To ameliorate that potential problem, the Court indicated that it was appropriate to have regard to that issue as a factor weighing in favour of making a costs order in favour of a successful applicant.

In *Shiels v James*,⁵⁵ Raphael FM held that the amount of the award would be totally extinguished if no order for costs was made and in those circumstances costs should follow the event.

In *Travers v New South Wales*,⁵⁶ Raphael FM stated:

This matter was originally commenced in the Federal Court. There was a lengthy hearing of Notice of Motion before Justice Lehane and the case before me lasted 2 ½ days. If costs were not awarded Stephanie would lose the benefit of the entire judgment. I order that the respondent should pay the applicant's costs to be taxed on the Federal Court scale if not agreed.⁵⁷

Similarly, in *McKenzie v Department of Urban Services*,⁵⁸ Raphael FM ordered that the respondents pay the costs of the applicant, stating:

Anti-Discrimination matters are generally considered to be a type of dispute which do not attract orders for costs. There was no provision for costs in the inquiry system previously operated by HREOC. In state tribunals there is provision to award costs but this is not often done. The Federal Court and the Federal Magistrates Court are courts of law and not tribunals and the *HREOC Act* does not contain any prohibition on the award of costs. In previous matters which have come before me e.g. *Shiels* and *Travers* I have indicated that I think an award of costs is appropriate where otherwise a party may

⁵² Ibid [25]. However, note that his Honour cited *Tadawan v South Australia* [2001] FMCA 25 in support of that proposition: see the discussion in 7.2 above.

⁵³ [2001] FMCA 58, [27].

⁵⁴ See 7.2 above.

⁵⁵ [2000] FMCA 2.

⁵⁶ (2001) 163 FLR 99.

⁵⁷ Ibid 117 [74].

⁵⁸ (2001) 163 FLR 133.

have the benefit of his or her award of damages totally eliminated by the cost of the proceedings.⁵⁹

In *Johanson v Blackledge*,⁶⁰ Driver FM ordered that costs should follow the event. His Honour agreed with the views expressed by Raphael FM in *Shiels v James*⁶¹ concerning the general desirability of an award of costs in favour of a successful applicant in human rights proceedings, so as to avoid an award of damages being swallowed up by the cost of litigation.

Driver FM awarded costs to the successful applicant in *Cooke v Plauen Holdings Pty Limited*,⁶² stating:

I agree with the views expressed by Raphael FM in *Shiels v James* [[2000] FMCA 2] at paragraph 80 concerning the general desirability of an award of costs in favour of a successful applicant in human rights proceedings, so as to avoid an award of damages being swallowed up by the cost of litigation.⁶³

His Honour made similar comments in *Escobar v Rainbow Printing Pty Limited (No.3)*,⁶⁴ stating:

My general approach to the issue of costs in human rights proceedings where an applicant is successful is set out in my decision in *Cooke v Plauen Holdings Pty Limited* [2001] FMCA 91. In that case I expressed agreement with views expressed by Federal Magistrate Raphael in *Shiels v James* [2000] FMCA 2, in particular at paragraph 80 of his decision. I noted the general desirability of an award of costs in favour of a successful applicant in human rights proceedings so as to avoid an award of damages being swallowed up by the cost of litigation.⁶⁵

With courts being apparently more inclined to award costs following the event,⁶⁶ it may be that this factor becomes less relevant. Alternatively, it may have some residual relevance as a doctrine supporting the proposition that the FMS should be reluctant to depart from the principle that costs follow the event in such cases.

⁵⁹ Ibid 156 [95].

⁶⁰ (2001) 163 FLR 58.

⁶¹ [2000] FMCA 2.

⁶² [2001] FMCA 91.

⁶³ Ibid [44].

⁶⁴ [2002] FMCA 160.

⁶⁵ Ibid [5].

⁶⁶ See discussion in 7.2 above.

7.3.4 The Courts Should Not Discourage Litigants from Bringing Meritorious Claims and Should be Slow to Award Costs at an Early Stage

In *Low v Australian Tax Office*⁶⁷ ('*Low*'), Driver FM dismissed the application on the basis that an extension of time for the filing of the application should not be granted because the application did not disclose an arguable case. His Honour declined to award costs, however, stating:

In my view the Court should be slow to award costs at an early stage of human rights proceedings so that applicants have a reasonable opportunity to get their case in order, to take advice and to assess their position. It would, in my view, be undesirable for costs to be awarded commonly at an early stage, as that would provide a deterrent to applicants taking action under what is remedial legislation in a jurisdiction where costs have historically not been an issue.

By disposing of the application now at this relatively early stage the respondent is able to avoid being put to the substantial expense of a full hearing and in those circumstances I do not think it necessary or appropriate to make any order as to costs.⁶⁸

In *Saddi v Active Employment*,⁶⁹ Raphael FM cited with approval and applied the approach of Driver FM in *Low*. Although Raphael FM declined to exercise his discretion to allow Mr Saddi to continue with his proceedings out of time (as Raphael FM was not satisfied that Mr Saddi's application had any prospect of success), he made no order for costs.

7.3.5 Costs Where Human Rights Proceedings are Discontinued

In *Ingui v Ostara*,⁷⁰ where the applicant discontinued proceedings prior to the hearing, Brown FM held that it was reasonable that the applicant should make some contribution to the costs incurred by the respondents in the proceedings to date.⁷¹ He therefore ordered that each party have the opportunity to make submissions as to the quantum of costs to be allowed.⁷² In *Ingui v Ostara (No.2)*⁷³ the applicant argued that as a result of intimidation and harassment by the respondents she did not pursue her claim of sexual harassment. Brown FM stated that as there had been no substantive hearing, he was not in a position to assess the bona fides of the respondents in respect of the position they took in the litigation, and could therefore find no reason to change his view that the

⁶⁷ [2000] FMCA 6.

⁶⁸ *Ibid* [11]. His Honour made similar obiter comments in *Chau v Oreanda Pty Ltd* [2001] FMCA 114, [26].

⁶⁹ [2001] FMCA 73.

⁷⁰ [2003] FMCA 132.

⁷¹ *Ibid* [36].

⁷² *Ibid* [41].

⁷³ [2003] FMCA 531.

applicant should contribute towards the respondents' costs. He did however reduce the amount of costs that would be awarded under the scale of costs (which together with disbursements amounted to \$4,694) to \$3,000 on the grounds that \$4,694 was excessive given the proceedings were discontinued well before the matter was fixed for final hearing, thus saving the respondents from incurring considerable costs.

7.3.6 The Courts Will Discourage Unmeritorious Claims and Will Not Award Costs Where the Trial is Prolonged by the Conduct of Either Party

In *Hassan v Smith*,⁷⁴ Raphael FM held that the applicant should pay the party-party costs because although he was told of the difficulties he faced in establishing his claim by HREOC upon termination, and by Raphael FM at two directions hearings, he nevertheless 'wanted his day in court'.⁷⁵ However, Raphael FM held that the applicant's conduct was not so unreasonable so as to warrant indemnity costs being awarded.

An application for indemnity costs was also refused in *Kowalski v Domestic Violence Crisis Service Inc (No.2)*,⁷⁶ where Driver FM noted that the fact the applicant 'was wholly unsuccessful does not mean that the proceedings should not have been instituted or continued'.⁷⁷

In contrast, indemnity costs were awarded against the unsuccessful applicant by Driver FM in *Wong v Su*,⁷⁸ where his Honour noted:

The applicant has been wholly unsuccessful in these proceedings. The application was pursued in a desultory way by the applicant and in the knowledge that the allegations made by her were untruthful. Accordingly, the application must be dismissed with costs. In addition, it is appropriate in the circumstances that the Court express its strong disapproval, both of the fact that the application was made at all and also the manner in which it was pursued. Applications of this nature, based upon untruthful evidence, are apt to bring anti-discrimination legislation into disrepute, and do a grave disservice to others wishing to pursue a genuine grievance. The respondents should not be out of pocket in having dealt with this application.⁷⁹

In *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd (No.2)*,⁸⁰ the respondents argued that the applicant's costs order should be reduced because

⁷⁴ [2001] FMCA 58.

⁷⁵ *Ibid* [27].

⁷⁶ [2003] FMCA 210.

⁷⁷ *Ibid* [8].

⁷⁸ [2001] FMCA 108.

⁷⁹ *Ibid* [19].

⁸⁰ [2003] FMCA 516.

the applicant had only been partially successful in her claim. Driver FM noted that:

The applicant was not successful in obtaining the financial outcome that she probably anticipated if she had been able to demonstrate a constructive dismissal. However that outcome, in my view, does not call for a reduced order as to costs for that reason alone... In this matter I have formed the view that the decision of the applicant to pursue her claim through to a final hearing was neither improper or unrealistic. She did not persuade me that she had been constructively dismissed, but on factual issues I accepted her as a reliable witness. The claim of constructive dismissal was always reasonably arguable although ultimately unsuccessful. The applicant should, in my view, receive an order for costs consistent with the general principle that costs follow the event.⁸¹

While the applicant's claim against the first respondent was upheld, her claim against the second and third respondents, who were employees of the first respondent, was dismissed on an issue of jurisdiction. An application for a costs order in favour of the second and third respondents was not granted on the basis that it was unlikely that the respondents' overall costs in the proceedings were increased in any significant degree by the inclusion of the second and third respondents as parties.⁸²

In *Horman v Distribution Group Limited*,⁸³ Raphael FM held that the fact that the trial was prolonged by the conduct of the applicant and her untruthfulness and that her Counsel persisted in suggesting a conspiracy between the respondent's witnesses militated against a costs order. His Honour therefore ordered that each party pay their own costs. On appeal, Raphael FM's approach to costs was affirmed by Emmett J.⁸⁴

In *Xiros v Fortis Life Assurance Ltd*,⁸⁵ Driver FM made the following observation in the course of considering the issue of costs after dismissing the application:

One circumstance that might disentitle a successful litigant to an order for costs can be the behaviour of the litigant during the course of the proceedings, for example, by taking unnecessary technical points or otherwise inappropriately prolonging the proceedings. That is certainly not the case here. On the contrary, the respondent, through its legal representatives, has behaved impeccably.⁸⁶

⁸¹ Ibid [6] and [11].

⁸² Ibid [17]-[18].

⁸³ [2001] FMCA 52.

⁸⁴ See *Horman v Distribution Group Limited* [2002] FCA 219, [45]. Note, however, that Emmett J raised some queries regarding Raphael FM's description of a *Calderbank* letter as 'defective'. As Emmett J noted, there are no technical requirements for a *Calderbank* letter, [44].

⁸⁵ (2001) 162 FLR 433.

⁸⁶ Ibid 441 [22].

His Honour nevertheless declined to award costs to the respondent for other reasons.⁸⁷

In *Bruch v Commonwealth of Australia*⁸⁸ McInnis FM stated that in the exercise of his discretion on the issue of costs, it was relevant to take into account the fact that the applicant had made an extravagant claim for damages 'solely to demonstrate anger'.⁸⁹ His Honour was of the view that this was not a valid basis for claiming damages or for exaggerating a claim in a human rights application. However, by reason of the fact that the respondent's application for summary dismissal was dismissed, McInnis FM determined that it was appropriate to order that the applicant pay only 80 per cent of the respondent's costs.

The Federal Court has also indicated that the conduct of the respondent may be a factor which weighs against the application of the principle that costs follow the event.

In the decisions of *Tate v Rafin*⁹⁰ and *Creek v Cairns Post Pty Ltd*,⁹¹ Wilcox and Kiefel JJ respectively had regard to the conduct of the respondent as a factor mitigating against an award of costs in their favour.

In *Tate v Rafin*,⁹² Wilcox J stated:

Generally speaking, it may be expected an order will be made in favour of the successful party. However, in the present case, I do not think it appropriate to make an order for costs. Although I have determined the proceeding must be dismissed, the respondents bear substantial responsibility for the fact that it was commenced in the first place; generally, because of the way they handled the situation that arose at the training session and, more particularly, because of the misleading impression conveyed by the fifth paragraph of the letter of 20 February 1996 [which suggested that the decision to revoke the applicant's membership was by reason of his disability].⁹³

In *Creek v Cairns Post Pty Ltd*,⁹⁴ Kiefel J stated:

The only matter which seems to me to weigh against the applicant being ordered to pay the respondent's costs in the proceedings is the time taken in the hearing on the defence raised by the respondent, which I found would not have been available to it. Indeed it was upon the basis that the provisions of s 18D had not been judicially considered, that the matter remained in this Court when it would otherwise have been transferred to the Magistrates' Court with

⁸⁷ See discussion in 7.3.1 and 7.3.2 above.

⁸⁸ [2002] FMCA 29.

⁸⁹ *Ibid* [64].

⁹⁰ [2000] FCA 1582.

⁹¹ [2001] FCA 1150.

⁹² [2000] FCA 1582.

⁹³ *Ibid* [71].

⁹⁴ [2001] FCA 1150.

consequent savings on costs. Taking these matters into account I consider it appropriate to order that the applicant pay one-half of the costs incurred by the respondent in the proceedings, including reserved costs.⁹⁵

In *Batzialas v Tony Davis Motors Pty Ltd*,⁹⁶ the respondent made an offer of compromise. McInnis FM noted that in the absence of contrary intention, the Federal Court Rules, including O 23 (which deals with offers of compromise), applies to human rights matters.⁹⁷ Accordingly, McInnis FM ordered the applicant to pay the respondent's costs taxed pursuant to sch 1 of the *Federal Magistrates Court Rules 2001* (Cth) from 11am on the day following service of the offer of compromise.⁹⁸

In *Forbes v Commonwealth (No 2)*,⁹⁹ the respondent had made an offer of settlement which was, in the view of Driver FM, 'exceptionally generous'. The offer was rejected by the applicant. The applicant was only partly successful in her application, which resulted in a declaration that the respondent had discriminated against her, and an order for an apology. Driver FM ordered that each party bear their own costs, concluding that:

the manner in which the proceedings were conducted on behalf of the applicant, coupled with the settlement offer made... disentitles the applicant to an order for costs in her favour, notwithstanding her success in the proceedings.¹⁰⁰

7.3.7 Self-Represented Applicants are Not Entitled to Any Legal Costs

In *Wattle v Kirkland*,¹⁰¹ Raphael FM held that the applicant was not entitled to any legal costs by reason of the fact that she was self-represented.

⁹⁵ Ibid [2].

⁹⁶ [2002] FMCA 243.

⁹⁷ Ibid [113].

⁹⁸ Ibid [119].

⁹⁹ [2003] FMCA 262.

¹⁰⁰ Ibid [11].

¹⁰¹ [2001] FMCA 66.

7.4 Application of s 47 of the *Legal Aid Commission Act 1979* (NSW) to Human Rights Cases in the FMS

Section 47 of the *Legal Aid Commission Act 1979* (NSW) provides that:

47 Payment of costs awarded against legally assisted persons

- (1) Where a court or tribunal makes an order as to costs against a legally assisted person:
 - (a) except as provided by subsections (2), (3), (3A), (4) and (4A), the Commission shall pay the whole of those costs, and
 - (b) except as provided by subsections (3), (3A), (4) and (4A), the legally assisted person shall not be liable for the payment of the whole or any part of those costs
- (2) The Commission shall not pay an amount in excess of \$5,000 (or such other amount as the Commission may from time to time determine):
 - (a) except as provided by paragraph (b), in respect of any one proceeding, or
 - (b) in respect of each party in any one proceeding, being a party who has, in the opinion of the Commission, a separate interest in the proceeding.

In *Minns v New South Wales (No.2)*,¹⁰² Raphael FM found that s 47 does not apply to proceedings in the FMS (and by implication the Federal Court). Raphael FM applied the decision of the Full Bench of the Federal Court and the majority of the High Court in *Bass v Permanent Trustee Co Limited*.¹⁰³ In that case, the majority of the High Court expressed the view that a ‘court or tribunal’ for the purpose of s 47 means a State court or tribunal.¹⁰⁴

As a result of this decision, it can no longer be assumed that legally aided applicants are protected against liability by s 47 of the *Legal Aid Commission Act 1979* (NSW) for the payment of the whole or part of the costs that might be ordered by the court if unsuccessful in human rights proceedings.

¹⁰² [2002] FMCA 197.

¹⁰³ (1999) 198 CLR 334.

¹⁰⁴ *Ibid* 361-62 [64].

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