Legal Bulletin

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1. Introduction and Welcome

Welcome to the December 2002-April 2003 issue of the Legal Bulletin, the regular publication of the Legal Section of the Human Rights and Equal Opportunity Commission (HREOC).

Regular readers will notice that we have revised the format. We hope that those changes better reflect the fact that our areas of expertise are primarily in Australian and international human rights law.

Most readers will be familiar with the existence of the expanding body of principles and jurisprudence built around international and regional human rights instruments. As in previous bulletins, we discuss selected developments in those areas in section 3.

It is perhaps less easy to identify a clearly distinguishable body of domestic law which might be labelled "Australian human rights law". This partially reflects the fact that, unlike many other nations, Australia has no constitutionally entrenched or statutory bill of rights.

However, State and Commonwealth Parliaments have enacted non-comprehensive statutory schemes providing remedies for breaches of some internationally recognised human rights. These include the right to privacy and the right not to be discriminated against on certain grounds. We have discussed developments in those areas in sections 4 (Australian Discrimination Law) and 5 (Australian and International Privacy Law).

Human rights principles are also potentially relevant to many other areas of Australian domestic law. Section 2, somewhat nebulously entitled "Selected general Australian human rights jurisprudence", is an attempt to capture the variety of decisions of domestic Courts involving human rights elements. That section spans a wide range of decisions, dealing with subjects such as refugee law, native title and the law of marriage. The increasing use of human rights materials by parties, interveners and Courts in that diverse range of cases may be seen as the first steps towards developing a coherent and distinct body of domestic human rights law.
Readers will notice that HREOC has continued to play a part in that process by exercising its "intervention function" in a number of the matters discussed in section 2. The Commonwealth Government has sought to impose certain conditions on the exercise of that function through the introduction of the *Australian Human Rights Commission Legislation Bill 2003*, which was introduced into the Federal Parliament on 27 March 2003. The bill is currently being considered by the Senate Legal and Constitutional Committee. We will not, in this Bulletin, discuss the contents of the bill. Interested readers may access HREOC's submission to the Senate Legal and Committee at the following web address: http://www.humanrights.gov.au/ahrc/submission.html

Stop Press: On 21 May 2003, the Chief Minister of the Australian Capital Territory announced that he had received the *Report of the ACT Bill of Rights Consultative Committee Towards an ACT Human Rights Act*, which recommended the introduction of an ACT *Human Rights Act.*

The ACT Government is currently considering that report.

2. Selected Australian human rights jurisprudence

Minister for Immigration & Multicultural and Indigenous Affairs v Al Masri [2003] FCAFC 70

Background

Mr Al-Masri was a Palestinian asylum seeker from the Gaza strip. His application for a protection visa was refused by a delegate of the Minister and the Refugee Review Tribunal. Rather than pursue review in the Federal or High Court, Mr Al Masri asked the Minister to return him to the Gaza Strip. Officers of the Minister's Department were unable to meet that request as Israel, Egypt and Jordan refused to cooperate. The Department had also tried (and failed) to deport Mr Al Masri to Syria.

On the evidence before him at the initial hearing, Merkel J found that there was no prospect of Mr Al Masri being removed in the reasonably foreseeable future and therefore ordered his release from detention.

After Mr Al Masri was released, negotiations with Israel resulted in an agreement that allowed the Minister to effect his removal to the Gaza Strip. In a further decision, Merkel J ruled that it was permissible for Mr Al Masri to be taken back into immigration detention on the basis that it had become possible to effect Mr Al Masri's removal. Mr Al Masri was then detained and subsequently deported. The Minister nevertheless appealed Merkel J's initial decision. HREOC was granted leave to intervene in the appeal.

Prior to the decision of the Full Court, a number of members of the Federal Court decided, at first instance, not to follow Merkel J's initial decision: see, for example, *WAIS v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1625 per French J, *NAES v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 2 per Beaumont J, *Daniel v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 20 per Whitlam J and *SHFB v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 29 per Selway J.

Decision of the Full Federal Court

In its decision dated 15 April 2003, the full Federal Court (Black CJ, Sundberg and Weinberg JJ) dismissed the Minister's appeal and awarded costs to the respondent. The Court found, for the reasons set out below, that the power under the *Migration Act 1958* (Cth) to detain was subject to limitations which, on the facts before the Court, had been exceeded, making Mr Al Masri's detention unlawful.

Central issue before the Full Court

The Court noted that the central issue in the appeal was whether the power and duty of the Minister to detain an unlawful non-citizen who had no entitlement to a visa but who had asked to be removed from Australia continued even when there was no real likelihood or prospect of that person's removal in the reasonably foreseeable future. In other words, whether the *Migration Act 1958* (Cth) authorises and requires the indefinite and possibly even permanent administrative detention of such a person.

The Court discussed three main points in reaching its conclusion:

1. Constitutional Principles – The Presumption against Exceeding the Bounds Set by the Constitution

The Court discussed the decision *of Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (*Lim*), where the High Court held that legislatively conferred executive or administrative powers to detain a non-citizen will be constitutionally valid so long as they are *"limited to what is reasonably capable of being seen as necessary* for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered" (emphasis added).

The High Court in *Lim* upheld the validity of statutory powers of detention which imposed an upper limit on that detention of approximately 10 months and which (via the equivalent of section 198(1) of the *Migration Act 1958* (Cth)) provided for a detainee to bring her or his detention to an end by request. Each of those features was relied upon by the majority in *Lim* in reaching the conclusion that such detention was a valid exercise of legislative power under s 51(xix) of the *Constitution.*

Having regard to that reasoning, the Full Court concluded that unless s 196 of the *Migration Act 1958* (Cth) was subject to an implied temporal limitation, broadly of the nature of the second limitation found by the trial judge, a serious question of invalidity would arise. Their Honours went on to comment that:

> Without such a limitation it may well be that the power to detain would go beyond what the High Court in *Lim* considered to be reasonably capable of being seen as necessary for the purposes of deportation. In the absence of such an implied limitation, the elements that saved the sections under challenge in *Lim* from going beyond what was constitutionally permissible would seem to be absent from the present general scheme of mandatory detention. One such element was a section with a practical capacity (assumed) to bring about release from detention. That element would be missing if s 196 were to operate without limitation and where the equivalent of s 54P(1) in the scheme now being considered, s 198(1), did not have practical effect in a case such as that of Mr Al Masri. The other element, perhaps not critical, but certainly an element in the reasoning in *Lim*, is the specific time limit on detention provided for in the scheme then under consideration. That element is wholly absent in the scheme for mandatory detention at the centre of this case [71, 72].

While their Honours found that constitutional considerations pointed strongly to the need and foundation for a temporal limitation on the power to detain, they considered that the central issue in the appeal could be decided under a well-established principle of statutory construction concerning fundamental rights and freedoms.

2. Statutory Construction – The Presumption Against the Curtailment of Fundamental Freedoms

The Court affirmed the principle that clear words are required before a statute can be construed as removing a fundamental right which in this case was the right to personal liberty. Their Honours commented that the right to personal liberty is among the most fundamental of all common law rights and also among the most fundamental of universally recognised human rights. After reviewing Australian case law and authorities from other common law countries, their Honours stated that the common law's concern for the liberty of individuals extends to aliens who are unlawfully within Australia. The principle that clear words are required before legislation will be construed as removing a fundamental right or freedom is not to be excluded simply because the subject matter of a statute is the detention of aliens.

Thus the critical question was whether there was a clear indication that the legislature had decided upon the curtailment of the right to personal liberty. The Court concluded:

> In our view, the language of s 196, either taken alone or in the context of the scheme as a whole, does not suggest that the Parliament did turn its attention to the curtailment of the right to liberty in circumstances where detention may be for a period of potentially unlimited duration and possibly even permanent. On the contrary, the textual framework of the scheme suggests an assumption by the Parliament that the detention authorised by s 196 will necessarily come to an end. Section 196 contemplates a "period of detention", and that is how the section is headed [121].

At first instance, Merkel J formulated a temporal limitation on the power to detain in light of the duty imposed by the Parliament on the Minister to effect removal "as soon as reasonably practicable". In their Honours' view, such a limitation was required by the above principles and had support from the language of an integral part of the statutory scheme.

3. Construction in Accordance with International Obligations

The Court was fortified in its conclusion by reason of the fact that the Minister's preferred construction of the relevant statutory provisions would authorise and require detention contrary to the right under Article 9(1) of the *International Covenant on Civil and Political Rights* ("ICCPR") not to be subjected to arbitrary detention.

The Honours referred to views of the Human Rights Committee, opinions expressed in works of scholarship in the field of international law and jurisprudence of the European Court of Human Rights in finding that arbitrariness is not to be equated with "against the law" but is to be interpreted more broadly so as to include a right not to be detained in circumstances which, in the individual case, are "unproportional" or unjust.

Their Honours concluded that:

> …s 196(1)(a) should be read subject to an implied limitation by reference to the principle that, as far as its language permits, a statute should be read in conformity with Australia's treaty obligations. To read s 196 conformably with Australia's obligations under Art 9(1) of the ICCPR, it would be necessary to read it as subject, at the very least, to an

> implied limitation that the period of mandatory detention does not extend to a time when there is no real likelihood or prospect in the reasonably foreseeable future of a detained person being removed and thus released from detention. It follows from our earlier discussion that we consider the language of the statute in question does permit the implication of such a limitation [156].

4. Application for special leave

The Minister has since filed an application for special leave to appeal to the High Court.

Re Minister for Immigration and Multicultural Affairs: Ex parte Lam [2003] HCA 6

The applicant was an asylum seeker from Vietnam and was granted a permanent visa. He had two children who were born in Australia and who are Australian citizens. The applicant and the mother of the children were estranged and for some time the children had been cared for by others. The applicant was later convicted for trafficking heroin and was sentenced to imprisonment for eight years.

Section 502(1) of the *Migration Act 1958* (Cth) in its form at the relevant time empowered the respondent Minister to cancel a person's visa if the Minister reasonably suspected that the person did not pass the character test. The effect of s 501(6)(a) was that a person does not pass the character test if they possess a "substantial criminal record". The applicant could not pass the character test because of his criminal history.

A delegate of the Minister wrote to the applicant giving him notice of the Minister's intention to cancel his visa and invited him to comment. In the applicant's submissions, he referred to his two children and the fact that they lived with friends. The Minister's Department replied asking for the name, address and telephone number of the carers, telling the applicant that the Department wished to contact them in order to assess the applicant's relationship with the children and the possible effects on them of a decision to cancel his visa. However, at the time that this letter was sent, the Department had the details it sought about the person who cared for the children.

The Department did not contact the children's carer before the Minister decided to cancel the applicant's visa. The applicant sought orders of certiorari and prohibition to quash the decision to cancel his visa on the primary ground that the Minister failed to accord procedural fairness to the applicant in that, after notifying the applicant that contact was being sought with the carers of the his children to assess the possible effects upon them of the cancellation of the his visa, the Minister (and his delegates) made no attempt to contact the carers.

The application was dismissed with costs by all members of the Court, holding that there procedural unfairness as the applicant lost no opportunity to present his case and no practical injustice had been shown.

Gleeson CJ noted that:

> Not every departure from a stated intention necessarily involves unfairness, even if it defeats an expectation. In some contexts, the existence of a legitimate expectation may enliven an obligation to extend procedural fairness. In a context such as the present, where there is already an obligation to extend procedural fairness, the creation of an expectation may bear upon the practical content of that obligation. But it does not supplant the obligation. The ultimate question remains whether there has been unfairness; not whether an expectation has been disappointed [34].

To similar effect, McHugh and Gummow JJ held that, while the conduct of the Minister's Department had given rise to an expectation on the part of the applicant:

> …the failure to meet that expectation does not reasonably found a case of denial of natural justice. The notion of legitimate expectation serves only to focus attention on the content of the requirement of natural justice in this particular case…It was not suggested that in reliance upon [the letter of the Minister's Department] the applicant had failed to put to the Department any material he otherwise would have urged upon it. Nor was it suggested that, if contacted, the carers would have supplemented to any significant degree what had been put already in the letter of 17 October 2000. The submission that the applicant, before the making by the Minister of his decision, should have been told that the carers were not to be contacted, thus lacks any probative force for a conclusion that the procedures so miscarried as to occasion a denial of natural justice. [105]-[106]

See similarly Hayne J at [122] and Callinan J at [148].

In obiter comments, McHugh and Gummow JJ in their joint judgement and Callinan J in a separate judgement expressed reservations concerning the majority judgement in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (*Teoh*). McHugh and Gummow JJ discussed the pre-Teoh decision of *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 (*Haoucher*) and noted that that decision did not stand beside *Teoh*. Their Honours commented that in *Haoucher*, the expectation was founded in the detailed policy statement by the Minister to the House of Representatives as to what would guide the exercise by the Minister of the statutory power of deportation. In contrast, *Teoh* involved various general statements in the *Convention on the Rights of the Child* and no expression of intention by the executive government that they be given effect in the exercise of any powers conferred by the Act.

Their Honours indicated that if *Teoh* is to have continued significance at a general level for the principles which inform the relationship between international obligations and domestic constitutional structure, further attention will be need to be given to the basis upon which that decision rests. In particular, their Honours noted that:

> The judgments in *Teoh* accepted the established doctrine that such obligations are not mandatory relevant considerations attracting judicial review for jurisdictional error. The curiosity is that, nevertheless, such matters are to be treated, if *Teoh* be taken as establishing any general proposition in this area, as mandatory relevant considerations for that species of judicial review concerned with procedural fairness. [101]

Their Honours went on to say:

> The reasoning which as a matter of principle would sustain such an erratic application of "invocation" doctrine remains for analysis and decision. Basic questions of the interaction between the three branches of government are involved. One consideration is that, under the Constitution (s 61), the task of the Executive is to execute and maintain statute law which confers discretionary powers upon the Executive. It is not for the judicial branch to add to or vary the content of those powers by taking a particular view of the conduct by the Executive of external affairs. Rather, it is for the judicial branch to declare and enforce the limits of the power conferred by statute upon administrative decision-makers, but not, by reference to the conduct of external affairs, to supplement the criteria for the exercise of that power [102].

Callinan J commented that, while in *Teoh* it was true that the Executive was both the ratifier of the Convention and the decision maker, its obligations and processes owed their existence to, and are defined by, the *Migration Act 1958* (Cth). In consequence, his Honour considered that the "view is open" that the High Court's decision in *Teoh* involved the elevation of the Executive above the Parliament. However, his Honour concluded that in the case before the Court, the matters in controversy in *Teoh* did not need to be revisited.

Attorney-General for the Commonwealth v Kevin and Jennifer [2003] FamCA 94

This case was an appeal by the Commonwealth Attorney-General against a decision by Chisholm J where his Honour declared valid the marriage between Kevin (a post-operative female to male transsexual person) and Jennifer. The Attorney-General took the view that Kevin was not a man and therefore that Kevin and Jennifer's marriage was not lawful.

HREOC was granted leave to intervene in the appeal to the Full Family Court. In regard to HREOC's submissions, the Court said:

> We should say that we were most indebted to the Commission for its assistance, which proved very helpful to us in considering this matter [342].

The Court went on to say:

> We consider that there is much force in the arguments advanced on behalf of the Commission in this regard. However, we do not find it necessary to rely upon them in arriving at our decision. They nevertheless give us greater confidence that our decision is correct and, in particular, support the argument that the contemporary every day meaning of the words 'man' and 'marriage' extend to Kevin and his marriage to Jennifer [347].

The Court dismissed the Attorney's appeal and in essence, agreed with the findings of Justice Chisholm.

The Court noted that the Commonwealth Parliament has the constitutional power to make laws in relation to "marriage" and that the terms "marriage", "man" and "woman" are not defined in the *Constitution*. It found that Chisholm J was correct to decide, as a question of law, that the words in issue should be given their contemporary, normal and everyday meaning. The Court rejected arguments by counsel for the Attorney-General to the effect that the words should be given the meaning they had at the time of the passage of the *Marriage Act 1961*. The Court noted that, if it appeared from the context that Parliament intended a word to be confined to its meaning or to have some special or technical meaning at the time the Act was passed, then the courts must respect that view and not substitute their own views. However, if the contrary is the case, then the courts must determine the meaning of the word in its contemporary sense.

The Court then considered the contemporary meanings of the words "marriage" and "man". The Court discussed the English decision of *Corbett v Corbett (otherwise Ashley)* [1971] P83 which stands for the legal proposition that a person with the chromosomes, gonads and genitals of one sex, who then undergoes gender re-assignment treatment and surgery cannot marry as a person of the re-assigned gender. The Attorney-General relied on that decision to argue that, in the present matter, Kevin was a female and that therefore his marriage to Jennifer was not valid under the *Marriage Act 1961*.

The Court did not find the reasoning in *Corbett* persuasive. It agreed with Chisholm J's view that a range of factors are relevant to determining a person's sex for the purposes of marriage law, such as their cultural sex, social acceptance and 'brain sex'. In relation to the last point, the Court noted that on the basis of the extensive expert medical evidence before the trial judge, it had been open to him to find as a matter of probability, that there is a biological basis for transsexualism. Their Honours held that Justice Chisholm was correct to find that *Corbett* is not the law in Australia and that the meaning of "man" in the *Marriage Act* includes a post-operative transsexual person such as Kevin.

See also the decision of the UK House of Lords in Bellinger v. Bellinger [2003] UKHL 21, in which their Lordships referred to Kevin & Jennifer (para 15) but rejected a submission that "a person may be born with one sex but later become, or become regarded as, a person of the opposite sex" for the purposes of the Matrimonial Causes Act 1973 (UK).

Prosecutors S157 of 2002 / S134 of 2002 v Minister for Immigration and Multicultural Affairs

These decisions of the High Court dealt with the construction and validity of the so called "privative clause" amendments inserted in the *Migration Act 1958* (Cth) following the Tampa incident. Those amendments were introduced with the stated purpose of significantly reducing the availability of judicial review of administrative decisions made under the *Migration Act 1958* (Cth) and under the *Migration Regulations 1994* (Cth). Broadly speaking, there were two issues to be decided by the High Court:

- Whether the privative clause and associated provisions were constitutionally valid; and
- If so, how the privative clause and associated provisions should be construed.

HREOC intervened in S134 of 2002.

The High Court handed down separate decisions in the two matters. The more significant decision is that handed down in S157 of 2002. The Court there found that the privative clause and associated provisions were constitutionally valid. However, the Court rejected the Minister's contention that the privative clause had reduced all otherwise mandatory requirements of the *Migration Act 1958* (Cth) and *Migration Regulations 1994* (Cth) to the status of "mere guidelines".

In a joint judgment, Gaudron, McHugh, Gummow, Kirby and Hayne JJ noted that "privative clause decision[s]" were defined as decisions "made, proposed to be made, or required to be made ... under this Act". Their Honours held that those words were not apt to refer either to:

> ...decisions purportedly made under the Act or, as some of the submissions made on behalf of the Commonwealth might suggest, to decisions of the kind that might be made under the Act. [75]

Rather:

> …the expression "decision[s] ... made under this Act" must be read so as to refer to decisions which involve neither a failure to exercise jurisdiction nor an excess of the jurisdiction conferred by the Act. Indeed so much is required as a matter of general principle. This Court has clearly held that an administrative decision which involves jurisdictional error is "regarded, in law, as no decision at all". Thus, if there has been jurisdictional error because, for example, of a failure to discharge "imperative duties" or to observe "inviolable limitations or restraints", the decision in question cannot properly be described in the terms used in s 474(2) as "a decision ... made under this Act" and is, thus, not a "privative clause decision" as defined in ss 474(2) and (3) of the Act. [76].

Their Honours did not provide exhaustive guidance as to what classes of error would be reviewable. Those issues will now need to be determined on a case by case basis, with the Courts considering the particular power being exercised and the wording of the statutory provisions in question.

Gleeson CJ and Callinan J (in separate judgments) substantially agreed with the joint judgment. However, Callinan J appeared to put the threshold test to be made out by an applicant for judicial review of a migration decision somewhat higher than the majority, referring to a need to show a "manifest error of jurisdiction".

Members of the Yorta Yorta Aboriginal Community v State of Victoria [2002] High Court of Australia (12 December 2002)

This appeal concerned a native title claim brought by the applicants to certain land and waters in southern NSW and northern Victoria. It was the first claim to be brought under the *Native Title Act 1993* (Cth) (NTA).

Central to the case was the construction of s 223(1) of the NTA. That section defines native title as the rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or water where (a) the rights and interests are possessed under the traditional laws acknowledged and customs observed by those peoples, and (b) those peoples by those laws and customs have a connection with the land or waters, and (c) the rights and interests are recognised by the common law of Australia.

Justice Olney of the Federal Court had rejected the native title claim of the applicants as he was of the view it could not be brought within the definition of native title in s 223(1) of the NTA. The Full Court of the Federal Court agreed.

HREOC was granted leave to intervene in the appeal to the High Court.

By a majority (5-2) the High Court dismissed the appeal from the decision of the Full Court. In a joint judgement, Gleeson CJ, Gummow and Hayne JJ (McHugh J concurring) held as follows:

> - The only native title rights or interests in relation to land or waters which the new sovereign order recognised [and therefore within the coverage of the NTA] were those that existed at the time of change in sovereignty [55];
>
> - When the society whose laws or customs existed at sovereignty ceases to exist, the rights and interests in land to which these laws and customs gave rise, also cease to exist. If the content of the former laws and customs is later adopted by some new society, those laws and customs will then owe their new life to that other, later, society and they are the laws acknowledged by, and customs observed by, that later society, they are not laws and customs which can now properly be described as being the existing laws and customs of the earlier society. The rights and interests in land to which the re-adopted laws and customs give rise are rights and interests which are not rooted in pre-sovereignty traditional law and custom but in the laws and customs of the new society [53];
>
> - it must be shown that the society, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist throughout that period as a body united by its acknowledgment and observance of the laws and customs [89].

Their Honours were satisfied that in this case there was no continued acknowledgment / observance of laws and customs and the forebears of the claimants had ceased to occupy their lands in accordance with those laws and customs. Accordingly they dismissed the appeal.

3. Selected international human rights jurisprudence

European Court of Human Rights

Sylvester v. Austria (24 April 2003)

In 1994 Mr and Mrs Sylvester lived in Michigan USA and had joint custody over their one year old daughter. In 1995 Mrs Sylvester, without Mr Sylvester's consent, took the child to Austria.

On 31 October 1995 Mr Sylvester, relying on the 1980 *Hague Convention on the Civil Aspects of International Child Abduction* ("the Hague Convention"), requested the Austrian courts to order the child's return. The mother in turn sought sole custody.

On 20 December 1995 the Graz District Civil Court, having found that Mrs Sylvester had wrongfully removed the child within the meaning of Article 3 of the Hague Convention ordered that the child to be returned to the father in Michigan. The court dismissed the mother's claim that the child's return would entail a grave risk of physical or psychological harm within the meaning of Article 13 (b) of the Hague Convention.

Appeals by the mother and enforcement proceedings by the father ensued. In 1996 the Austrian Supreme Court ordered the District Court to review its decision. In 1997 the District Court found in the mother's favour. It found that since the return order had been made, a year and four months had elapsed and the child had become a complete stranger to the father and that given that a young child needed a stable relationship with the main person of reference at least until the age of six, the child's removal from her main person of reference, namely her mother, would expose her to serious psychological harm.

Mr Sylvester then lodged a complaint under Article 8 (right to respect for family life) and Article 6 (right to a fair hearing) of the *European Convention on Human Rights* on the basis that the Supreme Court had ordered a review of questions which had already been dealt with in the final return order and that this had ultimately prevented the child from being returned to her father.

The European Court of Human Rights (ECHR) noted that the tie between the father and daughter was one of "family life" in terms of Article 8 of the *European Convention on Human Rights*. The ECHR concluded that, despite the requirements of the Hague Convention, the Austrian authorities failed to take, without delay, all the measures that could reasonably be expected to enforce the return order, and thereby breached the right of the father and daughter to respect for their family life, as guaranteed by Article 8.

The ECHR ordered Austria to pay the father 20,000 euros in respect of non-pecuniary damage and 22,682.61 euros in respect of costs and expenses.

Aktas v. Turkey (24 April 2003)

Yakup Aktas was arrested on 18 November 1990 and investigated in relation to assistance he may have given to the Workers Party of Kurdistan (PKK), an organisation in conflict with the Turkish government. Prior to his arrest he had been in good health. He died on 25 November 1990. A post-mortem examination, an autopsy and a forensic examination failed to yield a positive finding as to the exact cause of death. The body was returned to the applicant (the deceased's brother) and other members of his family prior to the burial and they observed the injuries described in the medical reports.

Proceedings were commenced in the Mardin Assize Court in March 1993 against the two interrogators of the deceased, Major Aytekin Özen and Master Sergeant Ercan Günay. They were charged with causing Yakup Aktas's death by beating during interrogation. The two interrogators asserted neither was present at the time of death, one having gone on leave, the other having been assigned to a different location and that the deceased was not interrogated in the two days between their departure and his death. In May 1994 the hearing concluded with Major Ozen and Master Sergeant Gunay being acquitted.

Mr Eshat Aktas, the deceased's brother, brought an application against the Republic of Turkey on 8 June 1994 alleging that his brother had died as a result of torture at the hands of agents of the respondent Government. The case was referred to the ECHR by the European Commission of Human Rights on 30 October 1999.

The ECHR, like the Commission, was concerned by the Government's stated inability to trace the doctor who pronounced Yakub Aktas dead; that the Government sought permission for 11 of the relevant government witnesses to give evidence in the absence of the applicant, his family and representatives; that the photographs produced by the government that were said to be photographs of the deceased did not show certain injuries; and that

the negatives of those photographs could not be produced.

Article 2

The ECHR rejected the respondent's assertions that the bruises to the deceased's body resulted from a friendly wrestling match with his brother within the seven days preceding his death. It found it proven beyond reasonable doubt that the deceased was subjected while in custody to external violence which directly caused his death. The Court found a breach of Article 2 [right to life] of the *European Convention on Human Rights.*

The ECHR noted that the obligation to protect the right to life under Article 2, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. It found a further breach of Article 2 in this regard.

Article 3

The ECHR further found that the deceased was the victim of inhuman and degrading treatment within the meaning of Article 3 of the *European Convention on Human Rights*, which provides as follows:

> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

The ECHR stated that it had no difficulty drawing the inference that the suffering inflicted on the deceased was particularly severe and cruel and in breach of article 3.

It similarly found that there was a further breach of Article 3 resulting from the inadequacy of the investigation.

Article 13

The ECHR found a violation of Article 13 of the *European Convention on Human Rights*, which provides:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

The applicant had not attempted to bring any domestic civil proceedings in respect of the breaches of the Convention. Nevertheless, the ECHR found that:

> the applicant's complaint of lack of access to a court is bound up with his more general complaint concerning the manner in which the investigating authorities dealt with the maltreatment and death of Yakup Aktas [331].

The ECHR went on to say:

> The authorities thus had an obligation to carry out an effective investigation into the circumstances of the maltreatment in custody and the death of Yakup Aktas ... no effective criminal investigation can be considered to have been conducted in accordance with Article 13, the requirements of which may be broader than the obligation to investigate imposed by Articles 2 and 3 … The Court finds, therefore, that the applicant has been denied an effective remedy in respect of the death of Yakup Aktas and thereby access to any other available remedies at his disposal, including a claim for compensation [333].

The ECHR held that the respondent State was to pay the applicant 226,065 euros in respect of pecuniary damage, to be held by the applicant for Yakup Aktas's widow and daughter; and, in respect of non pecuniary damage, 58,000 euros to be held by the applicant for Yakup Aktas's widow and daughter, and 4,000 euros to the applicant himself. The applicant was awarded 29,275 for costs and expenses.

Human Rights Committee

Zhedludkova v Ukraine (6 Dec 2002, Communication No 726/1996, CCPR/C/76/D/726/1996)

Ms Valentina Zheludkova, a Ukrainian national, submitted this communication on behalf of her son Alexander Zheludkov. He was arrested on 4 September 1992 and charged (with two other men) with the rape of a 13 year old girl. The author claimed that her son was held for more than 50 days without being informed of the charges against him and that he was not brought before a competent judicial authority during this period. The

author also claimed that her son was ill-treated while in detention. This ill-treatment included insufficient medical attention and a denial of access to information in the son's medical records.

The Committee concluded that the failure to bring the author's son before a judicial authority violated the author's rights under article 9(3) of the ICCPR [arrested person to be promptly brought before a judge and tried within a reasonable time or released] and the unexplained denial of access to his medical records violated his rights under article 10(1) [persons deprived of their liberty to be treated with humanity and respect for the inherent dignity of the human person].

Borisenko v Hungary (6 December 2002, Communication No 852/1999, CCPR/C/76/D/852/1999)

The author and his friend arrived in Budapest en route from Belgrade where as members of the Sambo Wrestling National Team of the Ukraine, they had taken part in a wrestling competition and were on their way back to the Ukraine. Later that day, they were late for their train and ran to the metro station. At this point they were stopped by three policemen in civilian clothing who suspected them of pick-pocketing. They were both interrogated for three hours at the police station and were charged with theft. The Pescht Central District Court decided to detain them due to the risk of flight. The police authorities referred the case to the public prosecutor's office which, at the request of the Ukrainian embassy, terminated their detention. On the same date, the immigration authorities ordered them both to be expelled from Hungary prohibiting their re-entry and stay in the country for five years. On asking the authorities whether they could challenge the expulsion order they were informed that it was not possible to appeal. At the same time, they both unknowingly signed a waiver of their right to appeal.

The Committee found a violation of article 9(3) of the ICCPR [arrested person to be promptly brought before a judge and tried within a reasonable time or released] based upon the fact that the author had been detained for three days before being brought before a judicial officer. With respect to the author's claim that he was not provided with legal representation from the time of his arrest to his release from detention which included a hearing at which he had to represent himself, the Committee recalled its previous jurisprudence that legal assistance should be available at all stages of criminal proceedings and consequently found a violation of article 14(3)(d) [right of accused to legal assistance].

Oral Hendricks v Guyana (20 Dec 2002, Communication No 838/1998, CCPR/C/76/D/838/1998)

The author who was suspected of having murdered his three step children was arrested and sentenced to death by hanging. He was tried more than three years after he was arrested. The Committee recalled its General Comment 8 which states that pre-trial detention should be an exception and as short as possible and concluded that there had been violations of articles 9(3) and 14(3) of the ICCPR.

The author further alleged that his lawyer was absent from the preliminary hearing and that as a consequence he was denied the right to cross-examine one witness. The Committee recalled its prior jurisprudence that in capital cases it is axiomatic that legal assistance be available at all stages of criminal proceedings and found that there had been a violation of article 14(3)(d) [right of accused to legal assistance] and 14(3)(e) [right of accused to examine witnesses] and consequently of article 6 [right to life and requirement for sentence of death to be in accordance with the law and provisions of the ICCPR].

Committee on the Elimination of Racial Discrimination

Hagan v Australia (14 April 2003, Communication No 26/2002 CERD/C/62/D/26/2002.)

In 1960, the grandstand of an important sporting ground in Toowoomba was named the "E.S. 'Nigger' Brown Stand" in honour of the well known sporting personality Mr E.S. Brown. Mr Brown was a man of white Anglo Saxon origin and acquired the nickname either because of his fair skin and blonde hair or because he had a penchant for using "Nigger Brown" shoe polish. In 1999, the author, an Indigenous man who has origins in the Kooma and Kullilli Tribes of South Western Queensland, requested the trustees of the sports ground to remove the term "nigger" which he found objectionable and offensive. After considering the views of numerous members of the community, the trustees advised the author that no action would be taken.

The Author complained to the Committee on the Elimination of Racial Discrimination of a violation of articles 2, 6 and 7 of the *International Convention on the Elimination of All Forms of Racial Discrimination.*

The Committee found the use and maintenance of the term "nigger" offensive and insulting, even though it may not have been regarded as so for an extended period of time. The Committee described the Convention as a living instrument that must be interpreted and applied taking into account the circumstances of contemporary society. In this context, the Committee recalled the increased sensitivities in respect of such words today and recommended that Australia take the necessary measures to secure the removal of the offending term from the sign.

4. Australian Discrimination Law

4.1 Federal Jurisdiction

4.1.1 *Disability Discrimination Act 1992* (Cth) (DDA)

Commonwealth of Australia v Williams [2002] FCAFC 435: s 53 of the DDA

The Full Court of the Federal Court overturned the decision of Federal Magistrate McInnes, in which his Honour found that the Australian Defence Forces (ADF) had discriminated against an officer with Insulin Dependent Diabetes (IDD) by refusing him continuing employment.

The Full Court decision focussed on Section 53 of the DDA, which relevantly provides:

> **Combat duties and peacekeeping services**
> (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 in connection with employment, engagement or appointment in the Defence Force:
>
> (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

Section 53(2) provides for definitions of the terms "combat duties" and "combat related duties" to be declared by regulations. The Disability Discrimination Regulations made on 29 January 1996, SR 27 of 1996 provide as follows:

> **Combat duties**
> For the purposes of subsection 53 (2) of the Act, the following duties are declared to be combat duties, namely, 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.
>
> **Combat-related duties**
> For the purposes of subsection 53 (2) of the Act, the following duties are declared to be combat-related duties:
>
> (a) duties which require, or which are likely to require, a person to undertake training or preparation for, or in connection with, combat duties;
>
> (b) duties which require, or which are likely to require, a person to work in support of a person performing combat duties.

In the decision below (*Williams v Commonwealth of Australia* [2002] FMCA 89), McInnes FM, made the following comments regarding the Commonwealth's reliance upon s 53 of the DDA:

> …To apply a 'blanket' immunity from the application of the DDA simply on the basis of a general interpretation of combat related duties will be inconsistent with the day-to-day reality of the Applicant's inherent requirements of his particular employment is in my view unsustainable. 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 a person who is employed, engaged or appointed in the Defence Forces. The section clearly contemplates the distinction between combat and non-combat personnel and for the reasons stated I am not satisfied …in this particular case that the applicant could be regarded as a person who could be said to be in a position involving the performance of combat duties or combat related duties [154].

The Full Court found that the Federal Magistrate had erred in that it appeared, from the above passage, that he had mistakenly applied to s 53 concepts derived from s 15(4) of the DDA. Section 15(4) provided a potential defence in the current matter if the applicant, because of his disability, was:

> unable to carry out the inherent requirements of his particular employment

The Court noted that Section 53 uses different language to section 15(4) and is concerned with a different concept. Section 15(4) focuses upon the actual duties and tasks that an employee is required to carry out. In contrast s 53 speaks of a *position* which requires the person to perform certain duties, although they may, in fact, never be required to be performed. The Full Court cited the distinction between the terms regarding a person's "job" or "position" articulated by McHugh J in *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, such that a 'job' refers to particular tasks or work that a person must perform, while 'position' concerns rank and status from which the person performs those tasks.

In light of those distinctions the Full Court held that s 53, and the relevant regulations, contemplate a "double contingency" extending to duties likely to be required, as distinct from actually required, in the event of armed conflict. The Court considered that it was clear that a member of the ADF may be employed in a position to which s 53(1)(a) applies, whether or not an armed conflict is currently in existence.

The Full Court disagreed with the Federal Magistrate's suggestion that such a construction of s 53 would exempt all members of the ADF from the protection afforded by the DDA. Rather, the provision contemplates a distinction between those persons likely to be involved in combat, or combat-related duties, and those who are not. Section 53 and the Regulations require an element of "directness" and are not simply to be applied in the sense that every member of the ADF could be characterised as supporting those in combat related duties.

Cosma v Qantas Airways Ltd [2002] FCAFC 42: Employment: 'particular employment' and 'inherent requirements'.

The Full Court of the Federal Court upheld the decision of Heerey J at first instance, in which his Honour held that the respondent had not unlawfully discriminated against the appellant in terminating the appellant's employment in July 2001.

The appellant had commenced employment with the respondent in 1988 where he had worked as a porter in Ramp Services. The job entailed performance, in gangs of six, of a diverse number of physically demanding duties under time pressures in constrained spaces. In September 1991 the appellant sustained a shoulder injury in the performance of his duties. After a brief return to work which aggravated the injury, the appellant was declared unfit for work and subsequently underwent surgery.

The appellant then returned to work in May 1992 where he performed numerous duties of a temporary or "one off" kind under the employer's rehabilitation regime. He remained unfit to return to his previous duties in the Ramp Services Division and in February 1997 was offered vocational assistance to evaluate redeployment or retraining options. He was also advised that termination of his position was a possibility. The appellant's employment was subsequently terminated effective July 1997.

The primary matter in dispute, both at first instance and on appeal was identification of the appellant's "particular employment" for the purposes of section 15(4) of the DDA (discussed above in relation to *Commonwealth of Australia v Williams* [2002] FCAFC 435). In seeking to support his claim of unlawful discrimination, the appellant submitted that:

> (i) His particular employment comprised the whole of the employment relationship extending beyond work as a ramp porter and including, inter alia, clerical and administrative tasks undertaken in the rehabilitation regime; or alternatively,
>
> (ii) that it was the work in which he was engaged at the time of his dismissal, namely clerical or administrative work; or finally
>
> (iii) that if the particular employment was as a Ramp Services operator, then there were a number of substantive positions in that section, of which the appellant could have performed the inherent requirements.

The respondent submitted that the appellant's particular employment was as a porter in Ramp Services, the inherent requirements of the position being:

> (a) the lifting, carrying, manhandling and storage of baggage and cargo at the ramp at Melbourne Airport;
>
> (b) with rotation of the various tasks between members of the gang of six, in the interests of fairness and with the aim of preventing injury in the performance of tasks of varying difficulty.

Heery J had accepted the respondent's submissions as to the nature of the applicant's employment, finding that all other work subsequent to the injury had been of a temporary or trial nature incidental to the rehabilitation regime, the object of which had been to return the appellant to his pre-injury status, or to help him to find alternative permanent employment with the respondent or elsewhere.

In approving the findings of Heery J and dismissing the appeal, the Full Court noted that "particular employment" and "inherent requirements" of the employment under s15(4) of the DDA are essentially questions of fact that must be determined by reference to the original contract of employment and any variations to it. Where the employee is hired to perform specific duties there may be little distinction between the particular employment described by those duties, and the inherent requirements of the job. In this case, the only permanent duties agreed upon between the parties were those associated with the appellant's employment as a porter in Ramp Services. During the rehabilitation period both parties were still operating pursuant to that original contract of employment.

See also in relation to the DDA:

Beck v Leichhardt Municipal Council [2002] FMCA 331- injunction application granted under s 46PP of the HREOC Act, following a complaint made to HREOC pursuant to the DDA.

4.1.2 Sex discrimination Act 1984 (Cth) (SDA)

Gardner v All Australian Netball Association Limited [2003] FMCA 81: Voluntary Associations

The applicant, an elite netball player, claimed discrimination on the grounds of pregnancy in the provision of services under ss 7 and 22 of the SDA. The All Australian Netball Association Limited (AANA) had imposed an interim ban preventing pregnant women from competing in the Commonwealth Netball Trophy. The applicant was pregnant at the time and was prevented from taking part in the competition.

The AANA claimed that the exclusion of the applicant was not unlawful as it came within the exemption under s39 of the SDA. 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 grounds 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 provisions of benefits, facilities or services to members of the body

There was no dispute regarding whether the AANA was a 'voluntary body'. The central issues before the Court involved the construction and scope of s 39.

The Sex Discrimination Commissioner was granted leave to appear as amicus curiae. The Commissioner submitted that statutory construction must take account of and give effect to the purposes and objects of the legislation*; Waters v Public Transport Corporation* (1991) 173 CLR 349 at 359 per Mason CJ and Gaudron; *IW v City of Perth* (1997) 191 CLR 1; and that exemptions and provisions which restrict rights should be construed narrowly*; X v Commonwealth* (1999) 200 CLR 177 at 223. She further submitted that account must also be taken of s 15AA of the *Acts Interpretation Act* 1901 (Cth) which provides:

> Regard to be had to purpose or object of Act
>
> (1) In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

Raphael FM accepted that a broad construction of the exemption would defeat the purpose of Part 2 Division 4 of the SDA (that is, the part of the SDA in

which s 39 appears), which was designed to cover only particular fields while generally maintaining the unlawfulness of acts of discrimination. His Honour further accepted that such a construction would undermine the objects of the SDA as a whole. He therefore held that section 39 should be restricted to the two sets of circumstances in the subparagraphs: admission of a member and provision to members of benefits, facilities or services.

Applying that analysis to the current matter, his Honour held that the exemption was limited to the AANA's relationship with its members. The members were the State and Territory associations. The applicant, as an individual player, was not and could never have been a member of the AANA or the South Australian Netball Association. The ban by the AANA could not therefore be brought within the exemption in s 39. On that basis, his Honour made a declaration that the respondent discriminated against the applicant pursuant to ss 7 and 22 of the SDA.

The applicant was awarded damages of $6,750.00.

Taylor v Morrison & Ors; Taylor v Australian Federal Police & Ors **[2003] FMCA 79: Vicarious Liability under the HREOC Act**

The applicant (a member of the Australian Federal Police) alleged unlawful discrimination by reason of sexual harassment and victimisation. The claims were contained in two applications made to the Federal Magistrates Court pursuant to s 46PO of the *Human Rights and Equal Opportunity Commission Act 1986* (HREOC Act).

The respondents to the first application were three named members of the Federal Police, the Commissioner of the Australian Federal Police and the Commonwealth of Australia. The respondents to the second application were the Commissioner of the Australian Federal Police and the Commonwealth. The applicant alleged that the activities constituting the harassment were carried out by the three members of the Australian Federal Police and that the Commissioner and Commonwealth were vicariously liable for their actions.

The Commissioner and the Commonwealth applied for summary dismissal.

The Commissioner submitted that the complaint to HREOC did not include a complaint against him and that a complaint had not been terminated against him by the President of HREOC under ss 46PE or 46PH of the HREOC Act, which is a requirement for the Court to have jurisdiction. The Commissioner further submitted he was not the employer of members of the Federal Police and could not be vicariously liable for their actions. The Commissioner also submitted that there was no vicarious liability in respect of claims of victimisation under the SDA.

The Commonwealth similarly applied for dismissal of claims of victimisation contending that there could not be vicarious liability for a claim of victimisation under the SDA.

Phipps FM dismissed the applications as against the Commissioner. His Honour noted that the complaint to HREOC named the Australian Federal Police as the organisation the applicant was complaining about. He also noted that the Commonwealth conceded that the complaint was against the Commonwealth, as the Commonwealth and not the Commissioner was the employer of members of the Australian Federal Police.

In relation to the summary dismissal applications of the Commonwealth, Phipps FM noted that s 46 PO of the HREOC Act permits an application to be made to the Federal Court or Federal Magistrates Court alleging unlawful discrimination and that s 3(1) defines 'unlawful discrimination' to mean:

> any acts, omissions or practices that are unlawful under … Part II of the SDA; and includes any conduct that is an offence under …section 94 of the SDA.

Section 94 provides that victimisation is an offence.

His Honour held that s 106 of the SDA which provides for vicarious liability on the part of an employer did not apply to a complaint of victimisation. This is because s 106 does not refer to Part IV of the SDA, the Part in which s 94 is contained.

It was submitted for the Commonwealth, that as s 106 makes specific provision for vicarious liability, there was no other basis for finding the Commonwealth vicariously liable in this matter.

In considering that submission, his Honour had regard to s 110 of the SDA, which provides:

> Except as expressly provided by this Act, nothing in this Act confers on a person any right of action in respect of the doing of an act that is unlawful by reason of a provision of Part II.

His Honour observed that:

- the function of that provision was not clear;
- prior to the April 2000 amendments to the HREOC Act, the intention of s 110 of the SDA was to restrict rights of action in respect of acts made unlawful under Part II to those expressly provided for in the SDA;
- after those amendments, it may be that s 110 has no operation.

His Honour considered that it was inappropriate to determine those issues on a summary dismissal application. It was, in any event, unnecessary to do so in his Honour's view as s 110 referred only to Part II, meaning:

> …it does not apply to the victimisation provision in section 94. It may be that it means that the vicarious liability provision in section 106 is expressly limited to claims under part II. If that is so, then any implied exclusion of common law rights must also be limited to part II...The intention of [section 110] prior to the April 2000 amendments, was to restrict rights of action in respect of acts made unlawful by Part II to those expressly provided for in the act. A claim relying on common law vicarious liability could not be brought. That there is not a corresponding provision in the April 2000 amendments to HREOCA is an argument that Parliament did not intend to exclude those rights. [20]-[21]

His Honour went on to observe:

> Vicarious liability has been applied in a claim under the *Racial Discrimination Act 1975* at a time when the act contained no express statutory provision; *Kordos v Plumrose (Aust.)* (1989) EOC 92-256. It is not so clear that there cannot be the vicarious liability for victimisation claims that the remedy of summary dismissal should be exercised. On the contrary, there are substantial arguments that it does apply. [22]

His Honour therefore held that the Commonwealth's summary dismissal application should fail.

See also in relation to the SDA:

- *Dranichnikov v Minister for Immigration, Multicultural and Indigenous Affairs* (No 2) [2002] FCA 1463, where French J dismissed the appellant's appeal from a decision of the FMS. The applicant alleged that the Minister and his officers had discriminated against her on the grounds of sex and marital status in refusing to deal with her application for a protection visa in her own right, separately from that of her husband.
- *Kennedy v ADI Ltd* [2002] FCA 1603 where Marshall J dismissed an application to lodge an appeal out of time from the decision of Ryan J in *Kennedy v ADI Ltd* [2001] FCA 614.
- *Daley v Barrington & Wright & NSW Greyhound Breeders, Owners and Trainers Association* [2003] FMCA 93, where Raphael FM dismissed the applicant's sexual harassment claims based on his Honour's findings of fact.

4.1.3 Racial Discrimination Act 1975 (Cth) (RDA)

AB v Minister for Education NSW [2003] FMCA 16: Interim injunctions under s46PP of the HREOC Act

AB, by his litigation guardian BB, sought an interim injunction pursuant to s 46PP of the HREOC Act to prevent the respondent withdrawing an offer of a place in a NSW selective high school.

The applicant was the holder of a bridging visa E class awaiting determination of his application for permanent residency. There was no dispute that AB was entitled to education at a NSW government school. The application package provided to BB regarding the test for entrance to a selective government high school advised that students must be an Australian Citizen or permanent resident. Students not meeting the requirements, but expecting to be able to meet them in the near future are permitted to sit the test but must be able to show they meet the requirements before being given an offer of a place.

At the time of the test in September 2002, BB completed the necessary form accompanying the package, indicating that AB was an Australian citizen or permanent resident. AB was offered a

place in January 2003. Following correspondence between the Minister, his Department and BB, the Minister advised BB that AB did not meet the requirements for a place, but that one would be held for him until January 31 2003 in the hope that the residency requirements could be met by that time.

BB made a complaint to HREOC claiming that the action of the Department of Education (NSW) constituted indirect racial discrimination (as defined in s 9(1A) RDA) contrary to s 9 RDA. She also filed an application in the Federal Magistrates Court for an interim injunction restraining the Department of Education from withdrawing the offer until the complaint had been conciliated by HREOC. To succeed in that application, BB was required to establish that there was a serious issue to be tried between the parties, and on the balance of convenience it was an appropriate order for the court.

Raphael ACFM accepted that it is possible for policy decisions by the New South Wales Government with respect to education to be in breach of the RDA by constituting direct or indirect discrimination. However, his Honour stated that the decision of Merkel J in *De Silva & Ors v Ruddock* [1998] 311 FCA (confirmed by the Full Court in *De Silva & Ors v Ruddock* 159 ALR 355), requires a distinction to be drawn between 'nationality' and 'national origin' under the RDA. Following those decisions, his Honour said that the state retains a right to make laws or enact policy which differ between citizens and non-citizens. On that basis, his Honour considered that the argument that the action of the department constituted indirect discrimination would be unlikely to succeed.

His Honour also emphasised the necessity of considering what constitutes maintenance of the status quo in the particular case as a requirement for granting an interim injunction. His Honour stated that the status quo in this matter consisted of the offer to the applicant of a place at the school, subject to the applicant complying with the conditions of citizenship or residency. The injunction sought by the applicant would, his Honour said, have the effect of holding open a place to someone who did not meet that requirement. His Honour held that that did not represent the status quo.

The application by AB was dismissed with an order to pay the respondent's costs of $2,500.

McLeod v Power [2003] FMC 2: Racial Villification

Brown FM considered whether the applicant, a correctional services officer, had been racially vilified in an argument with the respondent, an aboriginal woman visiting her de facto in the Yatala Labour Prison SA. During the altercation the respondent had referred to the officer as a 'white piece of shit' and said 'fuck you whites, you're all fucking shit' upon being refused entry to the prison for a visit.

Brown FM found that the incident had in fact occurred when the respondent was refused entry as a visitor, on the ground that she had not provided the requisite identification. However, he commented that the feelings of indignation experienced by Mr McLeod were more attributable to the perceived injustice of the abuse, and less from the addition of the racial epithet "white". He noted the imbalance of power in favour of the two officers who were in a position of authority and able to prevent the intended visit, and emphasised the importance of context in determining such a matter.

Proof of racial vilification rests upon establishing, objectively, that the act complained of was reasonably likely to offend a person with particular racial or ethnic origins: the "reasonable victim" test. It was not sufficient for the applicant to show that he personally was so offended, insulted, humiliated or intimidated. To this end, ordinary community perceptions and the context in which the words or action occurred are the standard to be applied. Brown FM cited with approval *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2001) EOC 93-141. In the context of both the power imbalance perceived by the respondent, and the purpose of the legislation, he held that "no reasonable correctional services officer with a pale skin" would have been offended, insulted, humiliated or intimidated and that the abuse, although unpleasant and offensive was not significantly transformed by the addition of the words "white" or "whites". He found that these words are not of themselves offensive words or terms of racial vilification.

His Honour further found that in Australia, being 'white' is not descriptive of any particular or homogeneous ethnic, national or racial group; nor is it a term of abuse applied to an oppressed group. The words uttered by the respondent were offensive, but they were not transformed to any significant degree by the addition of the words "white" or "whites".

Brown FM approved the reasoning of the Commission in *Korczac v Commonwealth of Australia (Department of Defence)* (2000) EOC 93-056 to the effect that:

> the RDA does not require the relevant acts to have occurred "in public" or "in a public place". What is required is that the acts occur "otherwise than in private [46].

The act complained of occurred in a public place, but was directed specifically at the applicant in a spontaneous response to the situation and was not done "otherwise than in private".

Finally, his Honour noted if that he had found that the exchange did transgress the RDA, such a finding would be unlikely to form the basis of any relief, bearing in mind the purpose of the Act to prevent harassment or threats to individuals based on their ethnic, national or racial origins, and the discretionary nature of relief.

4.2 State and Territory Discrimination Law

Australian Capital Territory

The Legislative Assembly passed The *Legislation (Gay, Lesbian and Transgender) Amendment Bill* 2002 on 13 March 2003 to address discrimination on the basis of sexual orientation or gender identity. The Bill amends 32 pieces of legislation to replace current definitions such as *spouse* and *de facto spouse* with the term "domestic partner" and enables those persons to whom gender identity is an issue to self-identify their sex.

The Legislative Assembly also passed the *Discrimination Amendment Bill 2002* (No2) on 13 March 2003 to amend *the Discrimination Act 1991* (ACT) to:

- provide for equal treatment of same-sex partnerships with marriages and de facto marriages by inserting the inclusive new term "domestic partner" in place of "de facto spouse" and replaces "marital status" with "relationship status";
- take into account developments in science that allow predictions to be made about a person becoming disabled in the future;
- allow employers to terminate the employment of a person with a disability where it would cause unjustifiable hardship to make reasonable accommodation; and
- strengthen conciliated agreements by making them enforceable as decisions of the Discrimination Tribunal.

Queensland

The *Discrimination Law Amendment Act 2002* (QLD) which commenced 31 March 2003:

- Introduces a new attribute of "family responsibilities" to achieve consistency with the *Industrial Relations Act 1999* (QLD) and ensure that people are able to fulfil family responsibilities not already covered by the *Anti-Discrimination Act 1991* (QLD) (ADA) (for example, care of aged parent) without fear of discrimination;
- replaces the term "Marital status" with "relationship status";
- Introduces a new attribute of "sexuality" which will provide more comprehensive protection for the general community and in particular for the gay and lesbian community;
- Introduces a new attribute of "gender identity" to protect people of transgender identity and intersex people from discrimination and bring Queensland into line with other Australian States and Territories;
- defines "Lawful sexual activity" so as to include work as a sex worker,
- Clarifies that the existing ground of "religion" includes protection for "holding or not holding a religious belief" and "engaging in, not engaging in or refusing to engage in a lawful religious activity" to ensure protection for people with no religious belief, such as atheists;
- Prohibits discrimination on the basis of "breastfeeding" in all areas covered by the ADA;
- Introduces new vilification laws to prohibit vilification on the basis of sexuality and gender identity;
- replaces the blanket exemption (except in race, age and impairment) which was formerly available to Church schools/

employers with a genuine occupational requirement test; and

- amends the prohibition on victimisation so that people alleging breach of that provision will no longer have to demonstrate an intention to bring an actual complaint before the Anti - Discrimination Commission Queensland (ADCQ).

In addition, the Act makes a number of reforms to ADCQ and Anti-Discrimination Tribunal (ADT) procedures:

- Respondents are now given the option of seeking an early conciliation conference without providing an initial written response to the ADCQ;

- Complainants have been given the right to require referral following a conciliation conference (at present, the complainant only has this right when the Commissioner has determined a complaint cannot be resolved by conciliation.);

- The ADT scale of costs has been adjusted to the District Court scale;

- offers of settlement may be taken into account by the ADT in the making of costs orders; and

- the range of remedies that the ADT may order are expanded by specifically providing that the ADT has the power to order apologies and retractions (both private and public) and to order the respondent to implement programs to eliminate unlawful discrimination.

5. Australian and International Privacy Law

Australia

More small businesses now required to comply with Privacy Act 1988 (Cth)

On 21 December 2002, more small businesses in Australia were required to comply with the *Privacy Act 1988* (Cth). The Act now covers personal information held by small businesses that trade in personal information, do contract work for Commonwealth government, or small businesses that are related to a business with a turnover of $3 million or more.
Small businesses that are health service providers have been required to comply with the *Privacy Act 1988* (Cth) since 21 December 2001 regardless of size.

USA

Linda Tripp v U.S.A: USDC-D.C. – No.01-506; March 31 2003

Linda Tripp, who secretly taped Monica Lewinsky describing her affair with President Clinton, commenced a lawsuit after Pentagon officials disclosed information about her to the New Yorker Magazine. The Pentagon disclosed that Ms Tripp had lied on her application for security clearance (she had been arrested at age 19 for grand larceny, while on her security clearance application she denied she had ever been arrested). Ms Tripp brought separate proceedings under the Privacy Act against the Department of Defence (DOD) for alleged disclosures regarding her bid to obtain a US military job in Germany.

Upon further review, a federal judge in Washington ruled that Ms Tripp could not sue the Pentagon for negligence however he ruled that she could proceed to trial on her complaint that the DOD's release of the data amounted to "misappropriation of her likeness", as defined by the invasion of privacy tort.

The People of the State of New York by Eliot Spitzer, Attorney General of the State of New York v Monsterhut Inc., d/b/a Monsterhut.com, Todd Pelow and Garry Hartl, Index No 402140/02

The New York Attorney General Eliot Spitzer brought proceedings against Monsterhut, a marketing company that advertises via the internet for persistent and repeated fraudulent and illegal conduct. It was alleged that Monsterhut had sent more than one half-billion commercial e-mails since March 2001 while falsely representing to consumers that all e-mail addresses were obtained by them through permission based protocols and that consumers had received such e-mails because they "opted-in" to receive them. More than 750,000 consumers had asked to be removed from Monsterhut's email list and forty thousand consumers complained. Monsterhut said it obtained lists of addresses from third-party providers, believing that the recipients had opted-in to receive messages while visiting Web sites.

In accordance with generally accepted industry wide standards, in an "opt-in" protocol, consumer e-mail addresses are collected and used only if the consumer affirmatively approves such collection. Under the "opt-out" protocol, consumer e-mail addresses are collected so long as the consumer has not specifically declined such collection by an affirmative act, for example, by the consumers failure to remove a check mark from a box which contained such marking as a default.

Wilkins J held that Monsterhut did not offer any proof or legal basis to demonstrate that their practice conformed with industry-wide accepted "opt-in" protocols. Recipients must actively give their permission to receive email to qualify as opt-in, or permission-based mail. Wilkins J decided that Monsterhut should be permanently enjoined from further engaging in any of the fraudulent, deceptive and illegal acts and practices pertaining to representations of "opt-in", "opt-out", the "permission based" nature of their protocols or the collection and use of their e-mail data.

Helen Remsburg, Administratrix of the Estate of Amy Lynn Boyer v Docusearch, Inc., d/b/a Docusearch.com & a, No 2002-255, 18 February 2003

Docusearch.com is an Internet-based investigation and information service. Liam Youens contacted Docusearch through its Internet website and on separate occasions requested the date of birth, contact telephone number and social security number (SSN) for Amy Lynn Boyer. Docusearch informed Youens of Boyer's employment address. Docusearch got this information through a subcontractor, who placed a "pretext" telephone call to Boyer, lying about who she was in order to convince Boyer to reveal her employment information to that subcontractor. On October 15 1999, Youens drove to Boyer's workplace and fatally shot her as she left work. A subsequent police investigation revealed that Youens kept firearms and ammunition in his bedroom and maintained a website containing references to stalking and killing Boyer.

The Court discussed a number of issues including whether Boyer's representatives had a cause of action for intrusion upon her seclusion against the company for damages caused by the sale of her SSN.

The Court began by stating that a person's interest in maintaining the privacy of their SSN was recognised by numerous federal and state statutes. As a result, the entities to which this information is disclosed and their employees are bound by legal and perhaps contractual constraints to hold SSNs in confidence to ensure that they remain private. While an SSN must be disclosed in certain circumstances, a person may reasonably expect that the number will remain private. A person whose SSN is obtained by an investigator without the person's knowledge or permission may have a cause of action upon seclusion for damages caused by the sale of the SSN but must prove that the intrusion was such that it would have been offensive to a person of ordinary sensibilities. The question was whether a person has a cause of action for intrusion upon seclusion where an investigator obtains the person's work address by using a pretextual phone call.

The Court concluded that a person's work address is readily observable by members of the public. Thus a work address could not be considered private and no intrusion upon seclusion action could be maintained.

Loeks, on behalf of T.L, a minor v Reynolds, Deputy Chris Washburn, in his individual capacity, Douglas County Sheriff's Office 34 Fed.Appx. 644, 2002 WL 539111 (10th Cir.(Colo.))

Then mother of a 13-year-old girl brought an action on her daughter's behalf against a police officer, the county sheriff's office and an 18-year-old man whom her daughter had met on the internet and had sex with. She claimed amongst other things that her child's constitutional rights of privacy had been violated when the sheriff's office issued a press release stating that her daughter and the 18-year old had "consensual sex". She contended that the stated reason for issuing the press release (that being to alert the public to the danger of internet-related sex crimes involving children) could have been served without commenting on whether the sex was consensual.

In regard to the issue of privacy, the Court commented that a constitutional right to privacy exists in certain forms of personal information possessed by the state if an individual has a legitimate expectation that it will remain confidential while in the state's possession. It is irrelevant whether these publicly disclosed allegations are true or false, the disclosed information itself must warrant constitutional protection.

In previous cases it had been held that a disclosure of information in police reports does not implicate a constitutional right of privacy. In this instance, the Court held that the mother did not meet her burden

to show that her daughter had a constitutional right of privacy in the information disclosed.

United Kingdom

Michael Douglas, Catherine Zeta-Jones & Northern & Shell PLC v Hello! Ltd & Ors [2003] EWHC 786 (Ch)

Douglas and Zeta-Jones were married at the Plaza Hotel in New York on 18 November 2000. The bride and groom had sold exclusive photographic rights of the event to OK! magazine. It was later discovered that a photographer from Hello! magazine had eluded security by coming to the event and taking photos which were then published.

Douglas and Zeta-Jones made a number of claims including a privacy claim. His Honour doubted that UK law has a distinct right as to privacy and dismissed the claim in this respect. While his Honour noted that the judgement of Sedley LJ in Douglas and Others v Hello! Ltd (21 December 2000) set out a powerful case for the existence of a law of privacy, he felt that those arguments for a general tort depended on UK law being so inadequate in relation to the protection and enforcement of individual rights to private and family life as to fall short of compliance with the *European Convention on Human Rights*, the *Human Rights Act 1998* (UK) and the requirements of the decisions of the ECHR. Even accepting such an argument, his Honour felt that it did not point to any need for the creation of new law in areas where protection and enforcement are already available.

His Honour commented that the ramifications of any free-standing law of privacy are so broad that the subject is better left to Parliament. While his Honour stated that Courts may need to develop this area of law if Parliament does not act soon, he expressed the view that this would only happen in a case where the existing law of confidence offered no protection or inadequate protection. However, that was not the case in the matter before the Court. His Honour held that the Hello! defendants were liable to all three claimants under the law as to confidence.