



# Federal Discrimination Law

AUSTRALIAN HUMAN RIGHTS COMMISSION FEDERAL DISCRIMINATION LAW

# FEDERAL DISCRIMINATION LAW

**Australian Human Rights Commission 2016**



**Australian  
Human Rights  
Commission**

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# Contents

<b>Foreword</b>	<b>xv</b>
<b>1 Introduction</b>	<b>1</b>
1.1 Nature and Scope of this Publication	2
1.2 'HREOC' and the 'Australian Human Rights Commission'	2
1.3 What is 'Unlawful Discrimination'?	2
1.3.1 'Unlawful discrimination' defined	2
1.3.2 Distinguishing 'unlawful discrimination' from 'ILO 111 discrimination' and 'human rights' under the AHRC Act	3
(a) 'ILO 111 discrimination'	4
(b) 'Human rights'	5
1.4 The Brandy Decision and the Commission's Former Hearing Function	6
1.4.1 The scheme prior to 1995	6
1.4.2 Brandy v HREOC	6
1.4.3 Human Rights Legislation Amendment Act (No 1) 1999 (Cth)	7
<b>2 The Age Discrimination Act</b>	<b>8</b>
2.1 Introduction to the ADA	10
2.1.1 Background	10
2.1.2 Structure of the ADA	11
2.1.3 Application of the ADA	11
2.1.4 Offences	12
2.2 Age Discrimination Defined	12
2.2.1 'Age' defined	12
2.2.2 Direct discrimination	13
2.2.3 Indirect discrimination	14
2.2.4 The 'dominant reason' test	14
2.2.5 Age discrimination and disability discrimination	15
2.2.6 Discrimination against a relative or associate on the basis of age	15
2.3 Proscribed Areas of Age Discrimination	15
2.3.1 Discrimination in employment and occupation	16
(a) Scope of the prohibition	16
(b) 'Inherent requirements' exemption	16
2.3.2 Discrimination in areas of public life other than employment	17
(a) Access to goods, services and facilities	17
(b) Education	17
(c) Accommodation	18

(d) Access to premises	18
(e) Land	18
(f) Requests for information on which unlawful age discrimination might be based	18
(g) Administration of Commonwealth laws and programs	18
2.4 Ancillary Liability	19
2.5 Victimisation	19
2.6 General Exemptions Under the ADA	19
2.6.1 Positive discrimination	19
2.6.2 Exemption for youth wages	21
2.6.3 Exemption relating to superannuation, insurance and credit	21
2.6.4 Exemptions for charities, religious and voluntary bodies	22
2.6.5 Exemption in relation to health	23
2.6.6 Exemptions relating to direct compliance with laws, orders of courts, taxation legislation and social security legislation	24
2.6.7 Exemption relating to Commonwealth employment programs	25
2.6.8 Exemption in relation to migration and citizenship	25
<b>3 The Racial Discrimination Act</b>	<b>26</b>
3.1 Introduction to the RDA	28
3.1.1 Scope of the RDA	28
(a) The prohibition on discrimination in section 9	28
(b) The right to equality before the law in section 10	29
(c) The interface between sections 9 and 10	32
3.1.2 Other unlawful acts and offences	33
3.1.3 Interaction between RDA, state, territory and other Commonwealth Laws	33
(a) Impact of section 10 on enjoyment of rights	34
(b) Impact of section 10 on discriminatory state laws	34
(c) Impact of section 10 on discriminatory territory laws	34
(d) Impact of section 10 on discriminatory Commonwealth laws	34
(e) Impact of section 9 on state laws	35
(f) The RDA does not invalidate state laws that promote the objects of ICERD	35
3.1.4 Constitutionality	36
(a) The RDA is supported by the external affairs power	36
(b) Part IIA of the RDA does not infringe the implied right of freedom of political communication	36
3.2 Racial Discrimination Defined	37
3.2.1 Grounds of discrimination	37
(a) Race	38
(b) Ethnic origin	39
(c) National origin	40
(d) Immigrant status	43
3.2.2 Direct discrimination under the RDA	43

(a) Section 9(1)	43
(i) Proving the elements of section 9(1)	44
(ii) Racist remark as an act of discrimination	45
(iii) 'Based on' and intention to discriminate	46
(b) Prohibitions in specific areas of public life	48
(c) Drawing inferences of racial discrimination	49
3.2.3 Indirect discrimination under the RDA	52
(a) Background	52
(b) The relationship between 'direct' and 'indirect' discrimination	52
(c) Defining the term, condition or requirement	53
(d) Not reasonable in the circumstances	53
(e) Ability to comply with a requirement or condition	56
3.2.4 Interference with the recognition, enjoyment or exercise of human rights or fundamental freedoms on an equal footing	58
(a) Human rights and fundamental freedoms defined	58
(b) Equal footing	62
3.3 Exceptions	63
3.3.1 Special measures	63
(a) Gerhardy v Brown	64
(b) Applying Gerhardy	65
(c) Maloney v The Queen	67
3.3.2 Reasonable justification	68
3.4 Racial Hatred	70
3.4.1 Background	70
3.4.2 Significance of term racial hatred	71
3.4.3 Persons to whom the provisions apply	71
3.4.4 Causation and intention to offend	72
3.4.5 Reasonably likely to offend, insult, humiliate or intimidate	75
(a) Objective standard	75
(b) Subjective effect on applicant	77
(c) Reasonable victim test	77
(d) Personal offence and group claims	78
(e) Context	79
(f) Truth or falsity of statement not determinative of offensiveness	80
3.4.6 Otherwise than in private	80
3.4.7 Exemptions	83
(a) Onus of proof	84
(b) A broad or narrow interpretation?	84
(c) Reasonably and in good faith	85
(i) Objective and subjective elements	85
(ii) Context and artistic works	88

(d)	Section 18D(a): artistic works	89
(e)	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	89
(f)	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	90
3.5	Victimisation	91
3.6	Vicarious Liability	92
<b>4</b>	<b>The Sex Discrimination Act</b>	<b>94</b>
4.1	Introduction to the SDA	96
4.1.1	Scope of the SDA	96
4.1.2	Limited application provisions	98
(a)	<b>Application of the SDA to external territories</b>	<b>99</b>
(b)	<b>Availability of the SDA to male complainants</b>	<b>99</b>
(c)	<b>Foreign corporations or trading corporations under section 9(11) of the SDA</b>	<b>100</b>
4.2	Direct Discrimination Under the SDA	101
4.2.1	Causation, intention and motive	101
4.2.2	Direct discrimination on the ground of sex	102
4.2.3	Direct discrimination on the ground of marital or relationship status	105
4.2.4	Direct discrimination on the ground of pregnancy	108
(a)	<b>Relationship between pregnancy and sex discrimination</b>	<b>109</b>
(b)	<b>Maternity leave – direct discrimination on basis of characteristic that appertains generally to pregnancy</b>	<b>109</b>
4.2.5	Direct discrimination on the ground of breastfeeding	116
4.2.6	Direct discrimination on the ground of family responsibilities	116
4.2.7	Direct discrimination on the ground of sexual orientation	119
4.2.8	Direct discrimination on the ground of gender identity	121
4.2.9	Direct discrimination on the ground of intersex status	121
4.3	Indirect Discrimination Under the SDA	122
4.3.1	Defining the ‘condition, requirement or practice’	124
4.3.2	Disadvantaging	127
4.3.3	Reasonableness	129
4.3.4	The relationship between ‘direct’ and ‘indirect’ discrimination	131
4.4	Special Measures Under the SDA	132
4.5	Areas of Discrimination	135
4.5.1	Provision of services and qualifying bodies	135
4.5.2	Clubs	137
4.6	Sexual Harassment	138
4.6.1	Conduct of a sexual nature	139
4.6.2	Unwelcome conduct	140

4.6.3	Single incidents	142
4.6.4	The 'reasonable person' test	142
4.6.5	'Workplace' and 'workplace participant'	146
4.6.6	Sexual harassment as a form of sex discrimination	148
4.6.7	Sex-based harassment and sex discrimination	151
4.7	Exemptions	151
4.7.1	Services for members of one sex	152
4.7.2	Voluntary bodies	153
4.7.3	Acts done under statutory authority	154
4.7.4	Competitive sporting activity	155
4.7.5	Marital or relationship status exemption for gender reassignment	157
4.8	Victimisation	157
4.9	Vicarious Liability	161
4.9.1	Onus of proof	161
4.9.2	'In connection with' employment	162
4.9.3	'All reasonable steps'	163
4.9.4	Vicarious liability for victimisation	166
4.10	Aiding or Permitting an Unlawful Act	166
<b>5</b>	<b>The Disability Discrimination Act</b>	<b>168</b>
5.1	Introduction to the DDA	171
5.1.1	2009 Amendments to the DDA	171
5.1.2	Scope of the DDA	171
5.1.3	Limited application provisions and constitutionality	173
(a)	The Disabilities Convention and Matters of International Concern	173
(b)	Discrimination in the course of trade and commerce	174
5.1.4	Retrospectivity of the DDA	175
5.1.5	Jurisdiction over decisions made overseas	175
5.2	Disability Discrimination Defined	176
5.2.1	'Disability' defined	176
(a)	Identifying the disability with precision	176
(b)	Distinction between a disability and its manifestations	177
5.2.2	Direct discrimination under the DDA	177
(a)	Issues of causation, intention and knowledge	178
(b)	The 'comparator' under section 5 of the DDA	183
(c)	'Adjustments' under section 5(3) of the DDA	195
5.2.3	Indirect discrimination under the DDA	197
(a)	2009 changes to indirect discrimination	197
(b)	The relationship between 'direct' and 'indirect' discrimination	198
(c)	Defining the 'requirement or condition'	200
(d)	Inability to comply with a requirement or condition	206
(e)	The effect of disadvantaging persons with the disability	210



(f) Reasonableness	211
5.2.4 Reasonable adjustments	219
(a) 'Reasonable adjustments'	219
(b) Direct discrimination under section 5(2)	219
(c) Indirect discrimination under section 6(2)	222
5.2.5 Associates, carers, disability aids and assistance animals	223
(a) Associates	223
(b) Disability aids, carers, assistants and assistance animals	224
(c) Special provisions about assistance animals	225
(i) What is an 'assistance animal'?	225
(ii) Guide and hearing dogs	225
(iii) Other types of assistance animals	226
(iv) Identifying the comparator in cases involving assistance animals	226
(v) Assistance animal exemptions	227
5.2.6 Disability standards	228
(a) Transport Standards	228
(b) Education Standards	231
(c) Premises standards	232
5.2.7 Harassment	233
5.3 Areas of Discrimination	235
5.3.1 Employment (section 15)	235
(a) Meaning of 'employment'	236
(b) 'Arrangements made for the purposes of determining who should be offered employment'	237
(c) 'Benefits associated with employment' and 'any other detriment'	238
(d) Inherent requirements	239
(i) Meaning of 'inherent requirements'	240
(ii) Extent to which an employer must assist an aggrieved person to be able to carry out inherent requirements	243
(iii) 'Unable to carry out'	244
(iv) Imputed disabilities	246
5.3.2 Education	248
(a) 'Educational authority'	249
(b) Education as a service?	249
(c) Availability of defence of unjustifiable hardship	249
5.3.3 Access to premises	250
5.3.4 Provision of goods, services and facilities	251
(a) Defining a 'service'	252
(i) Council planning decisions	252
(ii) Prisons as a service	252

(iii)	The detection and prevention of crime as a service	254
(iv)	Other disputed services	255
(b)	Identifying the service	256
(c)	'Refusal' of a service	257
(d)	Delay in providing a service or making a facility available	258
(e)	Ownership of facilities not necessary for liability	259
5.4	Ancillary Liability	259
5.4.1	Vicarious liability	259
5.4.2	Permitting an unlawful act	260
5.5	Unjustifiable Hardship and Other Exemptions	262
5.5.1	Unjustifiable hardship	262
(a)	'More than just hardship'	263
(b)	'Any person concerned'	264
(c)	Other factors	265
5.5.2	Other exemptions to the DDA	267
(a)	Annuities, insurance and superannuation	267
(b)	Defence force	269
(c)	Compliance with a prescribed law	270
(d)	Special measures	271
5.6	Victimisation	273
(a)	Test for causation	274
(b)	Threatens to subject to any detriment	275
<b>6</b>	<b>Practice and Procedure</b>	<b>278</b>
6.1	Introduction	281
6.2	Special Purpose Commissioners as Amicus Curiae	282
6.2.1	The nature of the role vis-a-vis an intervener	283
6.2.2	Jurisdiction of the court to grant leave	285
6.3	Parties to a Complaint to the Commission	285
6.3.1	Complainants	285
(a)	'A person aggrieved'	285
(b)	Bodies corporate	288
(i)	Can a body corporate be a 'person aggrieved'?	288
(ii)	Determining whether the 'person aggrieved' is the body corporate, its members or its directors	290
(c)	Unincorporated bodies	291
(d)	Complaints in respect of deceased persons	292
6.3.2	Respondents	293
6.3.3	Representative complaints to the Commission	293

6.4	Interim Injunctions	294
6.4.1	Section 46PP of the AHRC Act	294
6.4.2	Principles governing determination of whether to grant an injunction	294
	(a) Serious issue to be tried	295
	(b) Balance of convenience	296
6.4.3	Ex parte injunctions	296
6.4.4	Types of orders that the court can make under section 46PP	297
6.4.5	Duration of relief granted under section 46PP and the time period in which such relief must be sought	299
6.5	Election of Jurisdiction	300
6.6	AHRC Act is an Exclusive Regime	302
6.7	Scope of Applications Made Under Section 46PO of the AHRC Act to the Federal Circuit Court and Federal Court	303
6.7.1	Parties	303
	(a) Applicants	303
	(b) Respondents	304
	(c) Representative proceedings in the Federal Court	305
6.7.2	Relationship between application and terminated complaint	306
6.7.3	Validity of termination notice	312
6.7.4	Pleading claims in addition to unlawful discrimination	312
	(a) Non-federal claims — accrued jurisdiction of the court	312
	(b) Concurrent claims for unlawful discrimination and judicial review	314
6.8	Relevance of Other Complaints to the Commission	314
6.8.1	‘Repeat complaints’ to the Commission	314
6.8.2	Evidence of other complaints to the Commission	316
6.9	Pleading Direct and Indirect Discrimination as Alternatives	317
6.10	Applications for Extension of Time	317
6.10.1	Relevance of nature of human rights jurisdiction	318
6.10.2	Principles to be applied	318
	(a) Need for an acceptable explanation for delay	319
	(b) Prejudice arising from the delay	320
	(c) No arguable case	321
6.10.3	Examples of where extension of time has been granted	322
6.11	State Statutes of Limitation	323
6.12	Interim Injunctions Under Section 46PO(6) of the AHRC Act	324
6.13	Applications for Summary Disposal	325
6.13.1	Changes to the summary disposal provisions	325
6.13.2	Principles governing determination of whether there are ‘no	

reasonable prospects'	327
6.13.3 Onus/material to be considered by the court	330
6.13.4 Examples of matters where the power has been exercised	331
6.13.5 Frivolous or vexatious proceedings and abuse of process	331
(a) Vexatious	332
(b) Abuse of Process	332
6.13.6 Dismissal of application due to non-appearance of applicant	335
6.14 Application for Dismissal for Want of Prosecution	335
6.15 Application for Suppression Order	336
6.16 Transfer of Proceedings Between the FCC and the Federal Court	338
6.16.1 Transfer of matters from the Federal Court to the FCC	338
6.16.2 Transfer of matters from the FCC to the Federal Court	339
6.17 Appeals from the FCC to the Federal Court	341
6.17.1 Nature of appeals	341
6.17.2 Appeal of a decision on an interlocutory application	342
6.17.3 Extension of time for filing appeals	343
(a) Principles to be applied	343
(b) Examples of cases in which applications for leave to appeal out of time have been made	343
6.18 Approach to Statutory Construction of Unlawful Discrimination Laws	345
6.19 Standard of Proof in Discrimination Matters	346
6.20 Contempt of Court	349
6.21 Miscellaneous Procedural and Evidentiary Matters	351
6.21.1 Request for copy of transcript	351
6.21.2 Unrepresented litigants	351
6.21.3 Representation by unqualified person	354
6.21.4 Consideration of fresh evidence out of time	356
6.21.5 Statements made at conciliation	357
6.21.6 Security for costs	357
6.21.7 Restrictions on commencing proceedings without reasonable prospects of success	359
6.21.8 Judicial immunity from suit under federal discrimination law	361
6.21.9 Adjournment pending decision of Legal Aid Commission	361
6.21.10 Appointment of litigation guardians	362
6.21.11 Approval of settlements	363
6.21.12 'No case' submission	365
6.21.13 Separate decision of questions	365
6.21.14 Discovery in the Federal Circuit Court	366
<b>7 Damages and Remedies</b>	<b>367</b>
7.1 Section 46PO(4) of the Australian Human Rights Commission Act 1986 (Cth)	370
7.2 Damages	370

7.2.1	General approach to damages	370
(a)	Damages are compensatory	370
(b)	Torts principles are helpful by way of analogy	371
(c)	Multiple causes of injury/loss	372
(d)	General damages (hurt, humiliation and distress, pain and suffering and loss of enjoyment of life)	373
(e)	Aggravated and exemplary damages	375
(f)	A finding of discrimination is necessary	380
(g)	Avoiding double recovery	380
7.2.2	Damages under the RDA generally	381
(a)	Carr v Boree Aboriginal Corporation	382
(b)	Baird v Queensland	382
(c)	Gama v Qantas Airways Ltd	382
(d)	House v Queanbeyan Community Radio Station	382
(e)	Trapman v Sydney Water Corporation & Ors	383
7.2.3	Damages in racial hatred cases	383
(a)	McMahon v Bowman	384
(b)	Horman v Distribution Group	384
(c)	San v Dirluck Pty Ltd	384
(d)	Silberberg v The Builders Collective of Australia Inc	384
(e)	Campbell v Kirstenfeldt	385
(f)	Clarke v Nationwide News	385
(g)	Sidhu v Raptis	385
(h)	Barnes v Northern Territory Police	386
(i)	Kanapathy v In De Braekt (No 4)	386
(j)	Haider v Hawaiian Punch Pty Ltd	386
7.2.4	Damages under the SDA generally	386
(a)	Font v Paspaley Pearls Pty Ltd	389
(b)	Grulke v KC Canvas Pty Ltd	389
(c)	Cooke v Plauen Holdings Pty Ltd	390
(d)	Song v Ainsworth Game Technology Pty Ltd	390
(e)	Escobar v Rainbow Printing Pty Ltd (No 2)	390
(f)	Mayer v Australian Nuclear Science & Technology Organisation	391
(g)	Evans v National Crime Authority	392
(h)	Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd	392
(i)	Kelly v TPG Internet Pty Ltd	393
(j)	Gardner v All Australia Netball Association Ltd	393
(k)	Ho v Regulator Australia Pty Ltd	393
(l)	Howe v Qantas Airways Ltd	393
(m)	Dare v Hurley	394
(n)	Fenton v Hair & Beauty Gallery Pty Ltd	394
(o)	Rankilor v Jerome Pty Ltd	394
(p)	Iliff v Sterling Commerce (Australia) Pty Ltd	394
(q)	Poniatowska v Hickinbotham	395
(r)	Maxworthy v Shaw	395
(s)	Cincotta v Sunnyhaven Limited	395
(t)	Burns v Media Options Group Pty Ltd	396
7.2.5	Damages in sexual harassment cases	396

(a) Gilroy v Angelov	400
(b) Elliott v Nanda	400
(c) Shiels v James	401
(d) Johanson v Blackledge	401
(e) Horman v Distribution Group	401
(f) Wattle v Kirkland	402
(g) Aleksovski v Australia Asia Aerospace Pty Ltd	402
(h) McAlister v SEQ Aboriginal Corporation	402
(i) Beamish v Zheng	403
(j) Bishop v Takla	403
(k) Hughes v Car Buyers Pty Ltd	404
(l) Trainor v South Pacific Resort Hotels Pty Ltd	404
(m) Phillis v Mandic	405
(n) Frith v The Exchange Hotel	405
(o) San v Dirluck Pty Ltd	405
(p) Cross v Hughes	405
(q) Hewett v Davies	406
(r) Lee v Smith	406
(s) Lee v Smith (No 2)	406
(t) Noble v Baldwin & Anor	406
(u) Kraus v Menzie	407
(v) Ewin v Vergara (No 3)	407
(w) Alexander v Cappello and Anor	408
(x) Richardson v Oracle Corporation Australia Pty Ltd	408
<b>7.2.6 Damages under the DDA</b>	<b>409</b>
(a) Barghouthi v Transfield Pty Ltd	412
(b) Haar v Maldon Nominees	412
(c) Travers v New South Wales	412
(d) McKenzie v Department of Urban Services	413
(e) Oberoi v Human Rights & Equal Opportunity Commission	413
(f) Sheehan v Tin Can Bay Country Club	414
(g) Randell v Consolidated Bearing Company (SA) Pty Ltd	414
(h) Forbes v Commonwealth	414
(i) McBride v Victoria (No 1)	415
(j) Bassanelli v QBE Insurance	415
(k) Darlington v CASCO Australia Pty Ltd	415
(l) Clarke v Catholic Education Office	415
(m) Power v Aboriginal Hostels Ltd	415
(n) Trindall v NSW Commissioner of Police	416
(o) Hurst and Devlin v Education Queensland	416
(p) Drury v Andreco Hurll Refractory Services Pty Ltd (No 4)	417
(q) Wiggins v Department of Defence – Navy	417
(r) Vickers v The Ambulance Service of NSW	417
(s) Hurst v Queensland	418
(t) Rawcliffe v Northern Sydney Central Coast Area Health Service	418
(u) Forest v Queensland Health	418
(v) Gordon v Commonwealth	419
(w) Maxworthy v Shaw	419
(x) Burns v Media Options Group Pty Ltd	419

(y)	Innes v Rail Corporation of New South Wales	420
(z)	Watts v Australian Postal Corp	420
(aa)	Huntley v State of NSW, Department of Police and Justice (Corrective Services NSW)	420
(bb)	Burns v Director General of the Department of Education	421
(cc)	Mulligan v Virgin Australia Airlines Pty Ltd	421
(dd)	Pop v Taylor	421
7.3	Apologies	422
7.4	Declarations	424
7.5	Orders Directing a Respondent Not to Repeat or Continue Conduct	426
7.6	Other Remedies	428
<b>8</b>	<b>Costs Awards</b>	<b>431</b>
8.1	Introduction	432
8.1.1	General discretion applies	432
8.1.2	Power to limit and set costs	432
(a)	The rationale for the rule	434
(b)	Factors to consider when determining whether or not to make an order limiting costs	434
8.1.3	Limitation on amount of costs that can be awarded in the Federal Court	438
8.1.4	Scale of costs in FCC proceedings	439
8.2	Usual Principles of Costs to Apply	440
8.3	Factors Considered	442
8.3.1	Where there is a public interest element	442
(a)	What is a ‘public interest element’	443
(b)	Cases in which the public interest element has been held to be sufficient  to depart from the usual costs rule	444
(c)	Cases in which the public interest element has been held not to be  sufficient to depart from the usual costs rule	446
8.3.2	Unrepresented applicants	448
8.3.3	The successful party should not lose the benefit of their victory	448
8.3.4	Courts should be slow to award costs at an early stage	450
8.3.5	Unmeritorious claims and conduct which unnecessarily prolongs proceedings	451
8.3.6	Applicant only partially successful	453
8.4	Applications for Indemnity Costs	456
8.4.1	General principles on indemnity costs	456
8.4.2	Offers of compromise	459
8.4.3	Calderbank offers in unlawful discrimination cases	462
8.5	Application of Section 47 of the <b>Legal Aid Commission Act 1979</b> (NSW) to Human Rights Cases in the Federal Court and the FCC	467

Professor Gillian Triggs

*President*



## Foreword

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I am pleased to present, on behalf of the Australian Human Rights Commission and LexisNexis, the 2016 edition of *Federal Discrimination Law*.

*Federal Discrimination Law* is produced by the Commission's legal section and provides an overview of the federal unlawful discrimination laws and examines the significant issues that have arisen in the federal unlawful discrimination cases. It also contains comprehensive tables of damages awards made since 13 April 2000 when the function of hearing unlawful discrimination matters was transferred from the Commission to the Federal Court and the Federal Circuit Court.

In 2016, the Commission entered into a partnership with LexisNexis to update *Federal Discrimination Law* as it was last updated in 2011. It is this partnership that has resulted in the publication of the 2016 edition of *Federal Discrimination Law*.

The Commission has also entered into a partnership with AustLII to make *Federal Discrimination Law* available on the AustLII website at [www.austlii.edu.au](http://www.austlii.edu.au).

These important partnerships have resulted in this publication being current and available to a broader audience, including legal practitioners, businesses, employers and members of the public with an interest in the field. *Federal Discrimination Law* is also available on the Commission's website: <https://www.humanrights.gov.au/our-work/legal/publications/federal-discrimination-law-2016>.

It is vital that information and resources are available to enable individuals to understand and enforce their rights effectively, and to assist businesses and employers to meet their obligations under federal discrimination laws and support workplace diversity. The Commission hopes that the content of this publication will play a significant role in helping to educate all Australians in respect of their rights and responsibilities.

A handwritten signature in black ink that reads "Gillian Triggs". The signature is stylized with a large, sweeping initial 'G' and a long, horizontal flourish at the end.

Professor Gillian Triggs  
President



# 1 Introduction

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## Contents

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<b>1.1</b>	<b>Nature and Scope of this Publication .....</b>	<b>2</b>
<b>1.2</b>	<b>'HREOC' and the 'Australian Human Rights Commission' .....</b>	<b>2</b>
<b>1.3</b>	<b>What is 'Unlawful Discrimination'? .....</b>	<b>2</b>
1.3.1	'Unlawful discrimination' defined .....	2
1.3.2	Distinguishing 'unlawful discrimination' from 'ILO 111 discrimination' and 'human rights' under the AHRC Act .....	3
(a)	'ILO 111 discrimination' .....	4
(b)	'Human rights' .....	5
<b>1.4</b>	<b>The Brandy Decision and the Commission's Former Hearing Function.....</b>	<b>6</b>
1.4.1	The scheme prior to 1995.....	6
1.4.2	Brandy v HREOC.....	6
1.4.3	Human Rights Legislation Amendment Act (No 1) 1999 (Cth) .....	7

# Introduction

## 1.1 Nature and Scope of this Publication

*Federal Discrimination Law* provides an overview of significant issues that have arisen in cases brought under the:

- *Age Discrimination Act 2004* (Cth) ('ADA', see Chapter 2);
- *Racial Discrimination Act 1975* (Cth) ('RDA', see Chapter 3);
- *Sex Discrimination Act 1984* (Cth) ('SDA', see Chapter 4); and
- *Disability Discrimination Act 1992* (Cth) ('DDA', see Chapter 5).

The *Australian Human Rights Commission Act 1986* (Cth) ('AHRC Act'), formerly the *Human Rights and Equal Opportunity Commission Act 1986* (Cth),<sup>1</sup> establishes the regime for making complaints of unlawful discrimination.<sup>2</sup> Chapter 6 provides an overview of this regime as well as detailing the principles that have been applied by the Federal Court and Federal Circuit Court ('FCC') (formerly Federal Magistrates Court ('FMC')) to matters of procedure and evidence in federal unlawful discrimination cases.<sup>3</sup> The issue of costs is discussed in Chapter 8.

Damages and remedies are considered in Chapter 7. That chapter sets out the principles that have been applied by the Federal Court and FCC when considering granting remedies in federal unlawful discrimination cases. It also contains comprehensive tables of damages awards made since the function of hearing federal unlawful discrimination matters was transferred from the then Human Rights and Equal Opportunity Commission (often referred to by the acronym 'HREOC') to the Federal Court and then FMC on 13 April 2000.

It should be noted that *Federal Discrimination Law* does not aim to be a textbook, or a comprehensive guide to discrimination law in Australia.<sup>4</sup> It does not consider all aspects of the RDA, SDA, DDA or ADA and does not deal specifically with state and territory anti-discrimination laws. Rather, the publication provides a guide to the significant issues that have arisen in cases brought under federal unlawful discrimination laws, including matters of practice and procedure, and analyses the manner in which those issues have been resolved by the courts. In some areas, context is provided from cases decided in other areas of law, but this coverage is not intended to be exhaustive.

## 1.2 'HREOC' and the 'Australian Human Rights Commission'

Since 4 September 2008, the public name of the Human Rights and Equal Opportunity Commission has been the Australian Human Rights Commission. On 5 August 2009, the legal name of the Commission became the Australian Human Rights Commission.<sup>5</sup>

## 1.3 What is 'Unlawful Discrimination'?

### 1.3.1 'Unlawful discrimination' defined

'Unlawful discrimination' is defined by section 3 of the AHRC Act as follows:

*unlawful discrimination* means any acts, omissions or practices that are unlawful under:  
(aa) Part 4 of the *Age Discrimination Act 2004*; or

<sup>1</sup> *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), Sch 3.

<sup>2</sup> See AHRC Act Pt IIB – Redress for unlawful discrimination.

<sup>3</sup> Note that the Federal Magistrates Court ('FMC') was renamed the Federal Circuit Court ('FCC') in 2013.

<sup>4</sup> 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.

<sup>5</sup> *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), Sch 3.

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- (a) Part 2 of the *Disability Discrimination Act 1992*; or
  - (b) Part II or IIA of the *Racial Discrimination Act 1975*; or
  - (c) Part II of the *Sex Discrimination Act 1984*;  
and includes any conduct that is an offence under:
  - (ca) Division 2 of Part 5 of the *Age Discrimination Act 2004* (other than section 52); or
  - (d) Division 4 of Part 2 of the *Disability Discrimination Act 1992*; or
  - (e) subsection 27(2) of the *Racial Discrimination Act 1975*; or
  - (f) section 94 of the *Sex Discrimination Act 1984*.

The particular grounds of unlawful discrimination under the RDA, SDA, DDA and ADA can be summarised as follows:

- race, colour, descent or national or ethnic origin;
- sex;
- sexual orientation;
- gender identity;
- intersex status;
- marital or relationship status;
- pregnancy or potential pregnancy;
- breastfeeding;
- family responsibilities;
- disability;
- people with disabilities who have a carer, assistant, assistance animal or disability aid; and
- age.

Also falling within the definition of ‘unlawful discrimination’ is:

- offensive behaviour based on racial hatred;
- sexual harassment; and
- harassment of people with disabilities.

It is not an offence, in itself, to engage in conduct which constitutes unlawful discrimination.<sup>6</sup> Federal discrimination laws do, however, provide for a number of specific offences<sup>7</sup> and these are noted in each of the relevant chapters of this publication. It can be noted that conduct constituting some such offences is also included in the definition of ‘unlawful discrimination’: see the definition in section 3 of the AHRC Act, set out above.<sup>8</sup>

The regime for resolving complaints of unlawful discrimination under the AHRC Act before the Commission, the Federal Court and FCC is set out in Chapter 6.

### 1.3.2 Distinguishing ‘unlawful discrimination’ from ‘ILO 111 discrimination’ and ‘human rights’ under the AHRC Act

The focus of this publication is ‘unlawful discrimination’ and it does not consider in any detail the Commission’s functions in relation to ‘discrimination’ or ‘human rights’: concepts which have a distinct meaning under the AHRC Act. A brief summary of those functions is, however, provided below.

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6 See RDA, s 26; SDA, s 85; DDA, s 41; ADA, s 49.

7 See RDA, Pt IV; SDA, Pt IV; DDA, Pt 2, Div 4; ADA, Pt 5.

8 Because of the inclusion in the definition of ‘unlawful discrimination’ of conduct that is an offence, complaints in relation to such conduct may be made to the Commission. Note, however, that any criminal investigation and/or prosecution of such an offence is a matter for the Australian Federal Police and the Commonwealth Director of Public Prosecutions.

### (a) 'ILO 111 discrimination'

Independent of the 'unlawful discrimination' jurisdiction under the AHRC Act are the Commission's functions in relation to 'discrimination' and 'equal opportunity in employment'. These functions give effect to Australia's obligations under the *International Labour Organisation Convention (No 111) concerning Discrimination in respect of Employment and Occupation*<sup>9</sup> ('ILO 111').

To clearly distinguish 'unlawful discrimination' from the Commission's functions in relation to 'discrimination', the latter may be referred to as 'ILO 111 discrimination' (although such a term does not appear in the AHRC Act).

Section 3 of the AHRC Act defines 'discrimination' as meaning (except in Part IIB of the AHRC Act which relates to 'unlawful discrimination'):

- (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
- (b) any other distinction, exclusion or preference that:
  - (i) has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
  - (ii) has been declared by the regulations to constitute discrimination for the purposes of this Act; but does not include any distinction, exclusion or preference:
- (c) in respect of a particular job based on the inherent requirements of the job; or
- (d) in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed.

The *Australian Human Rights Commission Regulations 1989* (Cth) declare the following to be additional grounds of 'discrimination': age; medical record; criminal record; impairment; marital or relationship status; mental, intellectual or psychiatric disability; nationality; physical disability; sexual orientation and trade union activity.<sup>10</sup>

It can be seen, therefore, that the range of grounds to which ILO 111 discrimination applies is broader than the range of grounds covered by unlawful discrimination: notably, ILO 111 discrimination includes the grounds of religion, political opinion, criminal record, nationality and trade union activity.

On the other hand, ILO 111 discrimination is limited in its application to 'employment or occupation', while unlawful discrimination operates in a wide range of areas of public life (in employment, education, accommodation, the provision of goods and services etc).<sup>11</sup>

Despite these differences, there is clearly overlap between the concepts of ILO 111 discrimination and unlawful discrimination. It is important to clearly differentiate the two as there are distinct legal regimes for the resolution of complaints of ILO 111 discrimination and unlawful discrimination. Notably, remedies are available from the Federal Court and FCC in unlawful discrimination matters: such remedies are *not* available for ILO 111 discrimination matters.<sup>12</sup>

9 *Convention Concerning Discrimination in respect of Employment and Occupation*, opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960).

10 Reg 4.

11 See RDA, Pt II; SDA, Pt II; DDA, Pt 2; ADA, Pt 4.

12 See *Bahonko v Royal Melbourne Institute of Technology* [2006] FCA 1325, *Matthews v Hargreaves* [2010] FMCA 840, *Matthews v Hargreaves* (No. 2) [2010] FMCA 933.

Part II Division 4 of the AHRC Act provides for a range of functions to be exercised by the Commission in relation to equal opportunity in employment and ILO 111 discrimination, including the function of inquiring into acts or practices that may constitute such discrimination.<sup>13</sup> The Commission has the function of endeavouring, where appropriate, to effect a settlement of a matter which gives rise to an inquiry. If settlement is not achieved and the Commission is of the view that the act or practice constitutes ILO 111 discrimination, the Commission is to report to the Minister in relation to the inquiry.<sup>14</sup>

The Commission is empowered to make recommendations, including for payment of compensation, where it makes a finding of ILO 111 discrimination.<sup>15</sup> These recommendations are not, however, enforceable.

## **(b) 'Human rights'**

The Commission also has functions in relation to 'human rights', including inquiring into complaints alleging that an act or practice done by or on behalf of the Commonwealth<sup>16</sup> is inconsistent with, or contrary to, any human right.<sup>17</sup>

'Human rights', as defined by the AHRC Act,<sup>18</sup> means those rights recognised in the *International Covenant on Civil and Political Rights*<sup>19</sup> ('ICCPR'), the *Convention on the Rights of the Child*<sup>20</sup> ('the CRC'), the *Declaration on the Rights of the Child*,<sup>21</sup> the *Declaration on the Rights of Mentally Retarded Persons*,<sup>22</sup> the *Declaration on the Rights of Disabled Persons*,<sup>23</sup> the *Convention on the Rights of Persons with Disabilities*<sup>24</sup> and the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*.<sup>25</sup>

As with the Commission's functions in relation to ILO 111 discrimination, the Commission reports to the Minister in relation to such inquiries where they are not settled by conciliation and where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right.<sup>26</sup>

13 See AHRC Act, ss 31(b); 32(1).

14 AHRC Act, s 31(b)(ii). For more information in relation to the procedures surrounding complaints of ILO 111 discrimination under the AHRC Act, including the Commission's reports to the Minister in the exercise of these functions, see the Commission's website: <https://www.humanrights.gov.au/our-work/legal/projects/human-rights-reports>.

15 AHRC Act, s 35(2).

16 AHRC Act, s 3 defines 'act' and 'practice' to mean those acts and practices done: (a) by or on behalf of the Commonwealth or an authority of the Commonwealth; (b) under an enactment; (c) wholly within a Territory; or (d) partly within a Territory, to the extent to which the act was done within a Territory.

17 See AHRC Act, ss 11(1)(f), 20(1).

18 See AHRC Act, s 3.

19 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976 except article 41 which entered into force 28 March 1979), Sch 2 to the AHRC Act.

20 Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), declared to be a relevant international instrument for the purposes of the AHRC Act on 22 December 1992.

21 GA Res 1386 (XIV), UNGAOR, 14<sup>th</sup> sess, UN Doc A/4354 (1959) Sch 3 to the AHRC Act.

22 GA Res 2856 (XXVI), UN GAOR, 26<sup>th</sup> sess, UN Doc A/ 8429 (1971), Sch 4 to the AHRC Act.

23 GA Res 3447 (XXX), UN GAOR, 30<sup>th</sup> sess, UN Doc A/10034 (1975) Sch 5 to the AHRC Act.

24 Opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008), declared to be a 'relevant international instrument' for the purposes of the AHRC Act on 20 April 2009.

25 GA Res 36/55, UN GAOR, 36<sup>th</sup> sess, UN Doc A/36/684 (1981), declared a relevant international instrument for the purposes of the AHRC Act on 8 February 1993.

26 AHRC Act, s 11(1)(f)(ii). As is the case with ILO 111 discrimination, there is also overlap between the concepts of human rights and unlawful discrimination. Notably, one of the basic human rights recognised in both the ICCPR (arts 2(1) and 26) and the CRC (art 2) is the right to non-discrimination.

The Commission has the power to make recommendations<sup>27</sup> in the event that it finds a breach of human rights, including for the payment of compensation,<sup>28</sup> but these recommendations are not enforceable.

## 1.4 The Brandy Decision and the Commission's Former Hearing Function

The current regime for dealing with unlawful discrimination complaints has been in operation since 13 April 2000.<sup>29</sup>

Prior to this, hearings were conducted in the first instance by the then Human Rights and Equal Opportunity Commission (also known by the acronym 'HREOC').

### 1.4.1 The scheme prior to 1995

Between 1992 and 1995, the Commission had functions under the RDA, SDA and DDA with the following general features:

- the Race Discrimination Commissioner, Sex Discrimination Commissioner and Disability Discrimination Commissioner investigated and attempted to conciliate complaints of unlawful discrimination under the RDA, SDA and DDA;
- where the relevant Commissioner determined that the investigation into the complaint would not continue because, for example, the alleged act the subject of the complaint was not unlawful, the complaint was out of time or lacking in substance, the complainant could request an internal review of the Commissioner's decision by the President;
- where the complaint was not resolved by conciliation and the Commissioner was of the view that it should be referred for a hearing, the hearing was conducted by the Commission and the complaint either dismissed or substantiated; and
- where a complaint was substantiated, the Commission registered its determination with the Federal Court registry. Upon registration, the determination was to have effect as if it were an order of the Federal Court.

### 1.4.2 Brandy v HREOC

In *Brandy v Human Rights and Equal Opportunity Commission*<sup>30</sup> ('Brandy'), the High Court held that the scheme for registration of the Commission's decisions was unconstitutional as its effect was to vest judicial power in the Commission contrary to Chapter III of the *Constitution*.

The parliament responded to *Brandy* by enacting the *Human Rights Legislation Amendment Act 1995* (Cth) which repealed the registration and enforcement provisions of the RDA, SDA and DDA. Under this new regime, complaints were still the subject of hearings before the Commission and, where successful, the Commission made a determination (itself unenforceable). If a complainant sought to enforce a determination they had to seek a hearing 'de novo' by the Federal Court after which the Court could make enforceable orders if the complaint was upheld.

27 The Commission's reports to the Minister in the exercise of this function can be found at: <https://www.humanrights.gov.au/our-work/legal/projects/human-rights-reports>.

28 AHRC Act, s 29(2).

29 *Human Rights Legislation Amendment Act (No 1) 1995* (Cth).

30 (1995) 183 CLR 245.

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The obvious disadvantage of this regime was that a complainant potentially had to litigate their matter twice to get an enforceable remedy.

### 1.4.3 Human Rights Legislation Amendment Act (No 1) 1999 (Cth)

The *Human Rights Legislation Amendment Act (No 1) (1999)* was the parliament's ultimate response to the situation created by *Brandy*.

This Act amended the then *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ('HREOC Act'), RDA, SDA and DDA so as to implement the following significant changes to the functions of the Commission and the federal unlawful discrimination regime:

- the complaint handling provisions in the RDA, SDA and DDA were repealed and replaced with a uniform scheme in the HREOC Act;
- responsibility for the investigation and conciliation of complaints was removed from the Race Discrimination Commissioner, Sex Discrimination Commissioner and Disability Discrimination Commissioner and vested in the President;
- the right to an internal review by the President of matters terminated by reason of, for example, being out of time or lacking in substance, was removed;
- the Commission's hearing function into complaints of unlawful discrimination under the RDA, SDA and DDA was repealed and provision made for complainants to commence proceedings in relation to their complaint before the Federal Court or then FMC in the event that it was not conciliated when before the Commission for investigation; and
- the Race Discrimination Commissioner, Sex Discrimination Commissioner, Disability Discrimination Commissioner, Human Rights Commissioner and Aboriginal and Torres Strait Islander Social Justice Commissioner were given an *amicus curiae* function in relation to proceedings arising out of a complaint before the Federal Court or the then FMC.

# 2 The Age Discrimination Act

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## Contents

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<b>2.1</b>	<b>Introduction to the ADA.....</b>	<b>10</b>
2.1.1	Background .....	10
2.1.2	Structure of the ADA.....	11
2.1.3	Application of the ADA .....	11
2.1.4	Offences .....	12
<b>2.2</b>	<b>Age Discrimination Defined .....</b>	<b>12</b>
2.2.1	‘Age’ defined .....	12
2.2.2	Direct discrimination.....	13
2.2.3	Indirect discrimination .....	14
2.2.4	The ‘dominant reason’ test.....	14
2.2.5	Age discrimination and disability discrimination .....	15
2.2.6	Discrimination against a relative or associate on the basis of age.....	15
<b>2.3</b>	<b>Proscribed Areas of Age Discrimination .....</b>	<b>15</b>
2.3.1	Discrimination in employment and occupation .....	16
(a)	Scope of the prohibition.....	16
(b)	‘Inherent requirements’ exemption .....	16
2.3.2	Discrimination in areas of public life other than employment .....	17
(a)	Access to goods, services and facilities .....	17
(b)	Education .....	17
(c)	Accommodation.....	18
(d)	Access to premises.....	18
(e)	Land .....	18
(f)	Requests for information on which unlawful age discrimination might be based .....	18
(g)	Administration of Commonwealth laws and programs.....	18
<b>2.4</b>	<b>Ancillary Liability.....</b>	<b>19</b>
<b>2.5</b>	<b>Victimisation.....</b>	<b>19</b>
<b>2.6</b>	<b>General Exemptions Under the ADA .....</b>	<b>19</b>
2.6.1	Positive discrimination.....	19
2.6.2	Exemption for youth wages.....	21
2.6.3	Exemption relating to superannuation, insurance and credit.....	21
2.6.4	Exemptions for charities, religious and voluntary bodies .....	22
2.6.5	Exemption in relation to health .....	23



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2.6.6	Exemptions relating to direct compliance with laws, orders of courts, taxation legislation and social security legislation.....	24
2.6.7	Exemption relating to Commonwealth employment programs.....	25
2.6.8	Exemption in relation to migration and citizenship .....	25

# The Age Discrimination Act

The *Age Discrimination Act 2004* (Cth) ('ADA') commenced operation on 23 June 2004. At the date of publication there has not yet been a successful claim of unlawful age discrimination. A number of cases have considered claims of unlawful age discrimination but the claims were dismissed without significant discussion of the relevant provisions of the ADA.<sup>1</sup> This chapter therefore focuses on the background to the legislation and its significant features as well as highlighting some similarities and differences with other federal unlawful discrimination laws that may be relevant to its interpretation and application.<sup>2</sup>

## 2.1 Introduction to the ADA

### 2.1.1 Background

The ADA is intended to act as a catalyst for attitudinal change, as well as addressing individual cases of age discrimination. The stated objects of the ADA are to, amongst other things, raise community awareness that people of all ages have the same fundamental rights and equality before the law, and eliminate discrimination on the basis of age as far as is possible in the areas of public life specified in the Act.<sup>3</sup>

Another object of the ADA is to 'respond to demographic change by removing barriers to older people participating in society, particularly in the workforce, and changing negative stereotypes about older people'.<sup>4</sup> The Revised Explanatory Memorandum to the ADA (the Explanatory Memorandum) comments that:

The proposed new age discrimination Bill will be an integral part of a wide range of key Government policy priorities to respond to the ageing workforce and population, and the important social and economic contribution that older and younger Australians make to the community.

...

Age discrimination is clearly a problem for both younger and older Australians. In relation to older Australians, in particular, many recent reports have emphasised the negative consequences of age discrimination on the wellbeing of older Australians and the broader consequences for the community. There is also evidence that the ageing of Australia's population will lead to an increase in the problem of age discrimination if Government action is not taken to address this issue. Government action is needed to address the generally unfounded negative stereotypes that employers and policy makers may have about both younger and older Australians, which limit their contribution to the community and the economy.<sup>5</sup>

...

Given the ageing of Australia's population, the promotion of a mature age workforce is a priority for the Government.<sup>6</sup>

It can be noted, however, that the ADA does not just prohibit discrimination against older Australians on the basis of age. The ADA will, in general, also protect young people from discrimination on the basis of their age.

<sup>1</sup> See, for example, *Thompson v Big Bert Pty Ltd t/as Charles Hotel* [2007] FCA 1978; *O'Brien v Crouch* [2007] FMCA 1976; *Boyn v Schering Pty Ltd* [2008] FCA 961.

<sup>2</sup> Note that this Chapter aims only to provide a summary of some of the significant provisions of the ADA. As with the other Chapters in this publication, readers should not rely on it as being a comprehensive list of all aspects of the ADA and should refer to the ADA directly.

<sup>3</sup> ADA, s 3.

<sup>4</sup> ADA, s 3(e).

<sup>5</sup> Revised Explanatory Memorandum, Age Discrimination Bill 2003 (Cth).

<sup>6</sup> Ibid 10.

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The *Age Discrimination (Consequential Provisions) Act 2004* (Cth) ('Consequential Provisions Act') was enacted along with the ADA. The Consequential Provisions Act made consequential amendments to a number of Acts including the *Workplace Relations Act 1996* (Cth) and the then *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (now the *Australian Human Rights Commission Act 1986* (Cth) ('AHRC Act')).

On 21 June 2011, the *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth) amended the ADA to establish an office for an Age Discrimination Commissioner within the Australian Human Rights Commission. The Age Discrimination Commissioner will be responsible for raising awareness of age discrimination, educating the community about the impact of age discrimination and monitoring and advocating for the elimination of age discrimination across all areas of public life.

### 2.1.2 Structure of the ADA

The general scheme and structure of the ADA is similar to that of the *Disability Discrimination Act 1992* (Cth) ('DDA') and *Sex Discrimination Act 1984* (Cth) ('SDA'). The ADA sets out definitions of direct and indirect age discrimination and then sets out the areas of public life in which such discrimination is unlawful.

The ADA contains a number of permanent exemptions.<sup>7</sup> The ADA also empowers the Australian Human Rights Commission to grant temporary exemptions from the operation of certain provisions of the Act.<sup>8</sup>

### 2.1.3 Application of the ADA

The ADA applies throughout Australia, including all states, territories and external territories of Australia.<sup>9</sup> The prohibition on discrimination also applies in relation to discriminatory acts occurring in Australia but which also involve people, things or events outside Australia.<sup>10</sup> The ADA also applies, to the extent constitutionally permissible:

- to discrimination against Commonwealth employees and persons seeking to become a Commonwealth employee;<sup>11</sup>
- to qualifying bodies operating under Commonwealth laws;<sup>12</sup>
- to acts done under Commonwealth or territory (excluding ACT and NT) laws by Commonwealth or territory (excluding ACT and NT) governments, administrators or public bodies;<sup>13</sup>
- in relation to Australia's international obligations under ILO 111, the ICCPR, the CRC and the *International Covenant on Economic, Social and Cultural Rights*,<sup>14</sup> as well as other matters in respect of which the Commonwealth has power to legislate under section 51(xxix) of the Constitution;<sup>15</sup>
- to discrimination by corporations (including foreign corporations within the meaning of section 51(xx) of the Constitution);<sup>16</sup>

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<sup>7</sup> See ADA, Pt 4, Div 4.

<sup>8</sup> ADA, s 44. The Commission has developed criteria and procedures to guide the Commission in exercising its discretion under ADA, s 44. The Commission's guidelines and further information about the temporary exemptions granted by the Commission are available at: <https://www.humanrights.gov.au/temporary-exemptions-under-age-discrimination-act-2004-cth>

<sup>9</sup> ADA, ss 9(2), 10(5).

<sup>10</sup> ADA, s 9(3).

<sup>11</sup> ADA, s 10(3).

<sup>12</sup> ADA, s 10(4).

<sup>13</sup> ADA, s 10(6).

<sup>14</sup> Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

<sup>15</sup> ADA, s 10(7).

<sup>16</sup> ADA, s 10(8), (9).

- to discrimination in the course of, or in relation to, banking (other than state banking not extending beyond the limits of the state concerned, within the meaning of section 51(xiii) of the Constitution);<sup>17</sup>
- to discrimination in the course of, or in relation to, insurance (other than state insurance not extending beyond the limits of the state concerned, within the meaning of section 51(xiv) of the Constitution);<sup>18</sup> and
- to discrimination in international or inter-state trade and commerce.<sup>19</sup>

The ADA is intended to bind the executive governments of the Commonwealth and of each of the states (including the ACT and NT).<sup>20</sup>

The ADA does not purport to displace or limit the operation of state and territory laws capable of operating concurrently with the ADA.<sup>21</sup> It deals with any potential inconsistency between federal and state/territory laws by providing that where complainants have a choice as to jurisdiction, they are required to elect whether to make their complaint under federal or state/territory legislation.<sup>22</sup>

## 2.1.4 Offences

While the ADA makes age discrimination unlawful in certain circumstances, it is not, per se, an offence to discriminate on the basis of age.<sup>23</sup> The ADA does, however, create specific offences:

- it is an offence to publish or display an advertisement (or cause or permit its publication or display) which indicates an intention to unlawfully discriminate on the basis of age;<sup>24</sup>
- it is an offence ('victimisation') to intentionally cause detriment to a person because that person has made, or proposes to make, a complaint of discrimination or has taken part in discrimination proceedings;<sup>25</sup> and
- it is an offence to fail to disclose the source of actuarial or statistical data when required to do so by the President of the Australian Human Rights Commission ('Commission') under section 54(2) of the ADA.<sup>26</sup>

Conduct constituting either of the first two of these offences falls within the definition of 'unlawful discrimination' in section 3 of the AHRC Act. Accordingly, a complaint in relation to such conduct can be made to the Commission.<sup>27</sup>

## 2.2 Age Discrimination Defined

### 2.2.1 'Age' defined

'Age' is defined in section 5 of the ADA as including 'age group'. The ADA provides the following by way of example: 'The reference in subsection 26(3) to students above a particular age includes a reference to students above a particular age group'.

<sup>17</sup> ADA, s 10(10)(a).

<sup>18</sup> ADA, s 10(10)(b).

<sup>19</sup> ADA, s 10(11).

<sup>20</sup> ADA, s 13.

<sup>21</sup> ADA, s 12(3).

<sup>22</sup> ADA, s 12(4).

<sup>23</sup> ADA, s 49.

<sup>24</sup> ADA, s 50. Similar provisions are contained in the RDA (s 16), the SDA (s 86) and the DDA (s 44).

<sup>25</sup> ADA, s 51. Victimisation is also made an offence under the RDA (s 27(2)), the SDA (s 94) and the DDA (s 42).

<sup>26</sup> ADA, s 52. Similar provisions exist in the SDA (s 87) and the DDA (s 107).

<sup>27</sup> See further discussion at 2.5.

The definition of age does not extend to cover the age which might be imputed to a person,<sup>28</sup> although the definition of direct age discrimination includes less favourable treatment because of ‘a characteristic that is generally imputed to persons of the age of the aggrieved person’.<sup>29</sup>

## 2.2.2 Direct discrimination

The definition of direct discrimination is contained in section 14 of the ADA as follows:

### 14 Discrimination on the ground of age – direct discrimination

For the purposes of this Act, a person (the **discriminator**) **discriminates** against another person (the **aggrieved person**) on the ground of the age of the aggrieved person if:

- (a) the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or not materially different, the discriminator treats or would treat a person of a different age; and
- (b) the discriminator does so because of:
  - (i) the age of the aggrieved person; or
  - (ii) a characteristic that appertains generally to persons of the age of the aggrieved person; or
  - (iii) a characteristic that is generally imputed to persons of the age of the aggrieved person.

The extension of the definition of direct discrimination to include less favourable treatment because of ‘a characteristic that appertains generally’ to persons of that age or ‘a characteristic that is generally imputed’ to persons of that age addresses the stereotyping of a particular group of persons on the basis of actual or implied distinguishing or idiosyncratic traits.<sup>30</sup> However, it is not necessary to establish that the identified characteristic exists in every case: it is only necessary to establish that it generally exists or operates.<sup>31</sup>

In *Thompson v Big Bert Pty Ltd t/as Charles Hotel*,<sup>32</sup> the applicant alleged that she had been discriminated against on the basis of her age and sex in her employment as a bar attendant at the respondent’s hotel where she had worked for approximately six years. In late 2005, the applicant’s previously regular shift arrangements were altered and she believed that this was part of a plan to force her departure from the job as the new shifts would make it more difficult for the applicant to arrange childcare. The applicant also gave evidence that the owner of the hotel had been heard remarking that he wanted to replace some of the older staff with ‘young glammers’ and that this amounted to direct and indirect discrimination on the basis of her age. The applicant was 37 years of age at the time of the variation to the shift arrangements.

In relation to the direct age discrimination claim, the applicant argued that the dominant reason for the reduction in her hours was her age, or alternatively, a characteristic that appertains generally to persons of the applicant’s age or age group, or a characteristic that is generally imputed to persons of her age group.<sup>33</sup> The characteristic said to appertain generally to, or be generally imputed to, persons in their late 30s is that ‘they are less attractive and less glamorous, than persons in a younger age group’.<sup>34</sup>

28 This can be contrasted with the definition of disability under s 4 of the DDA.

29 ADA, s 14.

30 See, for example, *Commonwealth v Human Rights & Equal Opportunity Commission* (1993) 46 FCR 191, 207 (Wilcox J), in the context of the SDA.

31 (1993) 46 FCR 191, 207.

32 [2007] FCA 1978.

33 [2007] FCA 1978, [43].

34 Ibid.

Buchanan J dismissed the applicant's claim. His Honour was satisfied that the changes in the applicant's working arrangements were initially prompted by management's need to reduce the wages bill for the hotel and the subsequent deterioration in the relationship between the new manager of the premises and the applicant that led to the manager removing the applicant from shifts so that they would not have to work together. One feature of those changes was to place the applicant from time to time on shifts with a greater number of customers. This, in his Honour's view, was 'inconsistent with any suggested desire to replace her with "young glammers,"'<sup>35</sup> but was entirely consistent with the manager's desire 'to be rid of her presence without terminating the employment altogether'.<sup>36</sup>

The applicant's claims of indirect age and sex discrimination were also dismissed.<sup>37</sup>

### 2.2.3 Indirect discrimination

Section 15 of the ADA defines indirect discrimination as follows:

#### 15 Discrimination on the ground of age – indirect discrimination

- (1) For the purposes of this Act, a person (the **discriminator**) **discriminates** against another person (the **aggrieved person**) on the ground of the age of the aggrieved person if:
  - (a) the discriminator imposes, or proposes to impose, a condition, requirement or practice; and
  - (b) the condition, requirement or practice is not reasonable in the circumstances; and
  - (c) the condition, requirement or practice has, or is likely to have, the effect of disadvantaging persons of the same age as the aggrieved person.
- (2) For the purposes of paragraph (1)(b), the burden of proving that the condition, requirement or practice is reasonable in the circumstances lies on the discriminator.

Section 15 is similar in substance to the indirect discrimination provisions in the SDA.

However, unlike section 7B(2) of the SDA, the ADA does not contain any reference to the factors to be taken into account when determining whether a condition, requirement or practice is reasonable in the circumstances.<sup>38</sup> 'Reasonableness' in the context of indirect discrimination has been the subject of significant judicial consideration in DDA cases<sup>39</sup> and this is likely to be relevant in interpreting and applying section 15 of the ADA.

### 2.2.4 The 'dominant reason' test

Up until the amendments brought about by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), the ADA included a dominant reason test in determining whether or not an act has been done 'because of' the age of a person.<sup>40</sup>

<sup>35</sup> Ibid [44].

<sup>36</sup> Ibid [44].

<sup>37</sup> Ibid [46], [50].

<sup>38</sup> Section 7B of the SDA provides that these matters include (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; (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.

<sup>39</sup> See further 5.2.3(f).

<sup>40</sup> The Commission's concerns about the application of a 'dominant reason' test, amongst other things, were raised in its Submission to the Senate Legal and Constitutional Committee on the Age Discrimination Bill 2003: see <http://www.humanrights.gov.au/submission-age-discrimination-bill-2003>

The Amendment Act, however, brings section 16 of the ADA into line with the SDA,<sup>41</sup> *Racial Discrimination Act 1975* (Cth) ('RDA')<sup>42</sup> and DDA,<sup>43</sup> so that if an act is done for two or more reasons and a discriminatory ground is one of those reasons, then the act is taken to be done because of the age of the person, whether or not it was the dominant or substantial reason for doing the act.

This means that to substantiate a complaint, a person only needs to show that their age was a reason for the less favourable treatment they received.

### 2.2.5 Age discrimination and disability discrimination

The ADA provides that a reference to discrimination against a person on the ground of the person's age is taken not to include a reference to discrimination against a person on the ground of a disability of the person (within the meaning of the DDA).<sup>44</sup>

The Explanatory Memorandum to the ADA states that this provision:

deals with the situation where there is an overlap between the operation of this Act and the DDA. For example, an overlap could occur where a person has a disability that is or could be related to their age (such as impaired hearing or mobility). This provision ensures that the Act does not create a second or alternative avenue for complaints of disability discrimination where such complaints are properly covered by the DDA. Complaints of age discrimination that would also be covered by the DDA should be dealt with under the legislative regime established by that Act.<sup>45</sup>

It can be noted, however, that this section will not necessarily prevent a person from bringing a claim about both age and disability discrimination. The Explanatory Memorandum to the ADA states:

this Bill is not designed to limit a person's rights if they are the subject of discrimination. If particular circumstances or actions result in a person being discriminated against both on the ground of age (in a way that is not related to disability) and also on the ground of disability, then the person may still initiate a complaint about unlawful discrimination on the grounds of age and disability.<sup>46</sup>

This would seem to contemplate a person bringing a complaint about distinct (although possibly related) acts, some of which are attributable to age discrimination alone, others which are attributable to disability discrimination.

### 2.2.6 Discrimination against a relative or associate on the basis of age

Unlike the DDA<sup>47</sup> and RDA,<sup>48</sup> the ADA does not prohibit discrimination on the basis of the age of a person's relative or associate.

## 2.3 Proscribed Areas of Age Discrimination

The areas of public life in which age discrimination is proscribed are set out in Part 4, Divisions 1 – 3. In general, they reflect those proscribed in other federal unlawful discrimination legislation. Each of these areas is considered in turn.

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41 See SDA, s 8.

42 See RDA, s 18.

43 See DDA, s 10.

44 ADA, s 6.

45 See Revised Explanatory Memorandum, Age Discrimination Bill 2003 (Cth).

46 See Revised Explanatory Memorandum, Age Discrimination Bill 2003 (Cth).

47 See DDA, s 7.

48 See RDA, ss 11-13, 15.

## 2.3.1 Discrimination in employment and occupation

### (a) Scope of the prohibition

The prohibition on age discrimination in employment extends to:

- discrimination against employees,<sup>49</sup> commission agents<sup>50</sup> and contract workers.<sup>51</sup> It is unlawful to discriminate in recruitment and offers of employment, as well as the actual terms and conditions of employment, access to promotion and training and dismissal or any other detriment. These provisions do not extend, however, to voluntary work or domestic duties performed in private households,<sup>52</sup> and provide an exception where a person cannot perform the inherent requirements of the particular position because of their age;<sup>53</sup>
- partnerships consisting of six or more partners. It is unlawful to discriminate in relation to decisions about who can become a partner, and the terms and conditions upon which a partnership is offered. This provision also covers denying or limiting access to benefits, expelling a partner or subjecting a partner to any other detriment.<sup>54</sup> An exemption to this provision will apply where a person cannot perform the inherent requirements of the partnership because of their age;<sup>55</sup>
- qualifying bodies which provide authorisations or qualifications needed for carrying on an occupation, profession or trade. It is unlawful to discriminate in the conferring, extending or withdrawing of such authorisation or qualification, and in the terms or conditions on which an authorisation or qualification is granted.<sup>56</sup> It is an exception to this provision where a person cannot perform the inherent requirements of the particular profession or occupation because of their age;<sup>57</sup>
- registered organisations under the *Fair Work (Registered Organisations) Act 2009* (Cth). It is unlawful to discriminate by refusing membership to the organisation, in the terms and conditions on which an organisation is prepared to admit a member or in the access to benefits provided by the organisation;<sup>58</sup> and
- employment agencies. It is unlawful to discriminate by refusing to provide services or in the terms or conditions or manner in which their services are provided,<sup>59</sup> unless the person cannot carry out the inherent requirements of the particular employment because of their age.<sup>60</sup>

### (b) 'Inherent requirements' exemption

As noted above in relation to the particular aspects of employment that are covered by the prohibition of age discrimination, such discrimination will not be unlawful where a person is unable to carry out the inherent requirements of the particular position or employment because of their age.

In determining whether a person is unable to carry out the inherent requirements of a particular position or employment, the following factors must be taken into account:

<sup>49</sup> ADA, s 18.

<sup>50</sup> ADA, s 19.

<sup>51</sup> ADA, s 20.

<sup>52</sup> ADA, s 18(3).

<sup>53</sup> ADA, ss 18(4), 19(3) and 20(2).

<sup>54</sup> ADA, s 21.

<sup>55</sup> ADA, s 21(4).

<sup>56</sup> ADA, s 22.

<sup>57</sup> ADA, s 22(2).

<sup>58</sup> ADA, s 23.

<sup>59</sup> ADA, s 24.

<sup>60</sup> ADA, s 24(2).



- the person's past training, qualifications and experience relevant to the particular employment;
- 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.<sup>61</sup>

In relation to similar provisions in the DDA<sup>62</sup> and the then *Industrial Relations Act 1988* (Cth), the High Court has held that the 'inherent requirements' of a particular employment means 'something essential' to, or an 'essential element' of, a particular position.<sup>63</sup> The question of whether something is an inherent requirement of a particular position is required to be answered with reference to the function which the employee performs as part of the employer's undertaking and by reference to that organisation.<sup>64</sup> However, employers are not permitted to organise or define their business to permit discriminatory conduct.<sup>65</sup>

## 2.3.2 Discrimination in areas of public life other than employment

The ADA also makes age discrimination unlawful in the following areas:

### (a) Access to goods, services and facilities<sup>66</sup>

This provision makes it unlawful for someone who provides goods, services<sup>67</sup> and facilities to discriminate against a person on the basis of age by refusing to provide the goods, services or facilities, in the terms or conditions on which those goods, services or facilities are provided, or in the manner in which they are provided.

### (b) Education<sup>68</sup>

This provision makes it unlawful for an educational authority to discriminate against a person on the basis of age in refusing or failing to accept the person's application for admission, or in the terms and conditions on which the authority is prepared to admit the person as a student. It also makes it unlawful to deny or limit access to benefits provided by the educational institution, to expel a student or subject a student to any other detriment on the basis of their age.

However, this provision does not make it unlawful to discriminate on the ground of age in respect of admission to an educational institution established for students above a particular age, if the person is not above that age (for example, primary or high schools).<sup>69</sup>

61 ADA, s 18(5). Similar tests are provided for in the other areas of employment and occupation in which discrimination is proscribed: commission agents (s 19(4)), contract workers (s 20(3)), partnerships (s 21(5)), qualifying bodies (s 22(3)) and employment agencies (s 24(3)).

62 See DDA, s 21A. This section, as well as cases which have considered it in detail, are discussed at 5.3.1(d).

63 *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 294 [34] (Gaudron J with whom Brennan CJ agreed on this point), 305 [74] (McHugh J), 318 [114] (Gummow J); *X v Commonwealth* (1999) 200 CLR 177.

64 *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 284 [1] (Brennan CJ).

65 *X v Commonwealth* (1999) 200 CLR 177, 189-90 [37] (McHugh J); 208 [102] (Gummow and Hayne JJ (with whom Gleeson CJ and Callinan J agreed)).

66 ADA, s 28.

67 Note that s 5 of the ADA defines 'services' widely to include superannuation, banking, insurance, grants, loans, credit or finance, transport, travel, entertainment, recreation or refreshment, telecommunications, services provided by a professional or tradesperson or services provided by a government, government authority or local government body.

68 ADA, s 26.

69 ADA, s 26(3).

**(c) Accommodation<sup>70</sup>**

This provision makes it unlawful to discriminate against a person on the basis of their age by refusing an application for accommodation,<sup>71</sup> in the terms and conditions on which accommodation is offered or giving a person a lower priority in an accommodation waiting list. This provision also makes it unlawful to deny or limit access to benefits associated with accommodation or to evict the person or subject the person to any other detriment on the basis of their age.

However, this provision provides an exception where accommodation is provided by a person who lives on the premises or whose near relative lives on the premises, where the accommodation is offered to three or less persons.<sup>72</sup>

**(d) Access to premises<sup>73</sup>**

This provision makes it unlawful to discriminate against a person on the basis of age by refusing access to or use of premises<sup>74</sup> that the public or a section of the public is entitled to enter or use, or on the terms and conditions on which such access or use is permitted.

**(e) Land<sup>75</sup>**

This provision makes it unlawful to discriminate against a person on the basis of age in relation to the selling of, or other dealings in land. This includes refusing to sell land or applying discriminatory terms and conditions on which an interest in land is offered.

However, this provision contains an exception in relation to the giving of land in a will or as a gift.<sup>76</sup>

**(f) Requests for information on which unlawful age discrimination might be based<sup>77</sup>**

This provision makes it unlawful to ask a person to provide information if the information is being requested in connection with or for the purposes of doing an act which would be unlawful under the ADA, and persons of a different age would not be asked to provide that information in situations which are the same or not materially different.

**(g) Administration of Commonwealth laws and programs<sup>78</sup>**

This provision makes it unlawful for a person who performs functions or exercises powers under Commonwealth laws or under Commonwealth programs or has any other responsibility for the administration of those programs or laws, to discriminate against a person on the basis of age, in the exercise of those powers or responsibilities.

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70 ADA, s 29.

71 Note that accommodation is defined to include residential or business accommodation: ADA, s 29(4).

72 ADA, s 29(3). The term 'near relative' is defined in s 29(4).

73 ADA, s 27.

74 Premises is defined in section 5 of the ADA to include structures (such as buildings, aircraft, vehicles or vessels), places and parts of premises.

75 ADA, s 30.

76 ADA, s 30(2).

77 ADA, s 32.

78 ADA, s 31.

## 2.4 Ancillary Liability

The ADA provides for liability for an unlawful act where a person ‘causes, instructs, induces, aids or permits another person’ to do that act.<sup>79</sup> The approach to this section is likely to be assisted by consideration given to analogous provisions in the SDA<sup>80</sup> and DDA.<sup>81</sup>

The ADA also makes employers vicariously liable for age discrimination by employees, unless they can establish that they took reasonable precautions and exercised due diligence in order to avoid such discrimination.<sup>82</sup>

## 2.5 Victimisation

Victimisation that results from either actual or threatened detriment is an offence under section 51 of the ADA. Similar provisions exist at section 27(2) of the RDA, discussed at 3.5, section 94 of the SDA, discussed at 4.8, and section 42 of the DDA, discussed at 5.6.

Cases prior to 2011 (that considered the equivalent provisions in the SDA and DDA) have held that these victimisation provisions may give rise to civil and/or criminal proceedings.<sup>83</sup> This is because the definition of ‘unlawful discrimination’ in section 3 of the AHRC Act specifically includes conduct that is an offence under Division 2 of Part 5 of the ADA (which includes section 51).

However, in three cases since 2011, the Federal Court has cast doubt on whether either the Federal Court or the Federal Circuit Court has jurisdiction to hear an application under section 46PO of the AHRC Act if the alleged unlawful discrimination is an act of victimisation.<sup>84</sup> For further discussion on this issue of whether an application alleging victimisation may be brought as a civil claim pursuant to section 46PO of the AHRC Act, see 4.8.

## 2.6 General Exemptions Under the ADA

In addition to the exemptions provided in relation to specific provisions of the ADA (outlined above), the ADA contains a number of general exemptions.<sup>85</sup>

### 2.6.1 Positive discrimination

The ADA provides an exemption allowing positive measures to be taken (or ‘positive discrimination’) on the basis of age, as follows:

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79 ADA, s 56.

80 See *Elliott v Nanda* (2001) 111 FCR 240, 292-93 [163], 294-295 [169] in relation to the meaning of ‘permit’ in the context of s 105 of the SDA, discussed at 4.10.

81 See *Cooper v Human Rights & Equal Opportunity Commission* (1999) 93 FCR 481, 490 [27], 493-496 [37] – [41], in relation to s 122 of the DDA, discussed at 5.4.2.

82 ADA, s 57. Section 123(2) of the DDA is in the same terms (see 5.4.1). See also ss 18A and 18E of the RDA (see 3.6) and s 106 of the SDA (see 4.9).

83 See, for example, *O’Connor v Ross (No 1)* [2002] FMCA 210, [11].

84 *Walker v Cormack* (2011) 196 FCR 574, [37]-[41]; *Walker v State of Victoria* [2012] FCAFC 38, [98]-[100] (Gray J); *Chen v Monash University* [2016] FCAFC 66, [119]-[124] (Barker, Davies and Markovic JJ). Cf *Dye v Commonwealth Securities Limited (No 2)* [2010] FCAFC 118, [71] (Marshall, Rares and Flick JJ) where the Full Court of the Federal Court previously reached a different view.

85 The Commission’s concerns about a number of the exemptions contained in the ADA, amongst other things, were raised in its submissions to the Senate Legal and Constitutional Committee on the Age Discrimination Bill 2003: see <http://www.humanrights.gov.au/submission-age-discrimination-bill-2003>

### 33 Positive Discrimination

This Part does not make it unlawful for a person to discriminate against another person, on the ground of the other person's age, by an act that is consistent with the purposes of this Act, if:

- (a) the act provides a bona fide benefit to persons of a particular age; or

Example 1: This paragraph would cover a hairdresser giving a discount to a person holding a Seniors Card or a similar card, because giving the discount is an act that provides a bona fide benefit to older persons.

Example 2: This paragraph would cover the provision to a particular age group of a scholarship program, competition or similar opportunity to win a prize or benefit.<sup>86</sup>

- (b) the act is intended to meet a need that arises out of the age of persons of a particular age; or

Example: Young people often have a greater need for welfare services (including information, support and referral) than other people. This paragraph would therefore cover the provision of welfare services to young homeless people, because such services are intended to meet a need arising out of the age of such people.

- (c) the act is intended to reduce a disadvantage experienced by people of a particular age.

Example: Older people are often more disadvantaged by retrenchment than are other people. This paragraph would therefore cover the provision of additional notice entitlements for older workers, because such entitlements are intended to reduce a disadvantage experienced by older people.

This section is said to recognise that there are some circumstances in which age based distinctions are legitimate or justified by other strong policy interests.<sup>87</sup> The Explanatory Memorandum to the ADA explains the intention of this provision as follows:

- (a) [s 33(a)] recognises and permits a range of concessions and benefits that are provided in good faith to people of a particular age. The most common examples are discounts and concessions provided to older people. Such benefits are not seeking to give older people an unfair advantage or to exclude or disadvantage people of other ages, and have broad social acceptance.
- (b) [s 33(b)] recognises and permits measures that seek to address the needs of people of particular ages that are different to or more acute than the needs of other ages ... While this provision refers to the beneficial act in question being 'intended' to meet an age-related need, it is not necessary to establish that the person actually doing the particular act has a certain intention at the time ... [T]he provision is also directed at situations where a beneficial program or facility is established by a person or body with the intention of meeting an age-related need, but is operated by another person or body who simply carries out the policies determined by those who established the beneficial program.
- (c) [s 33(c)] recognises and permits measures that seek to overcome age-related disadvantage. Where a particular age group has been historically disadvantaged, or where social circumstances at the time are such that a particular age group has less access to certain social benefits or opportunities, measures that are aimed at alleviating these problems are allowed ... As with the needs-based exemption, the requisite intention to reduce disadvantage need not be held by the person actually providing the beneficial treatment.

The concept of positive discrimination embodied in this section of the ADA extends beyond the current understanding of 'special measures' in other federal unlawful discrimination laws. Under the SDA,<sup>88</sup> RDA<sup>89</sup> and DDA,<sup>90</sup> special measures are essentially confined to those actions taken in order to achieve substantive equality, or to meet the special needs of a particular group. Under the SDA and RDA, the taking of special measures ceases to be authorised once the purpose for which they were implemented

<sup>86</sup> Example 2 was introduced by the *Age Discrimination Amendment Act 2006* (Cth) commencing on 22 June 2006.

<sup>87</sup> See Revised Explanatory Memorandum, *Age Discrimination Bill 2003* (Cth).

<sup>88</sup> See SDA, s 7D.

<sup>89</sup> See RDA, s 8.

<sup>90</sup> See DDA, s 45.

has been achieved.<sup>91</sup> The DDA limits special measures to those ‘reasonably intended’ to address a special need or disadvantage and whose discriminatory effects are ‘necessary for implementing the measure’.<sup>92</sup>

Section 33 of the ADA is broader in its scope than the ‘special measures’ provisions found in the SDA, RDA and DDA because it authorises positive measures to be taken for purposes other than achieving substantive equality or meeting special needs. It extends to any ‘bona fide benefit’ (an expression which is not defined). Unlike the RDA or the SDA, section 33 of the ADA does not contain any temporal limitation such that the measure is no longer protected once its purposes have been achieved, although this may be implicit in sections 33(b) and (c) which require reference to be made to an existing need or disadvantage.

## 2.6.2 Exemption for youth wages

The ADA contains an exemption for youth wages as follows:

### 25 Exemption for youth wages

- (1) This Division does not make it unlawful for a person to discriminate against another person on the ground of the other person’s age, in relation to youth wages:
  - (a) in the arrangements made for the purpose of determining who should be offered work; or
  - (b) in determining who should be offered work; or
  - (c) in payment, or offer of payment, of remuneration for work.
- (2) In this section:

**youth wages** means remuneration for persons who are under 21.

The Explanatory Memorandum to the ADA states:

Youth wages are a well-recognised feature of workforce relations in Australia. This exemption will protect the competitive position of young people in the workforce by allowing employers and the like to continue to recruit and employ young people and remunerate them on the basis of an appropriate youth wage.<sup>93</sup>

## 2.6.3 Exemption relating to superannuation, insurance and credit

The ADA provides an exemption in relation to age-based discrimination in the terms and conditions on which an annuity, insurance policy or membership of a superannuation scheme is offered or refused, where the discrimination:

- is based upon actuarial or statistical data on which it is reasonable for the discriminator to rely; and
- is reasonable having regard to the matter of the data and other relevant factors; or
- 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.<sup>94</sup>

This exemption is in the same terms as that contained in section 46 of the DDA. The application of that provision of the DDA and the meaning to be given to the expression ‘reasonable’ therein has been considered in a number of cases, discussed at 5.5.2(a).

91 See SDA, s 7D(4); Article 1(4) of the *International Convention for the Elimination of all Form of Racial Discrimination*, to which s 8(1) of the RDA refers and *Gerhardy v Brown* (1985) 159 CLR 70, 139–40; *Maloney v R* (2013) 252 CLR 168.

92 See DDA, s 45.

93 Revised Explanatory Memorandum, Age Discrimination Bill 2003 (Cth).

94 ADA, ss 37(1), (2), (3).

The ADA also provides an exemption for age-based discrimination in the terms and conditions on which credit is provided or refused to a person where the discrimination:

- is based upon actuarial or statistical data on which it is reasonable for the discriminator to rely; and
- is reasonable, having regard to the matter of the data.<sup>95</sup>

Section 54 of the ADA provides for the Australian Human Rights Commission and its President to have the power to issue a notice requiring the disclosure of the source of actuarial or statistical data on which the discrimination was based, where a person has acted in a way that would, apart from the above exemptions, be unlawful. It is an offence not to provide the source of any such actuarial or statistical data if required to do so.<sup>96</sup>

The ADA also provides an exemption in relation to anything done in direct compliance with Commonwealth legislation (and regulations or instruments made under such legislation) which relates to superannuation and for certain public sector superannuation schemes.<sup>97</sup> The *Age Discrimination Amendment Act 2006* (Cth) expands the section 38 exemption. The exemption now applies to anything done in direct compliance with a regulation that relates to superannuation, even if the enabling Act does not relate to superannuation.<sup>98</sup>

## 2.6.4 Exemptions for charities, religious and voluntary bodies

Similar to the exemptions contained in the SDA<sup>99</sup> and DDA,<sup>100</sup> the ADA provides for exemptions for charities, religious and voluntary bodies.

The exemption for ‘charities’ is by way of an exemption for provisions of the governing rules of registered charities that ‘[confer] benefits for charitable purposes, or [enable] such benefits to be conferred, wholly or in part on persons of a particular age’ and ‘any act done to give effect to such a provision’.<sup>101</sup>

An act or practice of ‘a body established for religious purposes’ that ‘conforms to the doctrine, tenets or beliefs of that religion’ or ‘is necessary to avoid injury to the religious sensitivities of adherents of that religion’ is also exempt from the ADA.<sup>102</sup>

In relation to voluntary bodies, the ADA provides as follows:

### 36 Voluntary bodies

- (1) This part does not make it unlawful for a voluntary body to discriminate against a person, on the ground of the person’s age, 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.
- (2) In this section:

**registered organisation** means an organisation registered, or an association recognised, under the *Fair Work (Registered Organisations) Act 2009*.

<sup>95</sup> ADA, ss 37(4), (5).

<sup>96</sup> ADA, ss 52, 54. Similar provisions exist under the DDA: see s 107.

<sup>97</sup> ADA, s 38.

<sup>98</sup> ADA, s 38(1)(b).

<sup>99</sup> See ss 36 (Charities), 37 (Religious bodies), 39 (Voluntary bodies) of the SDA.

<sup>100</sup> See s 49 (Charities) of the DDA.

<sup>101</sup> ADA, s 34.

<sup>102</sup> ADA, s 35.

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

The Explanatory Memorandum states, in relation to section 36:

This clause provides an exemption for age discrimination by voluntary bodies, where the discrimination relates to admission to membership of the voluntary body or the provision of benefits, facilities or services to members of the body. The exemption does not extend to other possible acts of discrimination by voluntary bodies, such as in employment or in the provision of services to the public.<sup>103</sup>

### 2.6.5 Exemption in relation to health

The ADA provides an exemption in relation to exempted health programs, and anything done by a person in accordance with an exempted health program.<sup>104</sup>

Exempted health programs are defined as:

a program, scheme or arrangement that:

- (a) relates to health goods or services or medical goods or services; and
- (b) to the extent that it applies to people of a particular age, is reasonably based on evidence of effectiveness, and on cost (if cost has been taken into account in relation to the program, scheme or arrangement).

The evidence of effectiveness mentioned in paragraph (b) is evidence that is reasonably available from time to time about matters (such as safety, risks, benefits and health needs) that:

- (c) affect people of the age mentioned in that paragraph (if no comparable evidence is reasonably available from time to time in relation to people of a different age); or
- (d) affect people of the age mentioned in that paragraph in a different way to people of a different age (in all other cases).<sup>105</sup>

An example of such a program might be a scheme that provides free influenza vaccines to older people, on the basis of evidence showing that older people are at greater risk of complications as a result of influenza than are people of other ages.<sup>106</sup>

The ADA also provides an exemption for decisions relating to health or medical goods or services. This provision provides that it will not be discriminatory to take a person's age into account in making a decision relating to health or medical goods or services, if taking the person's age into account in making the decision is *reasonably* based on evidence and professional knowledge about the ability of persons of that age to benefit from those goods or services.<sup>107</sup>

103 See Revised Explanatory Memorandum, Age Discrimination Bill 2003 (Cth). In the context of the similarly-worded provisions of the SDA, it has been held that the exemption provides protection to voluntary bodies only in their relationships with their members, not in their relationships with non-members: see *Gardner v All Australian Netball Association Ltd* [2003] FMCA 81, and the discussion at 4.7.2.

104 ADA, ss 42(1), (2).

105 ADA, ss 42(6).

106 See note to s 42(1) of the ADA.

107 ADA, s 42(3).

## 2.6.6 Exemptions relating to direct compliance with laws, orders of courts, taxation legislation and social security legislation

The ADA provides an exemption in relation to acts done in direct compliance with certain federal and state and territory laws, court orders and industrial awards and agreements. A general exemption is given in relation to acts done in direct compliance with those acts or subsidiary legislative instruments contained in Schedule 1 to the ADA, or a provision of an act or subsidiary legislative instrument if the provision is contained in Schedule 2 to the ADA.<sup>108</sup> A two year exemption was provided (beginning on the day the ADA commenced) in relation to acts done in direct compliance with any other Commonwealth laws.<sup>109</sup> This exemption has now expired.

An exemption is also provided in relation to acts done in direct compliance with:

- acts or legislative instruments of a state or territory,<sup>110</sup> unless it is an instrument specified in regulations made under the ADA;<sup>111</sup> and
- a court order,<sup>112</sup> an order or award of an industrial relations tribunal,<sup>113</sup> a fair work instrument within the meaning of the *Fair Work Act 2009* (Cth)<sup>114</sup> or transitional instrument or Division 2B state instrument within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).<sup>115</sup>

The ADA also provides an exemption in relation to anything done by a person in direct compliance with a taxation law (within the meaning of the *Income Tax Assessment Act 1997* (Cth)),<sup>116</sup> and various pieces of social security legislation and subsidiary instruments listed at section 41 of the ADA, including the *National Disability Insurance Scheme Act 2013* (Cth).<sup>117</sup>

The exemption relating to direct compliance with acts of a state or territory was considered in *Keech v Metropolitan Health Service (WA)* ('*Keech*').<sup>118</sup> In *Keech*, the applicant was injured at work at the age of 66 and paid compensation under the *Workers' Compensation and Injury Management Act 1981* (WA) (the WA Act). The WA Act provided different schemes of payment whereby workers injured before attaining the age of 64 would be entitled to compensation for a longer period than workers injured after attaining this age. The applicant argued that by paying her compensation for the period prescribed by the WA Act, the respondent had treated her less favourably than a younger employee who incurred a workplace injury at the same time as she did. The applicant also argued that the respondent's conduct was not exempt from the ADA as it was not in direct compliance with the WA Act. She said the WA Act prescribed a date at which entitlements to compensation could cease, but it did not oblige employers to stop paying at this time.

Siopis J considered that the respondent's conduct was unlikely to constitute age discrimination but found it unnecessary to finally determine this issue, because in any case the respondent had directly complied with the WA Act. His Honour interpreted the WA Act as imposing an obligation on employers to pay compensation for a prescribed period and the respondent had directly complied with

108 ADA, ss 39(1), 39(1A).

109 ADA, s 39(2).

110 ADA, s 39(4).

111 ADA, s 39(5).

112 ADA, s 39(7).

113 ADA, s 39(8)(a).

114 ADA, s 39(8)(b)(i).

115 ADA, s 39(8)(b)(ii).

116 ADA, s 40. See for example, *Harste v Commissioner of Taxation* [2013] AATA 544.

117 ADA, s 41.

118 (2010) 215 FCR 393.



this requirement. As such, the employer's conduct was exempt from the ADA. His Honour made the following comments in relation to the meaning of 'direct compliance':

...in my view, the expression 'direct compliance' requires that impugned conduct is conduct which is actuated by an obligation which is directly imposed upon a party by the provisions of a statute or other nominated statutory instrument...

In this case, the respondent acted in response to the very terms of s 56 of the Compensation Act – a section of the Act which defined the extent and term of Ms Keech's entitlements to weekly payments by reference to her age at the time that the workplace accident occurred. The Compensation Act, thereby, directly imposed on the respondent an obligation to pay Ms Keech weekly payments for the defined period. By making weekly payments to Ms Keech for the duration of that term, and for no longer than that term, the respondent acted in direct compliance with the statute.<sup>119</sup>

## 2.6.7 Exemption relating to Commonwealth employment programs

The ADA provides an exemption in relation to exempted employment programs, and anything done by a person in accordance with an exempted employment program.<sup>120</sup>

An exempted employment program means a program conducted by or on behalf of the Commonwealth Government, that is primarily intended to improve the prospects of participants getting employment, or to increase workforce participation.<sup>121</sup> The program is also required to meet at least one of a list of requirements set out at section 41A(3)(c) of the ADA including, that it is intended to meet a need that arises out of the age of persons of a particular age.

## 2.6.8 Exemption in relation to migration and citizenship

The ADA provides an exemption for anything done:

- in relation to the administration of the *Migration Act 1958* (Cth) or the *Immigration (Guardianship of Children) Act 1946* (Cth) or subsidiary instruments;<sup>122</sup> or
- in direct compliance with the *Australian Citizenship Act 1948* (Cth) or the *Immigration (Education) Act 1971* (Cth).<sup>123</sup>

The exemption in relation to the administration of the *Migration Act 1958* (Cth) or the *Immigration (Guardianship of Children) Act 1946* (Cth) or subsidiary instruments is a potentially broad exemption as it appears to exempt discretionary acts not mandated by those laws or subsidiary instruments.

This exemption was considered by Nicholls J in *Jaravaza v Minister for Immigration*.<sup>124</sup> His Honour accepted the respondent's submissions that:

the phrase 'in relation to' in s 43(1) of the ADA was a 'broad connecting expression' and that the exception could not be confined to actions 'required' by the [Migration] Act or the Regulations.<sup>125</sup>

119 Ibid 401 [44]-[45]. Cited with approval in *Summers v Repatriation Commission* (2015) 230 FCR 179, 224-225 [183].

120 ADA, ss 41A(1), (2).

121 ADA, s 41A(3).

122 ADA, s 43(1).

123 ADA, s 43(2).

124 [2013] FCCA 68.

125 Ibid [104], [111].

# 3 The Racial Discrimination Act

## Contents

<b>3.1</b>	<b>Introduction to the RDA</b>	<b>28</b>
3.1.1	Scope of the RDA	28
(a)	The prohibition on discrimination in section 9	28
(b)	The right to equality before the law in section 10	29
(c)	The interface between sections 9 and 10	32
3.1.2	Other unlawful acts and offences	33
3.1.3	Interaction between RDA, state, territory and other Commonwealth Laws	33
(a)	Impact of section 10 on enjoyment of rights	34
(b)	Impact of section 10 on discriminatory state laws	34
(c)	Impact of section 10 on discriminatory territory laws	34
(d)	Impact of section 10 on discriminatory Commonwealth laws	34
(e)	Impact of section 9 on state laws	35
(f)	The RDA does not invalidate state laws that promote the objects of ICERD	35
3.1.4	Constitutionality	36
(a)	The RDA is supported by the external affairs power	36
(b)	Part IIA of the RDA does not infringe the implied right of freedom of political communication	36
<b>3.2</b>	<b>Racial Discrimination Defined</b>	<b>37</b>
3.2.1	Grounds of discrimination	37
(a)	Race	38
(b)	Ethnic origin	39
(c)	National origin	40
(d)	Immigrant status	43
3.2.2	Direct discrimination under the RDA	43
(a)	Section 9(1)	43
(i)	Proving the elements of section 9(1)	44
(ii)	Racist remark as an act of discrimination	45
(iii)	'Based on' and intention to discriminate	46
(b)	Prohibitions in specific areas of public life	48
(c)	Drawing inferences of racial discrimination	49
3.2.3	Indirect discrimination under the RDA	52
(a)	Background	52
(b)	The relationship between 'direct' and 'indirect' discrimination	52
(c)	Defining the term, condition or requirement	53
(d)	Not reasonable in the circumstances	53
(e)	Ability to comply with a requirement or condition	56
3.2.4	Interference with the recognition, enjoyment or exercise of human rights or fundamental freedoms on an equal footing	58
(a)	Human rights and fundamental freedoms defined	58
(b)	Equal footing	62

<b>3.3</b>	<b>Exceptions.....</b>	<b>63</b>
3.3.1	Special measures .....	63
(a)	Gerhardy v Brown .....	64
(b)	Applying Gerhardy .....	65
(c)	Maloney v The Queen .....	67
3.3.2	Reasonable justification.....	68
<b>3.4</b>	<b>'Racial Hatred' .....</b>	<b>70</b>
3.4.1	Background .....	70
3.4.2	Significance of term 'racial hatred' .....	71
3.4.3	Persons to whom the provisions apply .....	71
3.4.4	Causation and intention to offend .....	72
3.4.5	Reasonably likely to offend, insult, humiliate or intimidate.....	75
(a)	Objective standard .....	75
(b)	Subjective effect on applicant .....	77
(c)	Reasonable victim test .....	77
(d)	Personal offence and group claims .....	78
(e)	Context .....	79
(f)	Truth or falsity of statement not determinative of offensiveness .....	80
3.4.6	Otherwise than in private.....	80
3.4.7	Exemptions .....	83
(a)	Onus of proof .....	84
(b)	A broad or narrow interpretation? .....	84
(c)	Reasonably and in good faith .....	85
(i)	Objective and subjective elements.....	85
(ii)	Context and artistic works.....	88
(d)	Section 18D(a): artistic works .....	89
(e)	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.....	89
(f)	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.....	90
<b>3.5</b>	<b>Victimisation.....</b>	<b>91</b>
<b>3.6</b>	<b>Vicarious Liability.....</b>	<b>92</b>

# The Racial Discrimination Act

## 3.1 Introduction to the RDA

### 3.1.1 Scope of the RDA

The *Racial Discrimination Act 1975* (Cth) ('RDA') was the first Commonwealth unlawful discrimination statute to be enacted and is different in a number of ways from the *Sex Discrimination Act 1984* (Cth) ('SDA'), *Disability Discrimination Act 1992* (Cth) ('DDA') and *Age Discrimination Act 2004* (Cth) ('ADA').<sup>1</sup> This is because it is based to a large extent on, and takes important parts of its statutory language from, the *International Convention on the Elimination of all Forms of Racial Discrimination*<sup>2</sup> ('ICERD'). A copy of ICERD is scheduled to the RDA.<sup>3</sup>

Unlike the SDA, the DDA and the ADA, the RDA does not provide a discrete definition of discrimination<sup>4</sup> and then identify the specific areas of public life in which that discrimination is unlawful.<sup>5</sup> Also unlike the SDA, DDA and ADA which contain a wide range of permanent exemptions<sup>6</sup> and a process for applying for a temporary exemption,<sup>7</sup> there are only a limited number of statutory 'exceptions' to the operation of the RDA<sup>8</sup> (see 3.3 below).

Part II of the RDA sets out the prohibitions of racial discrimination and the right to equality before the law under section 10. Part IIA of the RDA, which was introduced in 1995, prohibits offensive behaviour based on racial hatred (discussed in detail under 3.4 below).

#### (a) The prohibition on discrimination in section 9

Section 9(1) prohibits what is generally known as 'direct' racial discrimination:

- (1) 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.

Section 9 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(1A), which was inserted into the RDA in 1990, prohibits 'indirect' racial discrimination:

(1A) 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

1 For a comprehensive overview of the introduction of the RDA see Race Discrimination Commissioner, *Racial Discrimination Act 1975: A Review*, (1995).

2 Opened for signature 21 December 1965, 660 UNTS 195 (entered into force generally 4 January 1969 and in Australia 30 September 1975). ICERD also creates the United Nations Committee on the Elimination of All Forms of Racial Discrimination (CERD Committee), an international body of experts responsible for monitoring state party implementation of ICERD through the examination of states reports and/or complaints from individuals about alleged violations. The work of the CERD Committee is available at <<http://www2.ohchr.org/english/bodies/cerd/>>.

3 The courts have held that where a statute, such as the RDA, gives effect to an international treaty (in this case, ICERD) the statute is to be construed in accordance with the corresponding words in the treaty: *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168, 264-265 (Brennan J). See further 6.18.

4 SDA, ss 5-7A; DDA, ss 5-8; ADA, ss 14-15.

5 SDA, Pt II; DDA, Pt 2; ADA, Pt 4.

6 SDA, Pt II, Div 4; DDA, Pt 2, Div 5; ADA, Pt 4, Div 5.

7 SDA, s 44; DDA, s 55; ADA, s 44.

8 RDA, 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).

- (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.

In addition to the general prohibition on racial discrimination in section 9, sections 11-15 of the RDA also specifically prohibit discrimination in the following areas of public life:<sup>9</sup>

- access to places and facilities;<sup>10</sup>
- land, housing and other accommodation;<sup>11</sup>
- provision of goods and services;<sup>12</sup>
- right to join trade unions;<sup>13</sup> and
- employment.<sup>14</sup>

Discrimination for the purposes of these specific prohibitions will be unlawful when a person is treated less favourably than another 'by reason of the first person's race, colour or national or ethnic origin'. These sections do not limit the generality of section 9<sup>15</sup> and have been described as 'amplifying and applying to particular cases the provisions of section 9'.<sup>16</sup>

Complaints alleging racial discrimination are sometimes considered under both section 9(1) and one of the specific prohibitions.<sup>17</sup>

## **(b) The right to equality before the law in section 10**

Section 10 of the RDA provides for a general right to equality before the law:<sup>18</sup>

### **10 Rights to equality before the law**

- (1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.
- (2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in article 5 of the Convention.
- (3) Where a law contains a provision that:
- (a) authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or

9 Note that the RDA has been held *not* to have extra-territorial operation: *Brannigan v Commonwealth* (2000) 110 FCR 566.

10 RDA, s 11.

11 RDA, s 12.

12 RDA, s 13.

13 RDA, s 14.

14 RDA, s 15.

15 RDA, s 9(4).

16 *Gerhardy v Brown* (1985) 159 CLR 70, 85 (Gibbs CJ).

17 See, for example, *Carr v Boree Aboriginal Corporation* [2003] FMCA 408.

18 Section 10 implements the obligation imposed by article 5 of ICERD to 'guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law'.

- (b) prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander;  
not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which subsection (1) applies and a reference in that subsection to a right includes a reference to a right of a person to manage property owned by the person.

There is no equivalent to section 10 in other state or Commonwealth anti-discrimination legislation. Section 10 does not make unlawful any acts, omissions or practices. It is 'concerned with the operation and effect of laws'<sup>19</sup> rather than with proscribing the acts or conduct of individuals.

The language of section 10(1) does not require the complainant to show that the infringement of their rights was 'based on'<sup>20</sup> or 'by reason of'<sup>21</sup> race, colour, or national or ethnic origin. The question under section 10 is whether the complainant, because of the operation and effect of law, does not enjoy a right to the same extent as others not of that race. As the Full Court of the Federal Court in *Bropho v Western Australia*<sup>22</sup> ('*Bropho*') stated:

In general terms, s 10(1) of the RD Act is engaged where there is unequal enjoyment of rights between racial or ethnic groups: see *Ward v Western Australia* (2002) 213 CLR 1. Section 10(1) does not require the Court to ascertain whether the cessation of rights is by reason of race, with the clear words of s 10 demonstrating that the inquiry is whether the cessation of rights is 'by reason of' of [sic] the legislation under challenge. Further, s 10 operates, not merely on the intention, purpose or form of legislation but also on the practical operation and effect of legislation (*Gerhardy* 159 CLR at 99; *Mabo v Queensland* (1988) 166 CLR 186 at 230-231; *Western Australia v Ward* 213 CLR at 103).<sup>23</sup>

In *Maloney v The Queen* French CJ said:

An important feature of s 10 is that it does not require that the law to which it applies make a distinction expressly based on race. The section is directed to the discriminatory operation and effect of the legislation. It provides a mechanism to overcome the effects of Commonwealth, State or Territory legislation to which it applies.<sup>24</sup>

It is not a requirement of section 10 that the impugned provision only affect members of a particular group and no others, nor that all members of a particular group are affected.<sup>25</sup>

Therefore, to make a successful claim under section 10 of the RDA, the complainant must be able to show:

- by reason of a law of the Commonwealth or of a state or territory (or a provision of the law);
- persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race; or
- persons of a particular race, colour or national or ethnic origin enjoy a right to a more limited extent than persons of another race.<sup>26</sup>

19 *Mabo v Queensland* (1988) 166 CLR 186, 230 (Deane J).

20 See RDA, s 9(1).

21 See RDA, ss 11-15.

22 *Bropho v Western Australia* (2008) 169 FCR 59, 80 [73]. The Australian Human Rights Commission ('the Commission') was granted leave to appear as intervener and its submissions are available at <[http://www.humanrights.gov.au/legal/submissions\\_court/intervention/bella\\_bropho.html](http://www.humanrights.gov.au/legal/submissions_court/intervention/bella_bropho.html)>. See further 3.3.2(a)(iii), 3.2.4(a) and 3.3.2 below.

23 (2008) 169 FCR 59, 80 [73].

24 (2013) 252 CLR 168, 179 [11] (French CJ). The Commission was granted leave to intervene in *Maloney v R* and its submissions are available at <<https://www.humanrights.gov.au/joan-monica-maloney-v-queen>>.

25 (2013) 252 CLR 168, [78]-[80] (Hayne J), [200] (Bell J), 302 [363] (Gageler J).

26 *Sahak v Minister for Immigration & Multicultural Affairs* (2002) 123 FCR 514, 523 [35] (Goldberg and Hely JJ).

For example, in *Mabo v Queensland*<sup>27</sup> the High Court considered whether the *Queensland Coast Islands Declaratory Act 1985* (Qld) ('the Queensland Act') breached section 10 of the RDA. The Queensland Act declared that the Murray Islands, upon first becoming part of Queensland in 1879, were vested in the Crown in right of Queensland, to the exclusion of all other rights and claims.

The majority of the High Court held that the Queensland Act discriminated on the basis of race in relation to the human rights to own property and not to be arbitrarily deprived of property, in that the native title interests that the Act sought to extinguish were only held by the indigenous inhabitants of the Murray Islands (the Miriam people). The majority found that the Queensland Act impaired the rights of the Miriam people 'while leaving unimpaired the corresponding human rights of those whose rights in and over the Murray Islands did not take their origin from the laws and customs of the Miriam people'.<sup>28</sup> Therefore, the Queensland Act was inconsistent with section 10 of the RDA and, by virtue of section 109 of the *Constitution*, inoperative.

In *Bropho*, the Full Court of the Federal Court held that, in applying section 10, it is necessary to recognise that some rights, such as property rights, are not absolute in their nature. Accordingly, actions that impact upon the ownership of property may not necessarily invalidly diminish the rights to ownership of property. The court held that 'no invalid diminution of property rights occur where the state acts in order to achieve a legitimate and non-discriminatory public goal'.<sup>29</sup> The court noted, however, that its reasoning was not 'intended to imply that basic human rights protected by the [RDA] can be compromised by laws which have an ostensible public purpose but which are, in truth, discriminatory'.<sup>30</sup>

In *Bropho*, the *Reserves (Reserve 43131) Act 2003* (WA) ('Reserves Act') and actions taken under it were said to have limited the enjoyment of the property rights of the Aboriginal residents of the Swan Valley Nyungah Community (Reserve 43131) by, in effect, closing that community. The court held that any interference with the property rights of residents was effected in accordance with a legitimate public purpose, namely to protect the safety and welfare of residents of the community.<sup>31</sup> It therefore did not invalidly diminish the property rights of the residents.

In *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury*,<sup>32</sup> McMurdo P noted that the *Bropho* approach 'places another layer' onto section 10 which is 'not apparent' from the terms of Part II of the RDA.<sup>33</sup> Having noted her concern, McMurdo P confined the application of *Bropho* to property rights and not other human rights.<sup>34</sup> Philippides JA also held that, to the extent that rights may be seen as property rights protected by section 10, the protection afforded is not absolute: 'as was recognised in *Bropho*, the content of a human right, such as the right to own property, may be modified to achieve a legitimate and non-discriminatory public purpose'.<sup>35</sup>

The *Bropho* line of reasoning was overruled by the High Court in *Maloney v The Queen* (see section 3.2.1 below). The court unanimously held that there was no basis to read down the scope of section 10 so

27 (1988) 166 CLR 186.

28 *Mabo v Queensland* (1988) 166 CLR 186, 218 (Brennan, Toohey and Gaudron JJ); see also 231 (Deane J); *Bropho v Western Australia* (2008) 169 FCR 59, 76-77 [61], 79 [70].

29 (2008) 169 FCR 59, 83-84 [83]; see generally 82-84 [80]-[83].

30 (2008) 169 FCR 59, 83 [82]. See further discussion at 3.2.4(a) below.

31 The court noted that the 'overwhelming evidence' of a number of inquiries into the circumstances of the community was that 'sexual and other forms of violence were pervasive': (2008) 169 FCR 59, 83 [82].

32 [2010] QCA 37.

33 [2010] QCA 37, [61].

34 [2010] QCA 37, [65].

35 [2010] QCA 37, [266].



that it did not apply to laws which imposed a reasonable or legitimate restriction on relevant human rights. The only exemption to section 10 is for laws that constitute special measures.<sup>36</sup>

### (c) The interface between sections 9 and 10

Section 9(1) applies to allegations that an act or conduct of a person<sup>37</sup> is discriminatory.<sup>38</sup>

Section 10 applies to a law that is alleged to be discriminatory in its terms or its practical effect.<sup>39</sup> To make a successful claim under section 10 of the RDA, the complainant must be able to show that the discrimination complained of arises by reason of a statutory provision.<sup>40</sup>

The making of laws by the Commonwealth and state and territory legislatures or delegated lawmakers cannot be challenged as an act under section 9.<sup>41</sup> Instead, the resulting law or delegated law can only be challenged under section 10.

Determining whether section 9 or section 10 applies in any particular case is important because different forms of action are required to be taken by a complainant depending on whether it is section 9 or section 10 that is said to be breached in a particular case.

Where section 9 is alleged to have been breached, a complaint of unlawful racial discrimination may be made to the Australian Human Rights Commission ('the Commission').<sup>42</sup> If the complaint cannot be resolved by conciliation, the President must terminate the complaint<sup>43</sup> and the person making the complaint can seek a legally enforceable decision from the Federal Court of Australia or the Federal Circuit Court about whether discrimination has occurred.<sup>44</sup>

In *Bropho v Western Australia*,<sup>45</sup> Nicholson J held that ordinarily an applicant claiming racial discrimination under section 9 must follow the procedures for making complaints to the Commission

36 (2013) 252 CLR 168, 191 [38]-[39] (French CJ), 206 [84]-[85] (Hayne J), 213 [112] (Crennan J), 232 [166] (Kiefel J), 241 [197] (Bell J), 286 [310], 297-298 [345]-[348] (Gageler J).

37 'Person' includes 'a body politic or corporate as well as an individual': *Acts Interpretation Act 1901* (Cth), s 2C.

38 This includes action taken by a person to implement a Commonwealth, state or territory law where that person has discretion about whether to implement the law in a discriminatory or non-discriminatory manner. However, s 10 would appear to apply to a discriminatory action taken by a person which is required by a Commonwealth, state or territory law. See *Gerhardy v Brown* (1985) 159 CLR 70, 92 (Mason J), 81 (Gibbs CJ); *Aboriginal Legal Rights Movement v South Australia* (1995) 64 SASR 558, [12] (Doyle CJ); *Western Australia v Ward* (2002) 213 CLR 1, 97-98 (Gleeson CJ, Gaudron, Gummow and Hayne JJ). The Commission was granted leave to intervene in *Western Australia v Ward* (2002) 213 CLR 1 and its submissions are available at <[http://www.humanrights.gov.au/legal/submissions\\_court/guidelines/submission\\_miriuwung.html](http://www.humanrights.gov.au/legal/submissions_court/guidelines/submission_miriuwung.html)>.

39 See *Gerhardy v Brown* (1985) 159 CLR 70, 81 (Gibbs CJ), 92-93 (Mason J) and 119 (Brennan J); *Mabo v Queensland* (1988) 166 CLR 186, 198 (Mason CJ), 204 (Wilson J), 216 (Brennan, Toohey and Gaudron JJ) and 242 (Dawson J); *Western Australia v Ward* (2002) 213 CLR 1, 98 [103] and 107 [126] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Bropho v Western Australia* (2008) 169 FCR 59, 80 [73].

40 *Sahak v Minister for Immigration & Multicultural Affairs* (2002) 123 FCR 514, 523 [35] (Goldberg and Hely JJ); *Bropho v Western Australia* (2008) 169 FCR 59, 77 [64], 80 [73].

41 *Gerhardy v Brown* (1985) 159 CLR, 81 (Gibbs CJ), 92-93 (Mason J), 120 (Brennan J); *Mabo v Queensland* (1988) 166 CLR 186, 197 (Mason CJ), 203 (Wilson J) and 216 (Brennan, Toohey and Gaudron JJ); *Western Australia v Ward* (2002) 213 CLR 1, 97-98 [102] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Bropho v Western Australia* (2008) 169 FCR 59, 79 [70].

42 The *Australian Human Rights Commission Act 1986* (Cth) ('AHRC Act') s 46P. The Commission's complaint handling regime is the exclusive means by which a person can obtain a remedy for alleged direct or indirect discrimination in breach of s 9 of the RDA. The courts therefore cannot grant remedies for a breach of s 9 unless a complaint has first been made to the Commission. *Re East; Ex parte Nguyen* (1998) 196 CLR 354, 365 [26] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Bropho v Western Australia* [2004] FCA 1209, [52]. See further 6.6 below.

43 AHRC Act, s 46PH.

44 AHRC Act, s 46PO.

45 [2004] FCA 1209.



set out in the *Australian Human Rights Commission Act 1986* (Cth) ('AHRC Act', then the *Human Rights and Equal Opportunity Commission Act 1986* (Cth)). However, issues as to constitutional validity can be litigated independently of the AHRC Act.<sup>46</sup>

In contrast to section 9 of the RDA, a person cannot rely upon section 10 to make a complaint of unlawful discrimination to the Commission. The Commission has no jurisdiction to inquire into an allegation that a state or territory law is inoperative because it is inconsistent with section 10(1). Rather, a person must lodge proceedings in either the Supreme Court of the state or territory in which the legislation was made<sup>47</sup> or in the Federal Court.<sup>48</sup>

### 3.1.2 Other unlawful acts and offences

Under section 17 of the RDA it is unlawful to incite or to assist the doing of an act of unlawful racial discrimination. To establish a successful claim the complainant will need to show the respondent was 'actively inciting or encouraging' behaviour that is made unlawful by Part II of the RDA or that the respondent assisted or promoted the doing of such acts.<sup>49</sup>

Section 16 of the RDA also prohibits the publication or display of an advertisement that indicates an intention to do an act of unlawful racial discrimination.

The RDA does not make it a criminal offence to do an act that is made unlawful by the provisions of Part II or Part IIA of the Act.<sup>50</sup> However, Part IV sets out a number of specific offences, including:

- hindering, obstructing, molesting or interfering with a person exercising functions under the RDA;<sup>51</sup> and
- committing an act of victimisation, namely:
  - refusing to employ another person;
  - dismissing or threatening to dismiss an employee;
  - prejudicing or threatening to prejudice an employee; or
  - intimidating or coercing, or imposing a penalty upon another person; by reason that the other person:
    - has made, or proposes to make a complaint under the AHRC Act;
    - has furnished, or proposes to furnish any information or documents to a person exercising powers under the AHRC Act; or
    - has attended, or proposes to attend, a conference held under the RDA or AHRC Act.<sup>52</sup>

Conduct constituting victimisation is also included in the definition of 'unlawful discrimination' in section 3 of the AHRC Act (see 1.3.1 above), allowing a person to make a complaint to the Commission in relation to it.

### 3.1.3 Interaction between RDA, state, territory and other Commonwealth Laws

Sections 9 and 10 of the RDA interact with state, territory and other Commonwealth laws in a number of ways.

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46 See further 6.6 below.

47 As occurred in the context of the SDA in *Pearce v South Australian Health Commission* (1996) 66 SASR 486.

48 As occurred in the context of the SDA in *McBain v Victoria* (2000) 99 FCR 116.

49 *Obieta v NSW Department of Education & Training* [2007] FCA 86, [232].

50 RDA, s 26.

51 RDA, s 27(1).

52 RDA, s 27(2).

**(a) Impact of section 10 on enjoyment of rights**

Section 10(1) operates to extend the enjoyment of rights under state, territory and other federal laws where those laws otherwise fail to make a right universal. In *Gerhardy v Brown*,<sup>53</sup> Mason J stated:

If racial discrimination arises under or by virtue of State law because the relevant State law merely omits to make enjoyment of the right universal, ie by failing to confer it on persons of a particular race, then s 10 operates to confer that right on persons of that particular race. In this situation the section proceeds on the footing that the right which it confers is complementary to the right created by the State law. Because it exhibits no intention to occupy the field occupied by the positive provisions of State law to the exclusion of that law the provisions of the State law remain unaffected.<sup>54</sup>

**(b) Impact of section 10 on discriminatory state laws**

Section 10(1) operates to make inoperative, by virtue of section 109 of the *Constitution*,<sup>55</sup> state laws that would otherwise operate to discriminate against people of a particular race by denying them rights or freedoms<sup>56</sup> regardless of the date the state law was enacted.<sup>57</sup> As Mason J in *Gerhardy v Brown* stated:

When racial discrimination proceeds from a prohibition in a State law directed to persons of a particular race, forbidding them from enjoying a human right or fundamental freedom enjoyed by persons of another race, by virtue of that State law, s 10 confers a right on the persons prohibited by State law to enjoy the human right or fundamental freedom enjoyed by persons of that other race. This necessarily results in an inconsistency between s 10 and the prohibition contained in the State law.<sup>58</sup>

**(c) Impact of section 10 on discriminatory territory laws**

Section 109 of the *Constitution* does not apply to a conflict between a Commonwealth law and a territory law. A territory legislature, established under section 122 of the *Constitution*, is a subordinate legislature to the Commonwealth, and is not competent to pass laws that are repugnant to a Commonwealth law. Therefore, depending on the legislative scheme in place in a particular territory, a law of that territory may be ‘treated as ineffective’ to the extent that it is inconsistent with section 10 of the RDA.<sup>59</sup>

**(d) Impact of section 10 on discriminatory Commonwealth laws**

Section 10 may operate to repeal racially discriminatory Commonwealth legislation enacted prior to the enactment of the RDA on 31 October 1975.<sup>60</sup> Whether repeal of the inconsistent law has occurred will be determined on a case by case basis.

<sup>53</sup> (1985) 159 CLR 70.

<sup>54</sup> (1985) 159 CLR 70, 98. See also *Western Australia v Ward* (2002) 213 CLR 1, 99-100 [106] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

<sup>55</sup> Section 109 of the *Constitution* provides: ‘When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid’.

<sup>56</sup> See, for example, *Mabo v Queensland* (1988) 166 CLR 186, 198 (Mason CJ), 204 (Wilson J), 216 (Brennan, Toohey and Gaudron JJ) and 242 (Dawson J); *Western Australia v Ward* (2002) 213 CLR 1, 98 [103] and 107 [126] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Maloney v The Queen* (2013) 252 CLR 168, 179 [10] (French CJ), 200-201 [66] (Hayne J), 227 [149] (Kiefel J), 252 [227] (Bell J), 282 [303] (Gageler J).

<sup>57</sup> This arises from the wording of s 109 of the *Constitution* which does not place any temporal limitations on the consideration of the relevant inconsistency. See, for example, *Ward v Western Australia* (2002) 213 CLR 1, 209 [468, [point 6]] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

<sup>58</sup> (1985) 159 CLR 70, 98-99; *Western Australia v Ward* (2002) 213 CLR 1, 100 [107] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). See *James v Western Australia* (2010) 184 FCR 582 for a discussion by the Full Court of the Federal Court on the distinction between a state law which fails to make a right universal and a state law which operates to discriminate against people of a particular race by denying them rights or freedoms.

<sup>59</sup> *Western Australia v Ward* (2002) 213 CLR 1, 108 [129] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

<sup>60</sup> See generally D Pearce and R Geddes, *Statutory Interpretation in Australia*, (8<sup>th</sup> ed, 2014) [7.9]-[7.13].

Section 10 cannot, however, prevent the enactment of a discriminatory Commonwealth law after 31 October 1975 which expressly or impliedly authorises the discrimination notwithstanding the terms of the RDA.<sup>61</sup>

Section 10 has been used as a basis for challenging Commonwealth regulations alleged to deny or impair the enjoyment of rights by members of a particular national origin.<sup>62</sup>

In *Clark v Vanstone*,<sup>63</sup> Gray J held that it was necessary, by virtue of section 10 of the RDA (amongst other factors), to read down section 4A(1) of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) ('the ATSIC Act') and clause 5(1)(k) of a 2002 Determination made under it relating to 'misbehaviour'. This was on the basis that the effect of these provisions was to impose a higher standard on office holders under the ATSIC Act (who were more likely to be Indigenous people) than on those elected or appointed to similar offices and was therefore discriminatory.

On appeal in *Vanstone v Clark*,<sup>64</sup> this aspect of the decision of Gray J was overturned. Weinberg J, with whom Black CJ agreed, noted that the 2002 Determination applied to positions held by both Indigenous and non-Indigenous persons and that 'it is no answer to the structure and text of the ATSIC Act to engage in speculation that holders of such officers were likely to be indigenous'.<sup>65</sup> His Honour stated:

Had the 2002 Determination provided a different test for suspension or termination of indigenous persons from that applicable to non-indigenous persons, it would obviously trigger the operation of s 10, and result in an adjustment of rights, as a matter of construction, as contemplated by the section ... . However, that is not the case here. There is no inconsistency of treatment based upon race within either the Act, or the 2002 Determination.<sup>66</sup>

### (e) Impact of section 9 on state laws

Section 9 of the RDA may also render inoperative inconsistent state laws, by virtue of section 109 of the *Constitution*. As Mason J in *Gerhardy v Brown* observed:

The operation of s 9 is confined to making unlawful the acts which it describes. It is s 10 that is directed to the operation of laws, whether Commonwealth, State or Territory laws, which discriminate by reference to race, colour or national or ethnic origin ... . This is not to say that s 9 of the [RDA] cannot operate as a source of invalidity of inconsistent State laws, by means of s 109 of the Constitution. Inconsistency may arise because a State Law is a law dealing with racial discrimination, the Commonwealth law being intended to occupy that field to the exclusion of any other law: *Viskauskas v Niland* (1983)153 CLR 280. Or it may arise because a State law makes lawful the doing of an act which s 9 forbids: see *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 at 490.<sup>67</sup>

### (f) The RDA does not invalidate state laws that promote the objects of ICERD

In *Viskauskas v Niland*<sup>68</sup> the High Court held that the RDA was intended to 'cover the field' in relation to racial discrimination in the provision of goods and services. Therefore, Part II of the *Anti-Discrimination Act 1977* (NSW), which dealt with racial discrimination, was inconsistent and constitutionally invalid.

61 *Pareroutja v Tickner* (1993) 42 FCR 32, 46. See also the then *Northern Territory National Emergency Response Act 2007* (Cth) s 132, as originally enacted.

62 See, for example, *Macabenta v Minister for Immigration & Multicultural Affairs* (1998) 90 FCR 202, 209-213 and *Sahak v Minister for Immigration & Multicultural Affairs* (2005) 123 FCR 514, 522-526 [31]-[55] (Goldberg and Hely JJ).

63 [2004] FCA 1105.

64 (2005) 147 FCR 299.

65 (2005) 147 FCR 299, 352 [198].

66 (2005) 147 FCR 299, 352 [199].

67 (1985) 159 CLR 70, 92-93. See also 121 (Brennan J); 146 (Deane J).

68 (1983) 153 CLR 280.

Following the decision in *Viskauskas v Niland*, the Commonwealth introduced section 6A into the RDA which, in sections (1), provides that the RDA ‘is not intended, and shall be deemed never to have been intended to exclude or limit the operation of a law of a state or territory’ which promotes the objects of the ICERD and is capable of operating concurrently with the RDA.<sup>69</sup>

However, in *University of Wollongong v Metwally*<sup>70</sup> the majority of the High Court held that this amendment could only have effect from the date it was enacted as Parliament was unable to deem that an inconsistency that had arisen by virtue of section 109 of the *Constitution* had never existed.<sup>71</sup>

A person is required to choose between making a complaint of racial discrimination or racial hatred under the AHRC Act and taking action under the equivalent state or territory legislation. If action has been taken under the state or territory legislation, the person is statute barred from making a complaint under the AHRC Act.<sup>72</sup>

### 3.1.4 Constitutionality

#### (a) The RDA is supported by the external affairs power

The constitutional validity of the RDA was considered in *Koowarta v Bjelke Petersen*.<sup>73</sup> In this case, the Queensland Government refused to approve a transfer of Crown lease to the Aboriginal Land Fund Commission for the benefit of John Koowarta and other members of the Winychanam Group. When Mr Koowarta brought proceedings alleging that the Queensland Government’s refusal to transfer the lease breached section 9 and section 12 of the RDA, the Queensland Government challenged the constitutional validity of the RDA.

The High Court upheld the validity of section 9 and section 12 of the RDA as an exercise of the Commonwealth’s power to make laws with respect to external affairs under section 51(xxix) of the *Constitution*. The High Court held that the RDA was enacted to give effect to Australia’s international obligations under the ICERD.<sup>74</sup> The majority rejected the submission that the RDA was supported by section 51(xxvi) of the *Constitution* which gives the Commonwealth the power to make laws with respect to the people of any race for whom it is deemed necessary to make special laws, on the basis that sections 9 and 12 applied equally to all persons and were not a special law for the people of any one race.<sup>75</sup>

#### (b) Part IIA of the RDA does not infringe the implied right of freedom of political communication

The case of *Hobart Hebrew Congregation v Scully*<sup>76</sup> considered whether Part IIA of the RDA (prohibiting offensive behaviour based on racial hatred) infringed upon the implied constitutional freedom of political communication. Commissioner Cavanough referred to *Lange v Australian Broadcasting Corporation*<sup>77</sup>

69 *Racial Discrimination Amendment Act 1983* (Cth). Similar provisions exist in the SDA (ss 10(3), 11(3)), the DDA (s 13(3)) and the ADA (s 12(3)).

70 (1984) 158 CLR 447.

71 (1984) 158 CLR 447, 455-458 (Gibbs CJ), 460-463 (Murphy J), 478 (Deane J), 475 (Brennan J).

72 RDA, s 6A(2). Provisions to this effect are also found in the SDA (ss 10(4), 11(4)), the DDA (s 13(4)), and the ADA (s 12(4)).

73 (1982) 153 CLR 168.

74 (1982) 153 CLR 168, 211-221 (Stephen J), 222-235 (Mason J), 237-242 (Murphy J), 253-261 (Brennan J).

75 (1982) 153 CLR 168, 210-211 (Stephen J), 186-187 (Gibbs CJ), 245 (Wilson J), 261-262 (Brennan J). The scope of the ‘race power’ in s 51(xxvi) of the *Constitution* was considered by the High Court in *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

76 *Hobart Hebrew Congregation v Scully* [2000] HREOCA 38.

77 (1997) 189 CLR 520.

and *Levy v Victoria*<sup>78</sup> and found that while the restrictions imposed by section 18C(1) of the RDA might, in certain circumstances, burden freedom of communication about government and political matters, the exemptions available in section 18D meant that 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'.<sup>79</sup> The legitimate end included the fulfilment of Australia's international obligations under ICERD, in particular article 4.

In *Jones v Scully*,<sup>80</sup> Mr Jeremy Jones sought to have the determination of Commissioner Cavanough enforced. The respondent argued that Part IIA of the RDA was constitutionally invalid because it infringed the implied freedom of political communication. Justice Hely held that Part IIA was constitutionally valid:

I agree with the Commissioner that, bearing in mind the exemptions available under s 18D, Pt IIA of the RDA is reasonably appropriate and adapted to serve the legitimate end of eliminating racial discrimination. Section 18D, by its terms, does not render unlawful anything that is said or done "reasonably and in good faith" providing that it falls within the criteria set out in pars (a)-(c). I consider that those exemptions provide an appropriate balance between the legitimate end of eliminating racial discrimination and the requirement of freedom of communication about government and political matters required by the Constitution. I accordingly reject the respondent's argument that the RDA should be declared unconstitutional "for the sake of freedom to communicate political matters".<sup>81</sup>

In *Toben v Jones*,<sup>82</sup> the appellant argued that to interpret section 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 section 51(xxix) of the *Constitution*, as article 4 of ICERD specifically refers to discrimination because of 'racial hatred'.

The Full Court of the Federal Court held that section 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 ICERD. The failure to fully implement ICERD (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 article 4 of ICERD but also at the other provisions of ICERD and the *International Covenant on Civil and Political Rights*, which dealt with the elimination of racial discrimination in all its forms.<sup>83</sup>

## 3.2 Racial Discrimination Defined

### 3.2.1 Grounds of discrimination

The RDA makes unlawful discrimination 'based on race, colour, descent or national or ethnic origin'.<sup>84</sup> Section 5 of the RDA extends the operation of sections 11, 12(1), 13, 14(1), 14(2) and 15(1) to include

78 (1997) 189 CLR 579.

79 *Hobart Hebrew Congregation v Scully* [2000] HREOCA 38.

80 (2002) 120 FCR 243.

81 (2002) 120 FCR 243, 306 [240].

82 (2003) 129 FCR 515.

83 (2003) 129 FCR 515, 524-525 [17]-[21] (Carr J), 528 [50] (Kiefel J), 534- 551[83]-[144] (Allsop J).

84 The grounds of unlawful discrimination in the sections of the RDA that prohibit discrimination in specific areas of public life, are 'race, colour or national or ethnic origin', omitting the ground of 'descent': see RDA, ss 10, 11, 12, 13, 14, 15 and 18C.

discrimination on the basis of a person's status as an immigrant. While these grounds of discrimination are not defined in the RDA, their meaning has been considered in a number of cases.<sup>85</sup>

### (a) Race

Courts have generally taken the view that 'race' as described in anti-discrimination legislation is a broad term and should be understood in the popular sense rather than as a term of art.<sup>86</sup> In *King-Ansell v Police*<sup>87</sup> ('*King-Ansell*') the New Zealand Court of Appeal rejected a biological test of race which distinguished people in terms of genetic inheritance and stated:

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.<sup>88</sup>

The meaning of 'race' was considered in the context of disputes between Aboriginal people in *Williams v Tandanya Cultural Centre*.<sup>89</sup> 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 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.<sup>90</sup>

In *Carr v Boree Aboriginal Corporation*,<sup>91</sup> 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'.<sup>92</sup> His Honour concluded that 'the provisions of the RDA apply to all Australians'.<sup>93</sup>

<sup>85</sup> Note that in *Phillip v State of New South Wales* [2011] FMCA 308 Lloyd Jones FM dismissed an application alleging discrimination under the RDA because the application was advanced with the characteristic of the applicant's accent as being substituted for race, colour, ethnic or national origin. His Honour stated that the issue of his accent must be directly linked to at least one of race, colour, ethnic or national origin [225].

<sup>86</sup> *Ealing London Borough Council v Race Relations Board* [1972] AC 342, 362 (Lord Simon).

<sup>87</sup> [1979] 2 NZLR 531.

<sup>88</sup> [1979] 2 NZLR 531, 542 (Richardson J).

<sup>89</sup> [2001] FMCA 46.

<sup>90</sup> [2001] FMCA 46, [21].

<sup>91</sup> [2003] FMCA 408.

<sup>92</sup> [2003] FMCA 408, [9]. The decision does not disclose what the race of the applicant is, other than being 'non-Aboriginal'.

<sup>93</sup> [2003] FMCA 408, [14]. Note, however the discussion at 3.4.3 below of the decision in *McLeod v Power* [2003] FMCA 2 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, [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, [62]. See also *Philip v State of NSW* [2011] FMCA 308 where Lloyd-Jones FM stated that the term 'African' was a 'gross oversimplification' as Africa did not comprise a single racial group and therefore did not meet the test of demonstrating 'race', [73]-[76].

## (b) Ethnic origin

Religious discrimination is not, per se, made unlawful by the RDA.<sup>94</sup> However the term 'ethnic origin' has been interpreted broadly in a number of jurisdictions to include Jewish and Sikh people. 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.<sup>95</sup>

Similarly, the House of Lords held in *Mandla v Dowell Lee*<sup>96</sup> that for a group (in that instance, 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.

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, to a finding that a group constitutes an 'ethnic group':

- 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.<sup>97</sup>

In *Miller v Wertheim*,<sup>98</sup> the Full Court of the 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"<sup>99</sup> 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

94 Note, however, that complaints about religious discrimination in employment may be made to the Commission under the ILO 111 discrimination provisions of the AHRC Act, although this does not give rise to enforceable remedies: see 1.3.2(a). The Commission has recommended that a federal law be introduced making unlawful discrimination on the ground of religion or belief and vilification on the ground of religion or belief: Human Rights and Equal Opportunity Commission, *Isma – Listen: National consultations on eliminating prejudice against Arab and Muslim Australians* (2004), 129.

95 [1979] 2 NZLR 531, 543.

96 [1983] 2 AC 548.

97 [1983] 2 AC 548, 562.

98 [2002] FCAFC 156.

99 [2002] FCAFC 156, [14]. See also *Jones v Scully* (2002) 120 FCR 243, 271-273 [110]-[113], *Jones v Toben* [2002] FCA 1150, [101], *Jeremy Jones v Bible Believers Church* [2007] FCA 55, [21] and *Silberberg v Builders Collective of Australia Inc* (2007) 164 FCR 475, 482 [22] where it was also found, in the context of complaints of racial hatred under Part IIA of the RDA, that Jews in Australia are a group of people with a common 'ethnic origin' for the purposes of the RDA.



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.<sup>100</sup>

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 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 introduced Part IIA of the RDA which prohibits offensive 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.<sup>101</sup>

Cases that have considered this issue in other jurisdictions have found that Muslims do not constitute a group with a common ethnic origin because while Muslims professed a common belief system, the Muslim faith was widespread covering many nations, colours and languages.<sup>102</sup>

### (c) National origin

The term ‘national origin’ has been interpreted by the courts as being distinct from nationality or citizenship. ‘National origin’ has been characterised as a status or attribute that is fixed at the time of birth whereas nationality and citizenship have been described as a ‘transient status’, capable of change through a person’s lifetime. Acts of discrimination based on nationality or citizenship are not prohibited by the RDA.

In *Australian Medical Council v Wilson*<sup>103</sup> (*‘Siddiqui’*) Sackville J held ‘national origin’ ‘does not simply mean citizenship’.<sup>104</sup> His Honour cited with approval Lord Cross in *Ealing London Borough Council v Race Relations Board*,<sup>105</sup> 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.

<sup>100</sup> [2002] FCAFC 156, [13].

<sup>101</sup> Explanatory Memorandum, *Racial Hatred Bill 1994* (Cth), 2-3.

<sup>102</sup> See, for example, the UK decisions of *Tariq v Young* (Unreported, Employment Appeals Tribunal, 24773/88) and *Nyazi v Rymans Ltd* (Unreported, Employment Appeals Tribunal, 6/88). 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.

<sup>103</sup> (1996) 68 FCR 46.

<sup>104</sup> (1996) 68 FCR 46, 75. Note that Black CJ and Heerey J did not specifically consider the meaning of ‘national origin’.

<sup>105</sup> [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.<sup>106</sup>

Sackville J stated that this view was powerfully supported by article 1(2) of ICERD, 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.<sup>107</sup>

The Full Court of the Federal Court in *Macabenta v Minister for Immigration & Multicultural Affairs*<sup>108</sup> ('*Macabenta*') followed *Siddiqui* and rejected the submission that 'national origin' could be equated with 'nationality' for the purposes of sections 9 and 10 of the RDA.<sup>109</sup> The Full Court held that the phrase 'race, colour or national or ethnic origin' in section 10 of the RDA should have the same meaning in the RDA as it has in ICERD, 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'.<sup>110</sup> 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 enquiry when assessing whether the indicia of a law include national origin as a discrimin. 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).<sup>111</sup>

In *Commonwealth v McEvoy*,<sup>112</sup> 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

106 [1972] AC 342, 365 (Lord Cross), cited in *Australian Medical Council v Wilson* (1996) 68 FCR 46, 75.

107 (1996) 68 FCR 46, 75.

108 (1998) 90 FCR 202.

109 (1998) 90 FCR 202, 210-211. See also *Ebber v Human Rights & Equal Opportunity Commission* (1995) 129 ALR 455.

110 (1998) 90 FCR 202, 209-210. A similar approach was taken to the word 'colour' in s 18C of the RDA by Brown FM in *McLeod v Power* [2003] FMCA 2, [56], although his Honour did not mention the decision in *Macabenta v Minister for Immigration & 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 s 18C and the whole of the RDA itself'.

111 (1998) 90 FCR 202, 209-211.

112 (1999) 94 FCR 341.

birth or by the national origin of a parent or parents, or a combination of some of those factors'.<sup>113</sup> 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. This meant that Mr Stamatov was found to be 'uncheckable' and therefore refused employment. 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.<sup>114</sup>

The same approach was taken by Merkel J in *De Silva v Ruddock (in his capacity as Minister for Immigration & Multicultural Affairs)*:<sup>115</sup>

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.<sup>116</sup>

Merkel J's decision was upheld on appeal<sup>117</sup> and was followed by Raphael FM in *AB v New South Wales Minister for Education & Training*.<sup>118</sup> In that case, an interim injunction was sought against a decision to deny enrolment in a New South Wales 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'.<sup>119</sup>

In *AB v New South Wales*<sup>120</sup> Driver FM dealt with the substantive issues that had first been litigated before Raphael FM. Driver FM held that the condition or requirement imposed on the applicant that he be an Australian citizen or a permanent resident in order to pursue study was not reasonable in the circumstances. However, because the condition or requirement was one pertaining to the 'nationality' or 'citizenship' not 'national origin' it was not discriminatory. In reaching this conclusion, Driver FM noted that 'national origin' had the meaning given to it by the Full Court of the Federal Court in *Macabenta* (see further below 3.2.3(e)).<sup>121</sup>

In *Kienie & Ors v Commonwealth of Australia*<sup>122</sup> the court considered whether the General Employment & Entitlements Redundancy Scheme (GEER scheme) amounted to indirect racial discrimination. Under the GEER scheme it was a condition or requirement that claimants be an Australian citizen or permanent resident in order to claim entitlements. The applicants were of German nationality working

113 (1999) 94 FCR 341, 352 [34].

114 (1999) 94 FCR 341, 352 [35].

115 *De Silva v Ruddock (in his capacity as Minister for Immigration & Multicultural Affairs)* (Unreported Federal Court of Australia, Merkel J, 19 February 1998).

116 *De Silva v Ruddock (in his capacity as Minister for Immigration & Multicultural Affairs)* (Unreported Federal Court of Australia, Merkel J, 19 February 1998) (emphasis in original).

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

118 [2003] FMCA 16.

119 [2003] FMCA 16, [13]-[14]. It is noted that complaints about discrimination in employment on the basis of nationality may be made to the Commission under the ILO 111 discrimination provisions of the AHRC Act, although this does not give rise to enforceable remedies: see 1.3.2(a).

120 [2005] FMCA 1113.

121 [2005] FMCA 1113, [52].

122 [2011] FMCA 210.

in Australia under temporary business visas. When their employer went into liquidation the GEER scheme was applied to its employees. The applicants were refused entitlements. Lloyd-Jones FM applied the approach in *De Silva v Minister for Immigration*<sup>123</sup> and in *AB v NSW Minister for Education and Training*<sup>124</sup> and the distinction between ‘nationality’ and ‘national origin’. His Honour held that the requirement was reasonable in the circumstances and further, that the benefits afforded to Australian citizens or permanent residents under the GEER scheme did not of itself discriminate against people from a particular ‘national origin’.

#### (d) Immigrant status

Section 5 of the RDA extends the operation of sections 11, 12(1), 13, 14(1), 14(2), 15(1), 15(2) and 18 to include discrimination on the basis of a person’s status as an immigrant. There is little case law on the meaning of ‘immigrant status’.

In *Jin v University of Queensland*,<sup>125</sup> Ms Jin had sought admission to a veterinary science program at the University of Queensland. Ms Jin was an American who was resident in Australia. She claimed that the admission requirements for the program discriminated against people whose first degree was from a university outside Australia. She, as an American, had a first degree from a university in the United States. She claimed that this admission requirement amounted to indirect discrimination in the provision of a service, contrary to section 13 of the RDA, by reason of the fact that she was or had been an immigrant.

It was agreed by the parties that Ms Jin was an immigrant. However, Judge Jarrett in the Federal Circuit Court held that section 5 of the RDA did not extend the operation of the prohibition on indirect discrimination in section 9(1A) of the RDA.<sup>126</sup> As a result, although section 9(1A) of the RDA extended the prohibition on discrimination in relation to the provision of goods and services in section 13 of the RDA to include indirect discrimination by reason of a person’s ‘race, colour, descent or national or ethnic origin’, this did not include indirect discrimination on the grounds of a person’s immigrant status.<sup>127</sup>

The result of this decision is that the prohibitions on discrimination on the basis of immigrant status that section 5 reads into sections 11, 12(1), 13, 14(1), 14(2), 15(1), 15(2) and 18 of the RDA will be limited to direct discrimination.

### 3.2.2 Direct discrimination under the RDA

#### (a) Section 9(1)

Section 9(1) prohibits what is generally referred to as ‘direct’ racial discrimination:

- (1) 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.

This broad prohibition is based on the definition of ‘racial discrimination’ contained in article 1(1) of ICERD.<sup>128</sup>

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123 (1998) 89 FCR 502.

124 [2003] FMCA 16.

125 [2015] FCCA 2982.

126 [2015] FCCA 2982 at [38].

127 [2015] FCCA 2982 at [41]-[42].

128 Article 1(1) of ICERD provides: ‘In this Convention, the term ‘racial discrimination’ shall mean any distinction, exclusion,

To establish a breach of section 9(1), a complainant must establish the following elements:

- a person did an act;<sup>129</sup>
- the act involved a distinction, exclusion, restriction or preference;<sup>130</sup>
- the act was based on race, colour, descent or national or ethnic origin (see 3.2.2(a)(iii) below); and
- the act had 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 (see 3.2.4 below).

**(i) Proving the elements of section 9(1)**

The decision of the Full Court of the Federal Court in *Baird v Queensland*,<sup>131</sup> emphasises a number of aspects to the correct approach to proving the elements of section 9(1) of the RDA.<sup>132</sup> This case concerned the underpayment of wages to Aboriginal people living in the Hope Vale and Wujal Wujal communities in Queensland. Those communities were managed, in the relevant period, by the Lutheran Church ('the Church') which was funded by the Queensland government ('the Government') for this purpose.

It was alleged that the payment of under-award wages was racially discriminatory, contrary to the RDA. The claim covered the period from 1975 until 1986 (after which time Aboriginal people living on Government and church-run communities were paid award wages). The applicants argued that the Government was responsible for the discrimination either as the employer through the agency of the Church, contrary to section 15 of the RDA and/or through the act of paying grants to the Church which were calculated to include a component for wages to be paid at under-award rates, contrary to section 9(1) of the RDA. Significantly, the Church was not a respondent to the case.

At first instance,<sup>133</sup> Dowsett J found that the claim under section 15 of the RDA failed because the Church, not the Government, employed the applicants and it did so in its own right. His Honour also rejected the claim under section 9(1) because there was no basis for asserting that the calculation of the grants involved a discriminatory element, nor was there a basis for finding that the payment of grants had the 'purpose or effect of depriving the applicants of their proper pay rates'.<sup>134</sup>

On appeal, the decision of Dowsett J was overturned.<sup>135</sup> Allsop J (with whom Spender and Edmonds JJ agreed) found that Dowsett J had erred in requiring the appellants to first, demonstrate an obligation for the Government to make payments to the Church and secondly, provide a 'real life comparator' or comparison against which to assess the 'discriminatory element'.

The Full Court held that neither aspect is a necessary element of section 9(1). Allsop J stated that the purpose of ICERD and the RDA is the 'elimination of racial discrimination in **all** its forms and

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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 human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'.

129 'Person' includes 'a body politic or corporate as well as an individual': *Acts Interpretation Act 1901* (Cth) s 2C.

130 In the absence of any significant judicial consideration, it seems that these terms should be given their ordinary meaning: for example, this would appear to be the approach of Sackville J in *Australian Medical Council v Wilson* (1996) 68 FCR 46.

131 (2006) 156 FCR 451.

132 For a discussion of this case see Jonathon Hunyor, 'Landmark decision in Aboriginal wages case' (2007) 45(1) *Law Society Journal* 46.

133 *Baird v Queensland* (No 1) [2005] FCA 495.

134 [2005] FCA 495, [142].

135 (2006) 156 FCR 451. The Commission was granted leave to intervene in the appeal. The Commission's submissions are available at <[http://www.humanrights.gov.au/legal/submissions\\_court/intervention/baird.html](http://www.humanrights.gov.au/legal/submissions_court/intervention/baird.html)>.

manifestations – not merely as manifested by people who are obliged to act in a particular way’, and that to achieve this broad purpose ‘requires broad and elastic terminology’.<sup>136</sup> In particular, Allsop J noted that:

it is important to treat the terms of s 9(1) as comprising a composite group of concepts directed to the nature of the act in question, what the act involved, whether the act involved a distinction etc based on race and whether it had the relevant purpose or effect ...<sup>137</sup>

Allsop J also noted that section 9(1) does not require a direct comparison to be available to demonstrate discrimination, observing that ‘[t]hose suffering the disadvantage of discrimination may find themselves in circumstances quite unlike others more fortunate than they’.<sup>138</sup>

The Full Court found that, on the facts as determined by Dowsett J, a breach of section 9(1) was made out. The acts of calculating and paying the grants by the Government clearly involved a distinction between award wages and below-award wages. This distinction was *based on* race because it was made by reference to the Aboriginality of the persons on reserves who were to be paid out of those grants. The Full Court also concluded that the act of the Government involving the distinction based on race could be seen to have ‘a causal effect on the impairment of the right of the appellants as recognised by article 5 of the Convention to equal pay for equal work’.<sup>139</sup>

## **(ii) Racist remark as an act of discrimination**

In *Qantas Airways Ltd v Gama*,<sup>140</sup> the Full Court of the Federal Court accepted that a racist remark may, depending on the circumstances, be sufficient to constitute an act of discrimination within the scope of section 9 of the RDA.

At first instance,<sup>141</sup> Raphael FM accepted that the making of remarks to the applicant in the workplace that he looked like a ‘Bombay taxi driver’ and walked up stairs ‘like a monkey’ denigrated him on the basis of his race and therefore amounted to acts of racial discrimination under section 9.

On appeal, Qantas argued that the racist remarks were not sufficient of themselves to constitute an act of discrimination. Qantas submitted that as Raphael FM had rejected the applicant’s other claims of racial discrimination in employment relating to such matters as the denial of promotions and training opportunities, and there was no evidence of systemic racial bullying or harassment, there was no nexus between the racist remarks and any adverse impact on the conditions of his employment.<sup>142</sup>

The Full Court of the Federal Court unanimously rejected Qantas’ submission on this point.<sup>143</sup> It held that the making of a remark was an ‘act’ for the purposes of section 9.<sup>144</sup> It also held that, in the circumstances of the case, the act involved a distinction based on race, noting:

It may be that the remark involves a distinction because it is made to a particular person and not to others. The remark may convey no express or implicit reference to the person’s race, colour, descent or national

<sup>136</sup> (2006) 156 FCR 451, 468 [62] (emphasis in original).

<sup>137</sup> (2006) 156 FCR 451, 468 [61].

<sup>138</sup> (2006) 156 FCR 451, 469 [63].

<sup>139</sup> (2006) 156 FCR 451, 471–472 [74] (Allsop J).

<sup>140</sup> (2008) 167 FCR 537. The Commission was granted leave to appear as intervener in the appeal and its submissions are available at <[http://www.humanrights.gov.au/legal/submissions\\_court/intervention/qantas\\_v\\_gama.html](http://www.humanrights.gov.au/legal/submissions_court/intervention/qantas_v_gama.html)> and <[http://www.humanrights.gov.au/legal/submissions\\_court/intervention/gama.html](http://www.humanrights.gov.au/legal/submissions_court/intervention/gama.html)>.

<sup>141</sup> *Gama v Qantas Airways Ltd (No 2)* [2006] FMCA 1767.

<sup>142</sup> (2008) 167 FCR 537, [73].

<sup>143</sup> (2008) 167 FCR 537, [76] (French and Jacobson JJ, with whom Branson J generally agreed, [122]).

<sup>144</sup> (2008) 167 FCR 537, [76].

or ethnic origin. Nevertheless, a linkage may be drawn between the distinction effected by the remark and the person's race or other relevant characteristic by reason of the circumstances in which the remark was made or the fact that it was part of a pattern of remarks directed to that person and not to others of a different race or relevant characteristic. Where the remark, critical of one person and not others, expressly or by implication links the criticism or denigration to that person's race then that linkage establishes both the distinction and its basis upon race. That was the present case.<sup>145</sup>

In relation to the final element of section 9, impairment of a person's enjoyment on an equal footing of any human right or fundamental freedom, the court held:

The denigration of an employee on the grounds of that person's race or other relevant attribute can properly be found to have the effect of impairing that person's enjoyment of his or her right to work or to just and favourable conditions of work.<sup>146</sup>

And further:

Undoubtedly remarks which are calculated to humiliate or demean an employee by reference to race, colour, descent or national or ethnic origin, are capable of having a very damaging impact on that person's perception of how he or she is regarded by fellow employees and his or her superiors. They may even affect their sense of self worth and thereby appreciably disadvantage them in their conditions of work. Much will depend on the nature and circumstances of the remark.<sup>147</sup>

The court accepted that the finding at first instance that the relevant remarks adversely affected the applicant's conditions of employment was open to Raphael FM on the facts.<sup>148</sup>

### **(iii) 'Based on' and intention to discriminate**

Unlawful discrimination as defined by section 9(1) of the RDA requires that a 'distinction, exclusion, restriction or preference' be 'based on' race or other of the related grounds.

Section 18 of the RDA provides that where an act is done for two or more reasons, and one of the reasons is race (or other ground), the act will be taken to be done by reason of race (or other ground), whether or not this is the dominant or even a substantial reason for doing the act. It is sufficient if race or another ground is simply one of the reasons for doing an unlawful act.

The meaning of 'based on' in section 9(1) was considered at length by Weinberg J in *Macedonian Teachers' Association of Victoria Inc v Human Rights & Equal Opportunity Commission*<sup>149</sup> ('*Macedonian Teachers*'). In this case, his Honour suggested that the expression 'based on' in section 9(1) of the RDA 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.<sup>150</sup>

After considering Australian and international authorities,<sup>151</sup> Weinberg J found that the relevant test imputed by the words 'based on' was one of 'sufficient connection' rather than 'causal nexus'.<sup>152</sup> His Honour held that while there must be a 'close relationship between the designated characteristic and

<sup>145</sup> (2008) 167 FCR 537, [76]

<sup>146</sup> (2008) 167 FCR 537, [77]. For a further discussion of this element of s 9(1), see 3.2.4 below.

<sup>147</sup> (2008) 167 FCR 537, 564 [78].

<sup>148</sup> (2008) 167 FCR 537, 564 [78].

<sup>149</sup> (1998) 91 FCR 8.

<sup>150</sup> (1998) 91 FCR 8, 29.

<sup>151</sup> (1998) 91 FCR 8, 24-41.

<sup>152</sup> (1998) 91 FCR 8, 33.

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'.<sup>153</sup>

The approach of Weinberg J to the meaning of 'based on' was endorsed by the Full Court of the Federal Court in *Bropho v Western Australia*.<sup>154</sup> This was an appeal against the decision of Nicholson J<sup>155</sup> to dismiss claims by a member of the Swan Valley Nyungah Community Aboriginal Corporation that the *Reserves (Reserve 43131) Act 2003 (WA)* ('Reserves Act') and actions taken by an Administrator under that Act breached sections 9, 10, and 12 of the RDA.

The Full Court unanimously dismissed the appeal. However, the appeal decision identified certain errors in the approach of Nicholson J to the operation of sections 9 and 10 of the RDA. In particular, the court noted that Nicholson J may have dealt with the various allegations of discrimination on the basis that there was no material distinction between the expression 'by reason of' in sections 10 and 12 and 'based on' in section 9.<sup>156</sup>

The Full Court said there was no reason to doubt the correctness of the following conclusions of Weinberg J in *Macedonian Teachers*:

There appears to me to be no authority which binds me to hold that the phrase 'based on' in s 9(1) of the Act is to be understood as synonymous with the other expressions typically used in anti-discrimination legislation such as, 'by reason of', or 'on the ground of'.

What is established by the authorities is that anti-discrimination legislation should be regarded as beneficial and remedial legislation. It should, therefore, be given a liberal construction. I am conscious of the fact that 'the task remains one of statutory construction' and a court 'is not at liberty' to give such legislation 'a construction that is unreasonable or unnatural' – see *IW v The City of Perth* (1997) 191 CLR 1 at 12 per Brennan CJ and McHugh J. See also *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78 at 88 per Davies J. There is, however, nothing 'unreasonable or unnatural', in my view, in treating as encompassed within the phrase 'based on' the meaning of 'by reference to', rather than the more limited meaning of 'by reason of'.<sup>157</sup>

Despite Nicholson J's apparent failure to give the expression 'based on' in section 9(1) its broader meaning, his Honour's decision to dismiss the claims under sections 9 and 12 was upheld.<sup>158</sup> The Full Court said that what was important was that his Honour had rejected the contention that the Administrator had acted to exclude the appellant (and others) from the reserve 'by reason of' race. It was therefore:

not a large step to say that, even on the broader meaning of the expression 'based on' discussed by Weinberg J in *Macedonian Teachers' Association*, the act of the administrator of excluding the appellant was not taken by reference to the appellant's race. It was taken by reference to her (and others) as a member of a dysfunctional community in which the young had been, and continued to be, at risk of serious harm.<sup>159</sup>

153 (1998) 91 FCR 8, 33. The Full Court of the 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].

154 (2008) 169 FCR 59. The Commission was granted leave to appear as intervener and its submissions are available at <[http://www.humanrights.gov.au/legal/submissions\\_court/intervention/bella\\_bropho.html](http://www.humanrights.gov.au/legal/submissions_court/intervention/bella_bropho.html)>.

155 *Bropho v Western Australia* [2007] FCA 519.

156 *Bropho v Western Australia* (2008) 169 FCR 59, 78 [66].

157 *Macedonian Teachers*, 29-30 cited in *Bropho v Western Australia* (2008) 169 FCR 59, 79 [68].

158 *Bropho v Western Australia* (2008) 169 FCR 59, 79-80 [71]-[72].

159 (2008) 169 FCR 59, 79-80 [71].



In *Macedonian Teachers* Weinberg J also stated that section 9(1) ‘should not be construed in such a way as to confine its proscription of racial discrimination to circumstances where there is an element of the improper motive [in the act]’.<sup>160</sup> Weinberg J’s conclusion that section 9(1) does not require motivation or intention to discriminate followed the decision of *Australian Medical Council v Wilson*<sup>161</sup> where Sackville J reviewed the Australian authorities in relation to other anti-discrimination statutes<sup>162</sup> and found that ‘the preponderance of opinion favours the view that section 9(1) [of the RDA] does not require an intention or motive to engage in what can be described as discriminatory conduct’.<sup>163</sup>

In *House v Queanbeyan Community Radio Station*<sup>164</sup> Neville FM found that the decision of the respondent radio station to refuse the membership applications of two Aboriginal women contravened section 9(1) of the RDA. The decision to refuse the membership applications was made at a meeting of the board of the radio station. The original draft of minutes of that meeting stated:

Wayne said he didn’t want any of them as members saying that they wanted to take over the station and the aboriginals were fighting on the street corners and he didn’t want them. Ron moved that all the applications be rejected. Rick said we would need to have a good reason for refusal. Brian asked if any memberships had been refused in the past and Wayne said there had been no refusals.

The minutes were subsequently amended to remove these remarks. The two women were informed their applications were refused because they had applied for family membership but they lived at different addresses.

Neville FM found that the statements made at the Board meeting contravened section 9(1) of the RDA. By virtue of section 18A of the RDA the respondent radio station was found to be vicariously liable for the acts of its board members. His Honour added that even if the membership applications had been rejected because they failed to comply with ‘the somewhat doubtful “family membership” requirement of the radio station’ that was ‘but one reason for rejection’. Therefore:

Having found that statements contrary to s 9(1) of the Act had been made at the Board meeting in July 2006, whether or not the family membership consideration was relevant, by virtue of s 18 of the Act, the racially discriminatory statements are taken to be the relevant reason.<sup>165</sup>

His Honour observed that while he did not consider that there was ‘any malice or intent to be racially discriminatory by any of the Board members of the respondent radio station towards the applicants, the jurisprudence in relation to the RDA clearly states that ‘intention is not a pre-requisite or requirement for an act to be rendered or found to be unlawful for the purposes of s 9(1)’.<sup>166</sup>

## (b) Prohibitions in specific areas of public life

In addition to section 9(1), sections 11-15 of the RDA prohibit discrimination in specific areas of public life ‘by reason of the first person’s race, colour or national or ethnic origin’.<sup>167</sup> Direct discrimination in some of these areas is also prohibited on the grounds of a person’s immigrant status, by virtue of section 5.

<sup>160</sup> (1998) 91 FCR 8, 39.

<sup>161</sup> (1996) 68 FCR 46.

<sup>162</sup> *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).

<sup>163</sup> (1996) 68 FCR 46, 74. See also *Bropho v Western Australia* [2007] FCA 519 where Nicholson J at [447] noted a breach of s 9 can be found ‘regardless of the motive or intent of the act’. This aspect of Nicholson J’s reasoning was cited, without demur, by the Full Court of the Federal Court on appeal: *Bropho v Western Australia* (2008) 169 FCR 59, 78-79 [67].

<sup>164</sup> [2008] FMCA 897.

<sup>165</sup> [2008] FMCA 897, [109].

<sup>166</sup> [2008] FMCA 897, [110].

<sup>167</sup> 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 3.4.4 below.



In *Purvis v New South Wales (Department of Education & Training)*<sup>168</sup> the High Court considered the expression 'because of' in the DDA.<sup>169</sup> 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.<sup>170</sup>

In *Trindall v NSW Commissioner of Police*,<sup>171</sup> the applicant, a man of 'mixed Aboriginal/African race', asserted that his employment was subject to unreasonable restrictions by reason of his inherited condition known as 'sickle cell trait'. In addition to a claim of disability discrimination, the applicant claimed that sickle cell trait particularly affects black Africans and therefore the employment condition constituted a restriction based on race, which impaired his right to work.<sup>172</sup> Driver FM rejected the allegation of racial discrimination contrary to section 9(1) and section 15(1)(b) of the RDA, stating:

While it is true that the sickle cell trait is most common among black Africans or persons of African descent, the trait occurs in persons of a variety of ethnic backgrounds, including persons of various Mediterranean backgrounds. The condition is one that is inherited. While it may well have originated in Africa, it has spread by natural inheritance through generations all around the globe. In the case of [the applicant], while the conduct of the NSW Police Service was based upon [the applicant's] disability, it was not based upon his race or ethnicity. His Aboriginality was irrelevant. His black African heritage was relevant but was not a conscious factor in the actions of the NSW Police Service. The Police acted as they did because [the applicant] had the sickle cell trait, not because he was black.<sup>173</sup>

### (c) Drawing inferences of racial discrimination

The existence of systemic racism has been routinely acknowledged by decision-makers considering allegations of racial discrimination. The extent to which this enables inferences to be drawn as to the basis for a particular act, especially 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.<sup>174</sup>

In *Murray v Forward*,<sup>175</sup> it was alleged that the respondent's view that the literacy of the complainant was inadequate 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.<sup>176</sup>

168 (2003) 217 CLR 92.

169 See 5.2.2(a)(i) of the DDA chapter.

170 (2003) 217 CLR 92, 102 [14] (Gleeson CJ), 144 [166] (McHugh and Kirby JJ), 136 [236] (Gummow, Hayne and Heydon JJ). It remains to be seen whether the distinction drawn by Weinberg J between the expression 'based on' and the other formulations appearing in the RDA, SDA and DDA (see 3.2.2(a)(iii)) will be significant in future cases.

171 [2005] FMCA 2.

172 [2005] FMCA 2, [4].

173 [2005] FMCA 2, [183].

174 See *Batzialas v Tony Davies Motors Pty Ltd* [2002] FMCA 243; *Chau v Oreanda Pty Ltd* [2001] FMCA 114; *Gama v Qantas Airways Ltd (No 2)* [2006] FMCA 1767; *Qantas Airways Ltd v Gama* (2008) 167 FCR 537.

175 [1993] HREOCA 21. See also Jonathon Hunyor, 'Skin-deep: Proof and Inferences in Racial Discrimination in Employment' (2003) 25 *Sydney Law Review* 537.

176 [1993] HREOCA 21, 4.

In *Sharma v Legal Aid Queensland*<sup>177</sup> ('*Sharma*'), Kiefel J held that a court should be wary of presuming the existence of racism in particular circumstances:

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.<sup>178</sup>

*Sharma* involved allegations of discrimination in recruitment for senior legal positions. The Federal Court was referred to the small number of people from non-English speaking backgrounds employed by the respondent, 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 evidence 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.<sup>179</sup>

The Full Court of the Federal Court upheld her Honour's decision on appeal<sup>180</sup> 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].<sup>181</sup>

Similar issues arose in *Tadawan v South Australia*.<sup>182</sup> In this case, 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

177 [2001] FCA 1699.

178 [2001] FCA 1699.

179 [2001] FCA 1699, [60].

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

181 [2002] FCAFC 196, [40].

182 [2001] FMCA 25. See also *Oberoi v Human Rights & 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].

surmise ... (*Bradshaw v McEwans Pty Ltd* (1951), unreported, applied in *TNT Management Pty Ltd v Brooks* (1979) 23 ALR 345).<sup>183</sup>

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.<sup>184</sup>

In *Meka v Shell Company Australia Ltd*,<sup>185</sup> the applicant was a foreign national whose application for employment was not considered by the respondent. In the absence of any direct evidence as to racial discrimination, the court was asked to infer that this was the reason for the decision. However, counsel for the applicant had not cross-examined the witnesses for the respondent who had denied that the applicant's race was a factor in the decision. In those circumstances, the court was not prepared to draw the inferences that the applicant sought to be drawn.<sup>186</sup>

In *Gama v Qantas Airways Ltd (No 2)*<sup>187</sup> Raphael FM was also asked to draw inferences that certain remarks and the treatment of the applicant in the workplace indicated an entrenched attitude towards the applicant based on his race. The applicant claimed that he was denied the same conditions of work and opportunities for training and promotion that were afforded to other employees on the basis of his race and disability and that certain remarks made to him by his supervisor and co-workers amounted to unlawful discrimination.

His Honour found that specific statements made to the applicant that he looked 'like a Bombay taxi driver' and that he walked up the stairs 'like a monkey' amounted to unlawful discrimination on the grounds of the applicant's race. His Honour also observed in the course of his reasons that 'there was a general culture inimical to persons of Asian background'.<sup>188</sup> However, his Honour was not prepared to accept that this evidence demonstrated that the rejections of the applicant's attempts at training and promotion were acts based on his race.<sup>189</sup>

In his cross-appeal to the Full Court of the Federal Court,<sup>190</sup> Mr Gama submitted that Raphael FM erred in applying the balance of probabilities test in relation to the drawing of inferences 'at such a high level that in the absence of direct evidence of racial discrimination, the [RDA] is ineffective'.<sup>191</sup> The court dismissed this ground of cross-appeal, noting simply that '[h]is Honour has dealt with these matters in his reasons in a way that does not disclose any error in the application of the standard of proof'.<sup>192</sup>

The court also rejected an appeal ground by Qantas that the negative comments by Raphael FM about a generally racist workplace culture infected his Honour's reasons yet were not relevant to his Honour's ultimate findings of liability and were not open on the evidence. Further, Qantas argued that his Honour relied on these comments to make sweeping generalisations about Qantas's workplace and some of its witnesses. The Full Court acknowledged that his Honour's comments about workplace culture were 'gratuitous', but held that they did not play any part in his determination of liability and therefore did not give rise to any error.<sup>193</sup>

183 [2001] FMCA 25, [52].

184 [2001] FMCA 25, [52]-[59].

185 [2005] FMCA 250.

186 [2005] FMCA 250, [22]-[23].

187 [2006] FMCA 1767. For a discussion of this decision, see Christine Fougere, 'Vicarious liability for race and disability discrimination in the workplace', (2007) 45(3) *Law Society Journal* 37.

188 [2006] FMCA 1767, [97].

189 [2006] FMCA 1767, [97].

190 *Qantas Airways Ltd v Gama* (2008) 167 FCR 537. The Commission was granted leave to appear as intervener in the appeal and its submissions are available at <[http://www.humanrights.gov.au/legal/submissions\\_court/intervention/qantas\\_v\\_gama.html](http://www.humanrights.gov.au/legal/submissions_court/intervention/qantas_v_gama.html)> and <[http://www.humanrights.gov.au/legal/submissions\\_court/intervention/gama.html](http://www.humanrights.gov.au/legal/submissions_court/intervention/gama.html)>.

191 *Qantas Airways Ltd v Gama* (2008) 167 FCR 537, 554 [49].

192 (2008) 167 FCR 537, 571 [113] (French and Jacobson JJ, with whom Branson J generally agreed, 573 [122]).

193 (2008) 167 FCR 537, 561 [64].

### 3.2.3 Indirect discrimination under the RDA

#### (a) Background

The RDA was amended in 1990<sup>194</sup> to include section 9(1A) which states:

(1A) 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.

Relatively 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 anti-discrimination laws are set out below to assist in the interpretation of the terms of section 9(1A). The development of these principles in the context of the SDA and DDA is discussed further in chapters 4 and 5.<sup>195</sup>

The following elements are required to establish indirect discrimination:

- a term, condition or requirement is imposed on a complainant (see 3.2.3(c) below);
- the term, condition or requirement is not reasonable in the circumstances (see 3.2.3(d) below);
- the complainant does not or cannot comply with that term, condition or requirement (see 3.2.3(e) below); and
- 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 (see 3.2.4 below).

The onus is on the applicant to make out each of these elements.<sup>196</sup>

#### (b) The relationship between 'direct' and 'indirect' discrimination

Prior to the insertion of section 9(1A) into the RDA, a body of opinion suggested that the language of section 9(1) and the specific prohibitions in the RDA were wide enough to cover indirect racial discrimination. It has been suggested that the section was inserted to remove doubt that section 9(1) and the succeeding provisions might not cover indirect discrimination rather than because its terms were not general enough to do so.<sup>197</sup> However, in *Australian Medical Council v Wilson*<sup>198</sup> ('*Siddiqui*'), the Full Court of the Federal Court held that sections 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

<sup>194</sup> By the *Law and Justice Legislation Amendment Act 1990* (Cth).

<sup>195</sup> See 4.3 and 5.2.3 respectively.

<sup>196</sup> *Australian Medical Council v Wilson* (1996) 68 FCR 46, 62 (Heerey J with whom Black CJ agreed on this issue, 47), 79 (Sackville J).

<sup>197</sup> See Race Discrimination Commissioner, *Racial Discrimination Act 1975: A Review: Community Consultation Guide* (1995), 61.

<sup>198</sup> (1996) 68 FCR 46.

the provisions, their legislative history and the preponderance of authority'.<sup>199</sup> This does not prevent applicants from pleading both direct and indirect discrimination in the alternative.<sup>200</sup> In *Maiocchi v Royal Australian & New Zealand College of Psychiatrists (No 4)* Griffiths J, in obiter, suggested that it is still open to question whether section 9(1) and section 9(1A) are mutually exclusive.<sup>201</sup>

Sections 11-15 of the RDA proscribe discrimination in particular fields of public life. The definition of 'indirect discrimination' in section 9(1A) explicitly applies for the purposes of Part II of the RDA, which contains sections 11-15. Therefore, it would appear that the definition of 'indirect discrimination' applies to the expression 'by reason of' race, as used in sections 11-15.<sup>202</sup> Judge Jarrett in *Jin v University of Queensland* held that section 9(1A) is capable of extending the operation of sections 11-15 and particularly, that 'acts of indirect discrimination as defined by section 9(1A) might, in appropriate circumstances, lead to the conclusion that section 13 of the Act has been breached'.<sup>203</sup> Judge Jarrett found that the operation of section 9(1A) is not extended by section 5, (further discussed at 3.2.1(d)) and therefore the extension of indirect discrimination to the areas of public life described in sections 11-15 was limited to indirect discrimination by reason of a person's 'race, colour, descent or national or ethnic origin' but not a person's immigrant status.<sup>204</sup>

### (c) Defining the term, condition or requirement

The words 'term, condition or requirement'<sup>205</sup> are to be given a broad meaning. It is still necessary, however, to identify specifically 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.<sup>206</sup>

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.<sup>207</sup>

### (d) Not reasonable in the circumstances

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

199 (1996) 68 FCR 46, 55. Black CJ agreed with his Honour's reasoning in this regard, 47. Sackville J expressed the same view, 74.

200 See, in the context of the DDA, *Minns v New South Wales* [2002] FMCA 60, [245]; *Hollingdale v Northern Rivers Area Health Service* [2004] FMCA 721, [19]. See also discussion at 6.9.

201 [2016] FCA 33, [342] (Griffiths J).

202 Note, however, that in *Bropho v Western Australia* [2007] FCA 519, Nicholson J held that indirect discrimination has no application to s 12(1)(d) ([2007] FCA 519, [468]). The decision of the Full Court of the Federal Court on appeal did not express a view on the correctness or otherwise of this aspect of Nicholson J's reasoning: see *Bropho v Western Australia* (2008) 169 FCR 59, 72 [38]. The Commission appeared as intervener in this case and submitted that s 12(1)(d) prohibited both direct and indirect discrimination. The Commission's submissions are available at <[http://www.humanrights.gov.au/legal/submissions\\_court/intervention/bella\\_bropho.html](http://www.humanrights.gov.au/legal/submissions_court/intervention/bella_bropho.html)>.

203 [2015] FCCA 2982, [34] (Jarrett J).

204 [2015] FCCA 2982, [38] (Jarrett J).

205 The term 'requirement' will be used as shorthand for the expression 'term, condition or requirement'.

206 *Australian Iron & 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), 406-407 (McHugh J); *Daghlian v Australian Postal Corporation* [2003] FCA 759, [110].

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

- whether or not the purpose for which the requirement is imposed could be achieved without the imposition of a discriminatory requirement, or by the imposition of a requirement that is less discriminatory in its impact;<sup>208</sup>
- 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;<sup>209</sup>
- the maintenance of good industrial relations;<sup>210</sup>
- relevant policy objectives;<sup>211</sup> and
- the observance of health and safety requirements and the existence of competitors.<sup>212</sup>

The requirement of ‘reasonableness’ under section 9(1A)(a) of the RDA was considered in *Siddiqui*. In that matter, 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 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 MCQ exam on a number of occasions and, although passing, he was not within the top 200 candidates, which was the quota set by the AMC at the time. Dr Siddiqui complained, amongst other things,<sup>213</sup> that the requirement to sit an exam and pass with a score which placed him within the quota constituted indirect racial discrimination.

The then Human Rights and Equal Opportunity Commission, 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. The Commission 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.<sup>214</sup>

208 (1991) 173 CLR 349, 363-364 (Mason and Gaudron JJ), 378 (Brennan J), 395 (Dawson and Toohey JJ).

209 (1991) 173 CLR 349, 378 (Brennan J).

210 (1991) 173 CLR 349, 395 (Dawson and Toohey JJ); *Secretary, Department of Foreign Affairs & Trade v Styles* (1989) 23 FCR 251, 263-264 (Bowen CJ and Gummow J).

211 (1991) 173 CLR 349, 410 (McHugh J).

212 (1991) 173 CLR 349, 395 (Dawson and Toohey JJ). See also *Daghlian v Australian Postal Corporation* [2003] FCA 759, [111]. In the context of the DDA, the Full Court of the Federal Court has provided a confirmation and summary of the principles to be applied to assessing ‘reasonableness’ which is likely to be relevant in the context of the RDA: see *Catholic Education Office v Clarke* (2004) 138 FCR 121, 145 [115] (Sackville and Stone JJ).

213 Dr Siddiqui’s complaint of *direct* discrimination was dismissed by the Commission 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. See *Siddiqui v Australian Medical Council* [2000] HREOCA 2.

214 *Siddiqui v Australian Medical Council* [2000] HREOCA 2.



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

It was held that the Commission 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.<sup>215</sup>

Further, it was held that the Commission had erred in its approach to reasonableness and its conclusion that the application of the quota to Dr Siddiqui was unreasonable.<sup>216</sup> The court approved of the following test of 'reasonableness'<sup>217</sup> articulated by Bowen CJ and Gummow J in *Secretary, Department of Foreign Affairs & Trade v Styles*:<sup>218</sup>

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.<sup>219</sup>

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.<sup>220</sup> 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'.<sup>221</sup>

The court held that once it was accepted, as the Commission had done, that a quota of 200 could lawfully be imposed, it was 'impossible to say that it [was] not a rational application of that quota to select the first 200 candidates in order of merit'.<sup>222</sup>

In *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission*,<sup>223</sup> 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'.<sup>224</sup> However, his Honour 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

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215 (1996) 68 FCR 46, 62.

216 (1996) 68 FCR 46, 62.

217 (1996) 68 FCR 46, 60 (Heerey J, with whom Black CJ generally agreed, 47, and with whom Sackville J agreed on the issue of reasonableness, 79).

218 (1989) 23 FCR 251.

219 (1989) 23 FCR 251, 263.

220 (1996) 68 FCR 46, 60.

221 (1996) 68 FCR 46, 61.

222 (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).

223 (1997) 80 FCR 78.

224 (1997) 80 FCR 78, 113.

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.<sup>225</sup>

In *Aboriginal Students' Support & Parents Awareness Committee, Alice Springs v Minister for Education, Northern Territory*,<sup>226</sup> the then Human Rights and Equal Opportunity Commission considered the closing of a primary school in Alice Springs which almost solely catered 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 another school which was 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 'shared some of the concerns' of the complainants, he was not persuaded that the requirement was 'not reasonable'.<sup>227</sup>

In *AB v New South Wales*,<sup>228</sup> Driver FM held that the term, condition or requirement imposed upon the applicant that he be an Australian or New Zealand citizen or an Australian permanent resident in order to be eligible for education in a selective school operated by the respondent was not reasonable in the circumstances. His Honour stated:

I accept that places at selective schools in New South Wales are a scarce commodity ... I also accept that it is reasonable to impose requirements to ensure that, as far as is practicable, persons entering a selective school are likely to complete their course of education. However, that purpose could, in my view, be achieved by a requirement that the student has applied for Australian permanent residency or citizenship. Making such an application demonstrates a commitment to live in Australia indefinitely sufficient to meet the expectation of completion of a course of secondary education.

It is true that the fact that there is a reasonable alternative that might accommodate the interests of an aggrieved person does not, of itself, establish that a requirement or condition is unreasonable. The court must objectively weigh the relevant factors, but these can include the availability of alternative methods of achieving the alleged discriminator's objectives without recourse to the requirement or condition: *Catholic Education Office v Clarke* (2004) 138 FCR 121 at 146 [115]. It is well known that the process of obtaining permanent residency and citizenship in Australia can be a lengthy one. Even where an application is refused, the process of review and appeal can take years. The present applicant has lived in this country for ten years and is seeking permanent residency. In my view, there is nothing in his circumstances which render it less likely that he would complete a course of education at Penrith Selective High School than if he had already been granted permanent residency or citizenship. The respondent's condition is unnecessarily restrictive and is disruptive to the educational expectations of both NSW residents, and those who may relocate to NSW from other States, which do not have selective public schools.<sup>229</sup>

Driver FM held, however, that the applicant had not made out his case of indirect discrimination: see 3.2.3(e) below.

### (e) Ability to comply with a requirement or condition

An applicant must prove that an affected individual or group 'does not or cannot comply' with the relevant requirement or condition.

225 (1997) 80 FCR 78, 112.

226 [1992] HREOCA 4.

227 [1992] HREOCA 4 (extract at (1992) EOC 92-415, 78,968). See also discussion by Drummond J in *Ebber v Human Rights & Equal Opportunity Commission* (1995) 129 ALR 455.

228 [2005] FMCA 1113.

229 [2005] FMCA 1113, [41]-[42].



As outlined above, the complainant in *Siddiqui* had failed on a number of occasions to meet a requirement set by the AMC to sit an exam and pass with a score which placed him within a certain quota. The Full Court of the 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 with a condition or requirement which discriminates against members of the group to which the complainant belongs.<sup>230</sup>

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*<sup>231</sup> (*‘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.<sup>232</sup>

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’.<sup>233</sup>

As discussed above, in *AB v New South Wales*,<sup>234</sup> the applicant, a boy of Romanian national origin, was refused enrolment at a selective high school operated by the respondent, on the basis that he was not an Australian citizen or permanent resident. He claimed that this amounted to indirect discrimination on the basis of national origin.

Driver FM found that it was appropriate to make a comparison between persons of Romanian national origin and persons of Australian or New Zealand national origin (‘national origin’ being a concept distinct from citizenship)<sup>235</sup> in determining whether or not indirect discrimination had occurred.

Driver FM rejected the applicant’s claim on the basis that there was no evidence that there was a broad class of persons of Australian national origin who were better able to comply with the respondent’s requirement for citizenship or permanent residence than persons of Romanian national origin (whether they were born in Romania or in Australia).<sup>236</sup>

230 (1996) 68 FCR 46, 80 (see also Heerey J, 62, with whom Black CJ agreed, 47).

231 [1983] 2 AC 548.

232 [1983] 2 AC 548, 565.

233 (1996) 68 FCR 46, 80. A similar approach has been taken in the context of the DDA: see, for example, *Travers v New South Wales* [2001] FMCA 18, [17]; *Clarke v Catholic Education Office* [2003] FCA 1085, [49].

234 [2005] FMCA 1113.

235 See 3.2.1(c).

236 [2005] FMCA 1113, [56]-[57].

## 3.2.4 Interference with the recognition, enjoyment or exercise of human rights or fundamental freedoms on an equal footing

### (a) Human rights and fundamental freedoms defined

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 races. Section 10 provides for the equal enjoyment of rights by people of different races.<sup>237</sup> The RDA specifically provides that these references to human rights and fundamental freedoms and the equal enjoyment of rights include the rights referred to in article 5 of ICERD.<sup>238</sup>

In considering the meaning of the terms 'human rights' and 'fundamental freedoms', the courts have held that article 5 is not an exhaustive list of the human rights and fundamental freedoms protected by the RDA.<sup>239</sup> Rather, courts have taken a broad approach to the rights and freedoms protected. For instance, in *Gerhardy v Brown*,<sup>240</sup> Mason J 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.<sup>241</sup>

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.<sup>242</sup>

The High Court also considered the meaning of 'right' in *Mabo v Queensland*,<sup>243</sup> 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.<sup>244</sup>

<sup>237</sup> See 3.1.1(b) and 3.1.3 for a discussion of the application of s 10.

<sup>238</sup> See RDA, ss 9(2) and 10(2).

<sup>239</sup> *Gerhardy v Brown* (1985) 159 CLR 70, 85 (Gibbs CJ), 101 (Mason J) and 126 (Brennan J); *Maloney v The Queen* (2013) 252 CLR 168, 178 [9] (French CJ), 226 [145] (Kiefel J), 249 [219] (Bell J), 294 [336] (Gageler J). The CERD Committee has also indicated that the list of rights set out in art 5 should not be taken by states as being an exhaustive list: *General Recommendation XX (Article 5)*, UN Doc HRI/GEN/1/Rev.5, 188-189 [1] available at <[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/8b3ad72f8e98a34c8025651e004c8b61?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/8b3ad72f8e98a34c8025651e004c8b61?Opendocument)>.

<sup>240</sup> (1985) 159 CLR 70.

<sup>241</sup> (1985) 159 CLR 70, 101-102.

<sup>242</sup> (1985) 159 CLR 70, 125-126.

<sup>243</sup> (1988) 166 CLR 186.

<sup>244</sup> (1988) 166 CLR 186, 229. See also 217 (Brennan, Toohey, Gaudron JJ): 'right' is not necessarily a legal right enforceable at municipal law.

In *Secretary, Department of Veteran's Affairs v P*,<sup>245</sup> 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 sections 9(1) or 10 of the RDA. 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 & 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) [of 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.<sup>246</sup>

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'.<sup>247</sup> 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 ICERD as that paragraph 'deals only with state-provided assistance to alleviate need in the general community and with benefits provided to advance the well-being of the entire community of the kind that many national states now make available to their citizens'.<sup>248</sup>

In *Iliafi v Church of Jesus Christ of Latter-Day Saints Australia*<sup>249</sup> the appellants claimed that the Church discriminated against them by disbanding its Samoan-speaking church congregations and conducting religious services exclusively in English. The Full Court of the Federal Court considered whether public worship as a group in one's native language is a human right or fundamental freedom protected by section 9 of the RDA. The court considered the right to freedom of religion, the right to freedom of expression and the right to nationality protected by article 5 of the ICERD and found that none of those protections extended to public worship as a group in one's native language.<sup>250</sup>

In *Maloney v The Queen*, a majority of the High Court held that restrictions on the possession of alcohol were inconsistent with section 10 because they interfered with Ms Maloney's right to own

245 (1998) 79 FCR 594.

246 (1998) 79 FCR 594, 599-600. In *Ebber v Human Rights & 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.

247 (1998) 79 FCR 594, 600.

248 (1998) 79 FCR 594, 601.

249 (2014) 221 FCR 86.

250 (2014) 221 FCR 86, 111 [86] in relation to freedom of religion (Kenny J, with whom Greenwood and Logan JJ agreed).

property pursuant to article 5(d)(v) of ICERD (see 3.3.1(c) below).<sup>251</sup> In *Macabenta v Minister of State for Immigration and Multicultural Affairs*,<sup>252</sup> 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.<sup>253</sup>

In *Australian Medical Council v Wilson*<sup>254</sup> ('*Siddiqui*'), Heerey J expressed doubt that there existed a right to practise medicine on an unrestricted basis.<sup>255</sup>

In *Hagan v Trustees of the Toowoomba Sports Ground Trust*,<sup>256</sup> 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 Opportunity Commission*:<sup>257</sup>

[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 [ICERD] 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 ...<sup>258</sup>

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.<sup>259</sup>

In *AB v New South Wales*,<sup>260</sup> Driver FM accepted that Article 5 of ICERD 'establishes that the right to education and training is a fundamental right protected by [ICERD]'.

251 (2013) 252 CLR 168 at 191 [38] (French CJ), 206 [84] (Hayne J), 213 [112] (Crennan J), 251 [224] Bell J, 301 [361] (Gageler J); cf 228 [155]ff (Kiefel J). Note that Bell and Gageler JJ also considered that there had been an interference with the right 'of access to any place ... intended for use by the general public' in art 5(f) of ICERD.

252 (1998) 154 ALR 591.

253 (1998) 154 ALR 591, 600.

254 (1996) 68 FCR 46.

255 (1996) 68 FCR 46, 59-60, citing *Jamorksi v Attorney-General (Ontario)* (1988) 49 DLR (4<sup>th</sup>) 426.

256 [2000] FCA 1615.

257 (1995) 129 ALR 455.

258 [2000] FCA 1615, [38] and [40]. Drummond J's approach was upheld on appeal: *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2000) 105 FCR 56, 61 [28]. Note that following the refusal of special leave to appeal to the High Court (*Hagan v Trustees of the Toowoomba Sports Ground Trust* B17/2001 (19 March 2002)) the applicant lodged a communication with the United Nations Committee on the Elimination of Racial Discrimination (*Hagan v Australia*, Communication No. 26/2002, UN Doc CERD/C/62/D/26/2002, 14 April 2003) which found a violation of certain articles of ICERD.

259 [2000] FCA 1615, [42].

260 [2005] FMCA 1113.

In the matter of *Bropho v Western Australia*,<sup>261</sup> Bella Bropho, a member of the Swan Valley Nyungah Community Aboriginal Corporation ('SVNC') and former resident of Reserve 43131 ('the Reserve'), complained that the *Reserves (Reserve 43131) Act 2003* (WA) ('Reserves Act') and actions taken by an Administrator appointed under that Act interfered with the enjoyment and exercise of the applicants' human rights and fundamental freedoms.

The Reserve had been designated in 1994 for the use and benefit of Aboriginal persons. In response to concerns about the sexual abuse of women and children, the Reserves Act was introduced in 2003. Amongst other things, the Reserves Act removed the power of care, control and management of the Reserve from the SVNC and placed it with an Administrator who was empowered to make directions in relation to the care, control and management of the Reserve.

The Administrator acted under the Reserves Act to direct all persons to leave the Reserve and prohibited entry to the Reserve. The applicants claimed that the Reserves Act and the actions of the Administrator were in breach of sections 9(1), 10 and 12(1)(d) of the RDA. They claimed that the Reserves Act interfered with, amongst other things, their enjoyment of the right to own property.

On appeal, the Full Court of the Federal Court took a broad approach to identifying the rights protected by the RDA. Contrary to the approach taken at first instance,<sup>262</sup> the court held that neither the RDA nor ICERD supported the conclusion that rights to property must be understood as 'ownership of a kind analogous to forms of property which have been inherited or adapted from the English system of property law or conferred by statute'.<sup>263</sup>

Instead, the court considered international law to help determine the content of the right to own property. In support of the proposition that the right to own property contained in ICERD encompassed indigenous forms of property holdings, the court cited the jurisprudence of the Inter-American Court of Human Rights which had recognised the proprietary nature of communal rights in several Latin American indigenous communities.<sup>264</sup>

However, the Full Court concluded that in this case section 10 did not invalidate the Reserves Act because the property rights in question were not absolute and, in fact, 'no property right, regardless of its source or genesis, is absolute in nature, and no invalid diminution of property rights occurs where the state acts in order to achieve a legitimate and non-discriminatory public goal'.<sup>265</sup> Therefore, it was not inconsistent with section 10 to limit property rights in order to achieve a legitimate and non-discriminatory public goal such as, in this case, protecting the safety and welfare of women residing at the Reserve.<sup>266</sup>

The proper approach to the construction of 'rights' within section 10 was further considered in *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury*.<sup>267</sup>

At first instance, Jones J dismissed a claim that changes to the *Liquor Act 1992* (Qld), which removed some Councils' ability to hold a general liquor licence after 1 July 2008, were inconsistent with

261 (2008) 169 FCR 59 (Ryan, Moore and Tamberlin JJ); [2007] FCA 519 (Nicholson J).

262 *Bropho v Western Australia* [2007] FCA 519, [378].

263 (2008) 169 FCR 59, 81 [78]. The Commission appeared as intervener in this case and made submissions on this issue: see <[http://www.humanrights.gov.au/legal/submissions\\_court/intervention/bella\\_bropho.html](http://www.humanrights.gov.au/legal/submissions_court/intervention/bella_bropho.html)>.

264 (2008) 169 FCR 59, 81-82 [79].

265 (2008) 169 FCR 59, 83-84 [83].

266 (2008) 169 FCR 59, 83 [82]. Note that the High Court overruled this line of reasoning in *Maloney v The Queen* (see 3.3.2 below) and held that there was no basis to read down the scope of s 10 so that it did not apply to laws which imposed a reasonable or legitimate restriction on relevant human rights. The only exemption to s 10 is for laws that constitute special measures.

267 [2008] QSC 305.

section 10(1) of the RDA because the rights said to be affected by the legislative changes were not rights protected by the International Covenant on Civil and Political Rights nor by the RDA.<sup>268</sup>

The Councils appealed this decision to the Court of Appeal of the Supreme Court of Queensland. The Court of Appeal unanimously accepted the need to take a broad approach to identifying the ‘rights’ protected.<sup>269</sup>

McMurdo P and Philippides J concluded that the right to equal treatment before the law was itself a right protected by section 10 of the RDA.<sup>270</sup> Both McMurdo P and Philippides J further considered that the impugned provisions impacted unequally on the appellant Councils’ property rights.<sup>271</sup> McMurdo P also held that the impugned provisions engaged the right to equal treatment before organs administering justice,<sup>272</sup> as well as protection against discrimination on any ground such as race<sup>273</sup> and the right of access to a service intended for use by the general public, such as hotels.<sup>274</sup>

## (b) Equal footing

To breach sections 9(1) and 9(1A)(c) of the RDA, a requirement must have the purpose or 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. Section 10 requires an applicant to prove that they ‘do not enjoy’ a right, or do so ‘to a more limited extent’ than persons of another race.

That expression ‘on an equal footing’ requires a comparison between the racial group to which the complainant belongs and another group without that characteristic (usually referred to as the ‘comparator’).

In *Siddiqui*, the Full Court of the Federal Court considered the meaning of ‘equal footing’ in section 9(1A)(c). As outlined above, the case concerned the requirement that overseas trained doctors submit to an examination as a requirement of registration to practice medicine in Australia. This did not apply to doctors trained at an accredited institution.

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.<sup>275</sup>

268 [2008] QSC 305, [26].

269 [2010] QCA 37, [35] (McMurdo P), [234]-[235] (Philippides J), [138] (Keane J). Note that special leave to appeal this decision was refused by the High Court: *Aurukun Shire Council v CEO, Liquor Gaming & Racing in Dept of Treasury; Kowanyama Aboriginal Shire Council v CEO of Liquor, Gaming & Racing* [2010] HCA Transcript 293.

270 [2010] QCA 37, [43] (McMurdo P), [242], [259] (Philippides J). Keane J dissenting on this point at [139], [147].

271 Having found that liquor licences could be construed as ‘property rights’ for the purposes of s 10 of the RDA at [51] (McMurdo P) and [265]-[266] (Philippides J). Keane J dissenting on this point at [151]-[155].

272 [2010] QCA 37, [44] (McMurdo P) found at [44] that ‘Queensland’s liquor licensing laws are part of Queensland’s “organs administering justice”’.

273 [2010] QCA 37, [45] (McMurdo P).

274 [2010] QCA 37, [58] (McMurdo P). McMurdo P could not reconcile the approach in *Bropho* with the decision of the High Court in *Gerhardy* and her Honour indicated that, but for the authority of *Bropho*, she would have found that the impugned provisions had also infringed on the appellants’ right to own property in the form of its liquor licence – see [61] – [65]. As noted previously in this chapter, McMurdo P confined the ratio of *Bropho* to property rights and not other human rights.

275 (1996) 68 FCR 46, 63.

Black CJ<sup>276</sup> and Sackville J<sup>277</sup> (Heerey J dissenting)<sup>278</sup> held that it was not necessary for the groups that are compared to have been subject to the same requirement.<sup>279</sup> 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.<sup>280</sup>

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.<sup>281</sup>

## 3.3 Exceptions

### 3.3.1 Special measures

The RDA contains very limited exceptions to the operation of the Act,<sup>282</sup> unlike the SDA, DDA and ADA which contain a wide range of permanent exemptions<sup>283</sup> and the mechanism for a person to apply for a temporary exemption.<sup>284</sup> The exception relating to special measures in section 8(1) of the RDA has received the most attention in the case law. Section 8(1) provides:

- (1) 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).

As set out in section 8(1), the special measures exception does not apply in the circumstances referred to in section 10(3) of the RDA, namely provisions in a law authorizing property owned by Aboriginal persons to be managed by another without their consent or preventing or restricting an Aboriginal person from terminating the management by another person of the Aboriginal person's property.

ICERD provides for special measures in two contexts – in article 1(4) as an exception to the definition of discrimination, and in article 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.

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276 (1996) 68 FCR 46, 47.

277 (1996) 68 FCR 46, 80-82.

278 (1996) 68 FCR 46, 63. His Honour stated that the 'two groups compared have to be subject to the *same* term, condition or requirement'.

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

280 (1996) 68 FCR 46, 81.

281 (1996) 68 FCR 46, 82-83 (Sackville J), 48 (Black CJ).

282 RDA, 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).

283 SDA, Pt II, Div 4; DDA, Pt 2, Div 5; ADA, Pt 4, Div 4.

284 SDA, s 44; DDA, s 55; ADA, s 44.



Article 1(4) of ICERD, with which section 8(1) is concerned, states:

- (4) 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.<sup>285</sup>

In *Maloney v The Queen*, Gageler J suggested that, in light of contemporary international understanding, special measures should not be seen as an ‘exception’ to the principle of non-discrimination but rather as ‘integral to its meaning’.<sup>286</sup>

#### (a) Gerhardy v Brown

The High Court first considered the meaning of section 8(1) in *Gerhardy v Brown*.<sup>287</sup> 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 whose members were all persons defined by the SA Act to be Pitjantjatjara. The SA 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 charged with an offence after entering the lands without a permit. He claimed that restricting his access to the lands was a breach of the RDA and, by reason of section 109 of the *Constitution*, that part of the SA Act was inoperative.

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

- the special measure must confer a benefit on some or all members of a class;
- membership of this class must be based on race, colour, descent, or national or ethnic origin;
- 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;
- 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
- the special measure must not have achieved its objectives.<sup>288</sup>

Brennan J also considered how to determine whether a measure was for the ‘advancement’ of the beneficiaries. His Honour stated:

‘Advancement’ is not necessarily what the person who takes the measure regards as a benefit for the beneficiaries. The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. The wishes

<sup>285</sup> Article 2(2) of ICERD 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.’

<sup>286</sup> (2013) 252 CLR 168, 282 [304], 292 [327].

<sup>287</sup> (1985) 159 CLR 70.

<sup>288</sup> (1985) 159 CLR 70, 133.



of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them.<sup>289</sup>

The other members of the court neither supported nor dismissed Brennan J's views on this point.<sup>290</sup> The court applied the five criteria identified by Brennan J and concluded that the permit provisions of the SA Act satisfied these criteria and therefore qualified as a special measure.<sup>291</sup>

## (b) Applying Gerhardy

In *Bruch v Commonwealth*,<sup>292</sup> a non-indigenous Australian student claimed that the Commonwealth had unlawfully discriminated against him in contravention of sections 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 section 8(1) of the RDA.<sup>293</sup>

His Honour found that the five indicia identified by Brennan J were satisfied because:

- the ABSTUDY rental assistance scheme conferred a benefit on a clearly defined class of natural persons made up of Aboriginal and Torres Strait Islander people;
- that class was based on race;
- 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 been achieved.<sup>294</sup>

In the matter of *Vanstone v Clark*,<sup>295</sup> the Full Court of the Federal Court considered whether or not a section of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) ('the ATSIC Act') and a Determination made under it relating to 'misbehaviour' were inconsistent with section 10 of the RDA (see 3.1.3(d) above). The Full Court also considered, in obiter comments, a suggestion by the appellant that a particular provision of the ATSIC Act, insofar as it prevented persons other than Aboriginal persons or Torres Strait Islanders from being appointed as Commissioners, constituted a 'special measure' under section 8 of the RDA. It could not, therefore, be impugned as being racially discriminatory and nor could the Determination made under it relating to misbehaviour.

Weinberg J, with whom Black CJ agreed, held as follows:

The Minister submitted that once it is conceded that s 31(1) is a 'special measure', any limits inherent in or attached to the office designated by that section are part of the special measure, and cannot be separately attacked as racially discriminatory. According to that submission the terms on which a Commissioner can be suspended from office, including the power to specify the meaning of misbehaviour, are part of the terms of that office. In my view, this submission cannot be accepted. It involves a strained, if not perverse, reading

289 (1985) 159 CLR 70, 135.

290 See, for example, Wilson J at 113 who refers to the consultation with the beneficiaries of the measure.

291 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, *Pareroutja v Tickner* (1993) 42 FCR 32; *Western Australia v Commonwealth* (1995) 183 CLR 373.

292 [2002] FMCA 29.

293 [2002] FMCA 29, [51].

294 [2002] FMCA 29 [54].

295 (2005) 147 FCR 299.

of s 8 of the RDA, and would thwart rather than promote the intention of the legislature. If the submission were correct, any provision of an ancillary nature that inflicted disadvantage upon the group protected under a 'special measure' would itself be immune from the operation of the RDA simply by reason of it being attached to that special measure.<sup>296</sup>

In *Bropho v Western Australia*<sup>297</sup> Nicholson J held that the whole of the Reserves Act was a special measure pursuant to section 8 of the RDA.<sup>298</sup> His Honour did not consider whether particular elements of the Reserves Act needed to be appropriate or adapted to the protective purpose of the special measure or if it is possible for one element of a purported special measure to be separately attacked as racially discriminatory.<sup>299</sup>

In concluding the Reserves Act was a special measure, Nicholson J considered the list of elements in article 1(4) of the ICERD, as set out by Brennan J in *Gerhardy v Brown*,<sup>300</sup> and stated:

The Act conferred a benefit upon some of the Aboriginal inhabitants who were women and children by removing the manager being the community believed by Government to be the source of failure to protect them and by empowering an Administrator to take steps to remove the threatening environment. The benefit conferred upon them was to establish a system which would enable them to access such protection as they may require in common with the access enjoyed by Aboriginal or non-Aboriginal persons living outside the Reserve. The advancement conferred was the removal of what was reasonably perceived by Government to be the impediment to their equal enjoyment of their human rights and fundamental freedoms.

The class from which the individuals the subject of the measure came was based on race, namely the Aboriginality of the inhabitants of the Reserve. (This is a different question to whether the Reserves Act contains provisions addressed to both Aboriginal and non-Aboriginal persons or to whether the effect of the Act is disproportional in its impact on Aboriginal persons so as to give rise to indirect discrimination).

The sole purpose of the Act was to secure adequate advancement of the beneficiaries in order that they could enjoy and exercise equally with others their human rights and fundamental freedoms.

The enactment occurred in circumstances where the protection given to the beneficiaries by the special measure was necessary in order that they may enjoy and exercise equally with others their human rights and fundamental freedoms.<sup>301</sup>

His Honour noted that a large number of the women living on the Reserve did *not* agree with the enactment of the Reserves Act and had made their objection known in an open letter to the Premier of Western Australia.<sup>302</sup> However, Nicholson J held that the wishes of the beneficiaries of a purported special measure were not necessarily a relevant factor in determining whether something was a special measure. The contrary view expressed by Brennan J in *Gerhardy v Brown* was not, in Nicholson J's view, supported by the other members of the High Court in that case and was therefore not followed.<sup>303</sup>

296 (2005) 147 FCR 299, 354 [208]-[209].

297 [2007] FCA 519.

298 [2007] FCA 519, [579]-[580].

299 This is in contrast to Nicholson J's approach to s 10 where he stated: 'I have difficulty in being invited to make a judgment on whether the Reserves Act was discriminatory in globo. This is for two reasons. First, both ss 9 and 10 of the RDA apply with respect to a particular human right. Second, as s 10 applies in relation not only to the laws as a whole but also to the provisions of the law, attention should be directed to the specific provisions of the Reserves Act in reaching a view whether, in relation to a particular human right, there is not any inconsistency with the RDA. There are a variety of provisions in the Reserves Act. This is not a case where the law under scrutiny is of such uniform effect it can be addressed globally.' [2007] FCA 519, [312].

300 (1985) 159 CLR 70, 133.

301 [2007] FCA 519, [579].

302 [2007] FCA 519, [570].

303 [2007] FCA 519, [569].

On appeal, the Full Court of the Federal Court found it was unnecessary to consider whether this aspect of Nicholson J's reasoning was correct.<sup>304</sup>

In *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury*<sup>305</sup> the Queensland Court of Appeal held that the impugned provisions were a special measure within the meaning of section 8 of the RDA. McMurdo P rejected the applicant's argument that the impugned provisions were not a special measure because they did not reflect the wishes of indigenous people in the communities. She granted that there was 'considerable force' in Brennan J's statement in *Gerhardy* that the 'wishes of the beneficiaries are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement'. In particular, McMurdo P considered that this approach was consistent with Indigenous peoples' 'right to self determination'. However, she found that the material before the court suggested that there was 'a strong body of informed support within the appellants' communities for the impugned provisions and the scheme of which they form part'.<sup>306</sup>

In *Morton v Queensland Police Service*,<sup>307</sup> the Queensland Court of Appeal supported consultation with intended beneficiaries, describing meaningful consultation as 'highly desirable' and important in ensuring that the measure is appropriately designed and effective in achieving its objective.<sup>308</sup> The court stopped short, however, of making the process of consultation and consent a mandatory requirement for a valid special measure. In the court's view, there are legitimate reasons for not doing so, including potential difficulty in reconciling competing views within a group affected by the measure,<sup>309</sup> and that some beneficiaries, perhaps for age, infirmity or cultural reasons, may have difficulty in expressing an informed and genuinely free opinion on the proposed measure.<sup>310</sup>

### (c) Maloney v The Queen

The High Court again considered the meaning of section 8(1) in *Maloney v The Queen* ('*Maloney*').<sup>311</sup> Ms Maloney was an Indigenous resident of Palm Island. Palm Island was subject to regulations made under sections 173G and 173H of the *Liquor Act 1992* (Qld) ('*Liquor Act*') which declared it a restricted area and restricted the nature and quantity of liquor which people could have in their possession in the community area on the island. Ms Maloney was charged with possession of more than a prescribed quantity of liquor in a restricted area on Palm Island contrary to section 168B of the *Liquor Act*.

Palm Island is overwhelmingly an Indigenous community.<sup>312</sup> Ms Maloney claimed that section 168B and certain regulations made under the *Liquor Act* were invalid on the basis that they were inconsistent with section 10 of the RDA. By a majority of 5:1, the court held that the impugned provisions were

304 *Bropho v State of Western Australia* (2008) 169 FCR 59. Note that the submissions of the Commission as intervener argued that Nicholson J's reasoning was in error on this issue: see <[http://www.humanrights.gov.au/legal/submissions\\_court/intervention/bella\\_bropho.html](http://www.humanrights.gov.au/legal/submissions_court/intervention/bella_bropho.html)>

305 [2010] QCA 37.

306 Keane JA observed that the views expressed by Brennan J in *Gerhardy* as to the possible crucial importance of the wishes of the beneficiaries of a measure to its characterisation as a special measure commands great respect but nevertheless, as was noted in *Bropho*, that view has 'no apparent judicial support'. Special leave to appeal this decision was refused by the High Court: *Aurukun Shire Council v CEO, Liquor Gaming & Racing in Dept of Treasury; Kowanyama Aboriginal Shire Council v CEO of Liquor, Gaming & Racing* [2010] HCA Transcript 293.

307 [2010] QCA 160, [31] (McMurdo P).

308 [2010] QCA 160, [31] (McMurdo P), [114] (Chesterman J, with Holmes J agreeing).

309 [2010] QCA 160, [31] (McMurdo P), [114] (Chesterman J, with Holmes J agreeing).

310 [2010] QCA 160, [31] (McMurdo P).

311 (2013) 252 CLR 168. The Commission was granted leave to intervene in this case. The Commission's submissions are available at <<https://www.humanrights.gov.au/joan-monica-maloney-v-queen>>.

312 (2013) 252 CLR 168 at 206 [84] (Hayne J), 219 [128] (Crennan J), 243 [202] (Bell J), 262 [255]-[256], 302 [362] (Gageler J).

inconsistent with section 10 because they interfered with Ms Maloney's right to own property pursuant to article 5(d)(v) of ICERD.<sup>313</sup> However, the court unanimously held that section 10 did not apply because the impugned provisions were a special measure designed to protect the residents of Palm Island from the effects of alcohol abuse and associated violence.<sup>314</sup>

The court's judgment in *Maloney* generally affirmed the principles set out in its previous judgment in *Gerhardy*. It also considered a number of other specific issues about the operation of special measures.

French CJ noted that "special measures" are ordinarily measures of the kind generally covered by the rubric of "affirmative action".<sup>315</sup> However, the court held that a law which criminalises certain conduct may still be a special measure.<sup>316</sup>

The court held that prior consultation with the affected community was not necessary in order for a measure to be a special measure.<sup>317</sup> However, French CJ noted that 'it should be accepted, as a matter of common sense, that prior consultation with an affected community and its substantial acceptance of a proposed special measure is likely to be essential to the practical implementation of that measure' and that 'in the absence of genuine consultation with those to be affected by a special measure, it may be open to a court to conclude that the measure is not reasonably capable of being appropriate and adapted for the sole purpose it purports to serve'.<sup>318</sup>

### 3.3.2 Reasonable justification

In *Bropho v Western Australia*,<sup>319</sup> Nicholson J found that in considering whether an allegation of racial discrimination can be established, regard can be had to the reasonableness of the enactment in question.<sup>320</sup>

On appeal, in *Bropho v State of Western Australia*, the Full Court of the Federal Court took a different approach to Nicholson J to the question of proportionality and reasonableness.<sup>321</sup> Instead of incorporating a general test of proportionality into the application of section 10, the court considered whether the rights that were subject to interference had been legitimately limited. They concluded that the 'the right to occupy and manage the land conferred by the statute was subject to the contingency that the right would be removed or modified if its removal or modification was necessary to protect vulnerable members of the community'.<sup>322</sup> The court also stated:

We accept that it will always be a question of degree in determining the extent to which the content of a universal human right is modified or limited by legitimate laws and rights recognised in Australia. We also emphasise that these observations are not intended to imply that basic human rights protected by the

313 (2013) 252 CLR 168 at 191 [38] (French CJ), 206 [84] (Hayne J), 213 [112] (Crennan J), 251 [224] Bell J, 301 [361] (Gageler J); cf 228 [155]ff (Kiefel J). Note that Bell and Gageler JJ also considered that there had been an interference with the right 'of access to any place ... intended for use by the general public' in art 5(f) of ICERD.

314 (2013) 252 CLR 168 at 193-194 [46] (French CJ), 213 [108] (Hayne J), 223 [139] (Crennan J), 236 [178] (Kiefel J), 260-261 [249] (Bell J), 304-305 [370]-[376] (Gageler J).

315 (2013) 252 CLR 168 at 194 [46] (French CJ).

316 (2013) 252 CLR 168 at 194 [46] (French CJ), 222 [137] (Crennan J), 238 [186] (Kiefel J), 261 [249] (Bell J), 301 [357] (Gagler J).

317 (2013) 252 CLR 168 at 185 [24] (French CJ), 208 [91] (Hayne J), 222 [136] (Crennan J), 238 [186] (Kiefel J), 257 [240] (Bell J), 300 [357] (Gageler J).

318 (2013) 252 CLR 168 at 186 [25] (French CJ).

319 [2007] FCA 519.

320 [2007] FCA 519, [544]-[551].

321 (2008) 169 FCR 59.

322 (2008) 169 FCR 59, 83 [82].

RD Act can be compromised by laws which have an ostensible public purpose but which are, in truth, discriminatory. However we doubt very much that this is such a case.<sup>323</sup>

On this basis, the court held that section 10 did not invalidate the Reserves Act because the property rights in question were not absolute.<sup>324</sup> Therefore, it was not inconsistent with section 10 to limit property rights in accordance with the legitimate public interest to protect the safety and welfare of women and children residing at the Reserve.<sup>325</sup>

The approach of Nicholson J and of the Full Court differed from the approach of the High Court in *Gerhardy v Brown* where the court accepted that all differential treatment was prima facie discriminatory unless it was saved as a special measure.<sup>326</sup>

In *Gerhardy v Brown*, the Solicitor-General for South Australia submitted, in the context of section 9 of the RDA, that there is no discrimination 'when there is an objective or reasonable justification in the distinction, exclusion, restriction or preference. For there to be discrimination the distinction or differentiation must be arbitrary, invidious or unjustified'.<sup>327</sup>

That submission was not upheld and was specifically rejected by two members of the court.<sup>328</sup> Questions of proportionality and reasonableness were not relevant to the court's consideration of section 10(1) in *Gerhardy v Brown*.

The question of proportionality was considered in detail by the High Court in *Maloney v The Queen*. The court unanimously overruled the *Bropho* line of reasoning and held that there was no basis to read down the scope of section 10 so that it did not apply to laws which imposed a reasonable or legitimate restriction on relevant human rights. The only exemption to section 10 is for laws that constitute special measures.<sup>329</sup>

The court in *Maloney* reached different conclusions about the application of proportionality analysis to section 8(1), each relying on different aspects of article 1(4) of ICERD or different interpretations of it:

- French CJ said that, when considering whether a law is a special measure, a court may determine whether the law is reasonably capable of being appropriate and adapted to the sole purpose of securing the adequate advancement of the relevant group;<sup>330</sup>
- Hayne J placed emphasis on the word 'adequate' in article 1(4) of ICERD. For his Honour, the relevance of proportionality to section 8 of the RDA is limited to whether the same goal could be achieved to the same extent by an alternative law that would restrict the rights and freedoms of the relevant group to a lesser extent;<sup>331</sup>
- For Crennan and Kiefel JJ, article 1(4) of ICERD suggested that any special measures taken must be 'necessary' and that section 8(1) of the RDA therefore involves a test of 'reasonable necessity'; that is, a test of 'the legitimacy and proportionality of a legislative restriction of

323 (2008) 169 FCR 59, 83 [82].

324 (2008) 169 FCR 59, 83-84 [83].

325 (2008) 169 FCR 59, 83-84 [82]-[83].

326 This aspect of the court reasoning has been the subject of academic commentary: see Sarah Pritchard, 'Special Measures', in *Racial Discrimination Act 1975: A Review*, Race Discrimination Commissioner, 1995; Wojciech Sadurski, 'Gerhardy v Brown v The Concept of Discrimination: Reflections on the Landmark Case that Wasn't', (1986) 11 *Sydney Law Review* 5.

327 (1985) 159 CLR 70, 72.

328 (1985) 159 CLR 70, 113-114 (Wilson J), 131 (Brennan J).

329 (2013) 252 CLR 168, 191 [38]-[39] (French CJ), 206 [84]-[85] (Hayne J), 213 [112] (Crennan J), 232 [166] (Kiefel J), 241 [197] (Bell J), 286 [310], 297-298 [345]-[348] (Gageler J).

330 (2013) 252 CLR 168, 185 [21] (French CJ).

331 (2013) 252 CLR 168, 211 [102] (Hayne J).

a freedom or right'.<sup>332</sup> An aspect of this test involves considering whether there are less restrictive alternative measures available.<sup>333</sup>

- Bell J adopted an alternative reading of article 1(4) of ICERD and reached the conclusion that there was no test of proportionality in relation to section 8(1) of the RDA.<sup>334</sup>
- Gageler J said that sections 8 and 10 of the RDA needed to be considered as part of an integrated whole.<sup>335</sup> His Honour held that the causal nexus connoted by the words 'by reason of' in section 10 of the RDA required an absence of justification for different treatment. Such justification is to be assessed by a standard of 'reasonable necessity'.<sup>336</sup>

## 3.4 'Racial Hatred'

### 3.4.1 Background

Racial hatred provisions were introduced into the RDA in 1995.<sup>337</sup> The majority of cases decided under the RDA in recent years have involved consideration of those provisions.

Section 18C of the RDA provides:

#### **18C 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 *Australian Human Rights Commission Act 1986* allows people to make complaints to the Australian Human Rights 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.

- (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.

There have been some unsuccessful legislative proposals to amend Part IIA of the RDA and section 18C in particular.<sup>338</sup>

<sup>332</sup> (2013) 252 CLR 168, 219 [130] (Crennan J), 235 [178] (Kiefel J).

<sup>333</sup> (2013) 252 CLR 168, 222-223 [137] (Crennan J), 237 [182] (Kiefel J).

<sup>334</sup> (2013) 252 CLR 168, 258 [242]-[243], 259-260 [246] (Bell J).

<sup>335</sup> (2013) 252 CLR 168 at 282 [304], 292 [327] (Gageler J).

<sup>336</sup> (2013) 252 CLR 168 at 295-296 [339]-[342] (Gageler J).

<sup>337</sup> *Racial Hatred Act 1995* (Cth).

<sup>338</sup> In April 2014, the Commission made a detailed submission in response to an exposure draft of a Government Bill to amend Part IIA of the RDA. The Commission's submissions are available at <https://www.humanrights.gov.au/submissions/amendments-part-ii-a-racial-discrimination-act-1975>.

### 3.4.2 Significance of term ‘racial hatred’

Although the term ‘racial hatred’ appears in the heading in Part IIA of the RDA, the term does not appear in any of the provisions under this heading. It has been held that an applicant is not required to prove that the impugned behaviour had its basis in ‘racial hatred’ in order to establish a breach of Part IIA.<sup>339</sup>

### 3.4.3 Persons to whom the provisions apply

Section 18C(1) of the RDA operates to protect a person or group of a particular ‘race, colour or national or ethnic origin’.<sup>340</sup>

It is not necessary to establish that all people in a racial group may be offended by the acts the subject of complaint. It will be sufficient to show that a particular group may reasonably be affected by the conduct. For example:

- in *McGlade v Lightfoot*,<sup>341</sup> the relevant group was defined as ‘an Aboriginal person or a group of Aboriginal persons who attach importance to their Aboriginal culture’;<sup>342</sup>
- in *Creek v Cairns Post Pty Ltd*,<sup>343</sup> the group was defined as ‘an Aboriginal mother, or carer of children, residing in the applicant’s town’;<sup>344</sup>
- in *Jones v Toben*,<sup>345</sup> 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’;<sup>346</sup>
- in *Eatock v Bolt*,<sup>347</sup> the relevant group was defined as ‘Aboriginal persons of mixed descent who have fair skin and who by a combination of descent, self-identification and communal recognition are, and are recognised as, Aboriginal persons’;<sup>348</sup>
- in *Clarke v Nationwide News Pty Ltd trading as The Sunday Times*, the relevant group was defined as ‘adult members of the local Aboriginal community, including parents and carers of children’.<sup>349</sup>

In *McLeod v Power*,<sup>350</sup> 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 specific race or national or ethnic group, being too wide a term.<sup>351</sup> 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

339 *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 357 [18]; *Toben v Jones* (2003) 129 FCR 515, 549 [137] (Allsop J); *Eatock v Bolt* (2011) 197 FCR 261, 307-311 [196]-[208].

340 See 3.2.1 above in relation to the interpretation of these terms.

341 (2002) 124 FCR 106.

342 (2002) 124 FCR 106, 117 [46].

343 (2001) 112 FCR 352.

344 (2001) 112 FCR 352, 356 [13].

345 [2002] FCA 1150.

346 [2002] FCA 1150, [95]-[96].

347 (2011) 197 FCR 261.

348 (2011) 197 FCR 261, 327-328 [280]-[284].

349 (2012) 201 FCR 389, [191].

350 [2003] FMCA 2.

351 [2003] FMCA 2, [55].



are under threat.<sup>352</sup> His Honour suggested that it would be ‘drawing a long bow’ to include ‘whites’ as a group protected under the RDA.<sup>353</sup>

In *Kelly-Country v Beers*,<sup>354</sup> Brown FM held that, when considering the material of a comedian which circulated throughout the country generally, the appropriate group for the purposes of the assessment required by section 18C(1) was ‘ordinary Aboriginal people within Australian society’. His Honour stated that it was not appropriate to otherwise place any geographical limitation on the group.<sup>355</sup>

### 3.4.4 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 section 9(1) which uses the expressions ‘based on’ and sections 11-15 which uses ‘by reason of’.<sup>356</sup>

Section 18B provides that the complainant’s race, colour or national or ethnic origin need only be one of the reasons for doing an act and need not be the dominant or substantial reason for the act.

Drummond J held in *Hagan v Trustees of the Toowoomba Sports Ground Trust*<sup>357</sup> that section 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.<sup>358</sup> His Honour also held that section 18C(1)(b) should not be interpreted mechanically. It should be applied in light of the purpose and statutory context of section 18C – namely, as a prohibition of behaviour based on racial hatred.<sup>359</sup> Drummond J concluded, after examining the Second Reading Speech for the Bill that inserted Part IIA into the RDA, that ‘it would give section 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’.<sup>360</sup>

On appeal, the Full Court of the Federal Court confirmed that the condition in section 18C(1)(b) requires consideration of the reason or reasons for which the relevant act was done.<sup>361</sup>

Kiefel J held similarly in *Creek v Cairns Post Pty Ltd*<sup>362</sup> (*‘Creek v Cairns Post’*) that section 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 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).<sup>363</sup>

352 [2003] FMCA 2, [59].

353 [2003] FMCA 2, [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 Newspaper Pty Ltd* [1997] HREOCA 23.

354 [2004] FMCA 336.

355 [2004] FMCA 336, [100].

356 RDA, ss 11-15. The issue of causation generally under the RDA is discussed at 3.2.2(a)(iii) and 3.2.2(b) above.

357 [2000] FCA 1615.

358 [2000] FCA 1615, [16].

359 [2000] FCA 1615, [34].

360 [2000] FCA 1615, [36].

361 *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2001) 105 FCR 56, 60 [21] and [23].

362 (2001) 112 FCR 352.

363 (2001) 112 FCR 352, 357 [18].



A relevant inquiry identified by Kiefel J in *Creek v Cairns Post* is whether ‘anything suggests race as a factor’ in the decision to do the relevant act.<sup>364</sup>

In *Jones v Toben*,<sup>365</sup> Branson J adopted the approach of Kiefel J in *Creek v Cairns Post* to the words ‘because of’ in section 18C(1)(b).<sup>366</sup> Branson J considered the material before her which, amongst other things, conveyed the imputation that there was serious doubt that the Holocaust occurred. Her Honour found 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]).<sup>367</sup>

The approach of Kiefel J in *Creek v Cairns Post* was considered by the Full Court of the Federal Court in *Toben v Jones*.<sup>368</sup> Carr J agreed with the way in which Kiefel J had framed the relevant inquiry in *Creek v Cairns Post* (which had also been approved of by Hely J in *Jones v Scully* and Branson J in *Jones v Toben*).<sup>369</sup> Kiefel J in *Toben v Jones* clarified that a causal connexion is required by section 18C(1)(b) and the relevant inquiry was as to what was the reason for the conduct in question.<sup>370</sup> This requires consideration of the motive of the person in question. An inquiry as to motive or reason is not limited to the explanation a person may give for their conduct. The true reason for their conduct may be apparent from what they said or did.<sup>371</sup> Allsop J in *Toben v Jones* confirmed that the test for causal connection was as articulated by the Full Court in *Hagan v Trustees of the Toowoomba Sports Ground Trust*. His Honour did not consider that Kiefel J had sought to widen that test.<sup>372</sup>

In *Miller v Wertheim*,<sup>373</sup> the Full Court of the Federal Court 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 section 18C.

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.<sup>374</sup>

In *McGlade v Lightfoot*,<sup>375</sup> an interview was reported in a newspaper in which the respondent made comments that were alleged to breach the racial hatred provisions. Carr J 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 other reason for the respondent’s statements than the race or ethnic origin of the relevant group of people.<sup>376</sup>

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364 (2001) 112 FCR 352, 359 [28].

365 [2002] FCA 1150.

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

367 [2002] FCA 1150, [99]. Her Honour’s approach was approved on appeal in *Toben v Jones* (2003) 129 FCR 515.

368 (2003) 129 FCR 515.

369 (2003) 129 FCR 515, 525-526 [24]-[31].

370 (2003) 129 FCR 515, 531 [61].

371 (2003) 129 FCR 515, 531 [62]-[63].

372 (2003) 129 FCR 515, 552-554 [149]-[155].

373 [2002] FCAFC 156.

374 [2002] FCAFC 156, [12]-[13].

375 (2002) 124 FCR 106.

376 (2002) 124 FCR 106, 121 [66].

In *Kelly-Country v Beers*,<sup>377</sup> Brown FM considered the performance of a comedian who portrays an Aboriginal character 'King Billy Cokebottle' for the duration of his routine, much of which involves jokes with no specific racial element. In doing so, the respondent applies black stage make-up, has an unkempt white beard and moustache as well as 'what appears to be a white or ceremonial ochre stripe across his nose and cheek bones ... [and] a battered, wide brimmed hat, of a kind often associated with Australian, particularly Aboriginal people, who live in a rural or outback setting'.<sup>378</sup>

His Honour noted that 'the intention of the person perpetrating the act complained of is not relevant ... an act that would otherwise be unlawful is not excused if its originator meant no offence by it'.<sup>379</sup> However, his Honour suggested that the portrayal of the character 'King Billy Cokebottle' was not an act done 'because of' race:

I have some difficulty in reaching the conclusion that Mr Beers performs his act because of Aboriginal people any more than I could conclude that Barry Humphries assumes the character of Edna Everage because of women in Moonee Ponds ... King Billy Cokebottle is a vehicle for his particular style of comedic invention.<sup>380</sup>

In *Silberberg v The Builders Collective of Australia Inc*<sup>381</sup> the applicant, who was Jewish, alleged a breach of the racial hatred provisions of the RDA in respect of two postings on an internet discussion forum. The claim was brought against the individual who posted the relevant postings, as well as against the incorporated association which hosted the forum as part of its website.

Gyles J held that it was reasonably likely that a person of the applicant's ethnicity would have been offended, insulted, humiliated or intimidated by the messages. Accordingly, his Honour upheld the complaint against the individual respondent and ordered a restraint against him publishing the same or similar material.<sup>382</sup>

In relation to the website host, his Honour held that the failure to remove material 'known to be offensive' within a reasonable time would breach section 18C(1)(a).<sup>383</sup> However, his Honour found that the evidence in this case did not establish that the failure to remove the message was connected to the race or ethnic origin of the applicant. His Honour stated:

there is substance to the argument that the failure to remove the offensive material has not been shown to have any relevant connection with race or ethnic origin of the applicant or indeed any other Jewish person as required by s 18C(1)(b) of the Act. The failure of the unidentified administrator to remove the Second Message on and after 1 July 2006 was the clearest case of failure to act. I cannot conclude that such failure was attributable, even in part, to the race or ethnic origin of the applicant. If Dwyer is accepted, the message should have been removed if its offensive nature was understood. However, failure to do so is just as easily explained by inattention or lack of diligence. Drawing the necessary causal connection would be speculation rather than legitimate inference. The same reasoning would be more obviously applicable to the systematic failure to monitor and remove offensive postings. Absent the necessary causal connection there is no breach of Pt IIA by the Collective.<sup>384</sup>

Gyles J therefore found the organisation had not acted unlawfully by allowing the offensive material to be copied, or by failing to delete it from the website promptly.

377 [2004] FMCA 336. The Acting Race Discrimination Commissioner was granted leave to appear as amicus curiae in this matter. The Commission's submissions are available at <[http://www.humanrights.gov.au/legal/submissions\\_court/amicus/kelly\\_country.html](http://www.humanrights.gov.au/legal/submissions_court/amicus/kelly_country.html)>.

378 [2004] FMCA 336, [30].

379 [2004] FMCA 336, [85]. Note, however, that his Honour's decision suggests that intention *is* relevant to determining the meaning and offensiveness of a particular act: 446 [111], 446 [114].

380 [2004] FMCA 336, [110].

381 (2007) 164 FCR 475.

382 (2007) 164 FCR 475, 486 [37].

383 (2007) 164 FCR 475, 485 [34].

384 (2007) 164 FCR 475, 486 [35].

In *Eatock v Bolt*,<sup>385</sup> Bromberg J found that the publisher of a newspaper (HWT) was vicariously liable for the conduct of its employee Mr Bolt in writing two articles that were in breach of section 18C. However, his Honour found that HWT was also primarily liable as a result of its own conduct.<sup>386</sup> That is, by publishing the articles HWT did an act that was reasonably likely to offend the identified group and that at least one of the reasons for publishing the article was the race of the persons in that group.

Justice Bromberg held that where a publisher of an article is aware that the author's motivation includes the race, colour, national or ethnic origin of the people the article deals with, then the act of publication (as an act in aid of the dissemination of the author's intent) was done because of the racial or other attributes which motivated the author.<sup>387</sup> This reasoning applies regardless of whether the author of the article is an employee of the publisher.

The liability of media outlets for the contents of their publications was also considered by Barker J in *Clarke v Nationwide News Pty Ltd trading as The Sunday Times*.<sup>388</sup> Ms Clarke complained about the publication by Nationwide News of 'blog' comments by readers of its online news website *Perthnow* underneath articles dealing with a car accident in which her three sons had died. Nationwide News had invited readers to make comments about the online articles. Comments were reviewed by journalists employed by Nationwide News and, if approved by them for publication, appeared on the website underneath the articles.

Barker J said:

where the evidence is that a respondent actively solicits and moderates contributions from readers before publishing them, and reserves the right not to publish or to modify them, the potential for a finding of contravention of s 18C is real. While the apparent subjective intention or motivation of the respondent in doing an act in such circumstances will be relevant to the question of causation, it will not be definitive.<sup>389</sup>

In this case, Barker J held that the publication of the comments complained of was done because of race, that the publication of those comments was not reasonable, and that there had been a breach of section 18C.

### 3.4.5 Reasonably likely to offend, insult, humiliate or intimidate

#### (a) Objective standard

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.<sup>390</sup> It is not necessary for an applicant to prove that any person was actually offended, insulted, humiliated or intimidated by the conduct.<sup>391</sup>

385 (2011) 197 FCR 261.

386 (2011) 197 FCR 261, 337-338 [329]-[332].

387 (2011) 197 FCR 261, 337-338 [332].

388 (2012) 201 FCR 389, 409-412 [96]-[110]. See also Edgerton 'Online newspaper liability for user blogs containing racial vilification' (2012) 50 *Law Society Journal* 50. The Commission was granted leave to intervene in this case. The Commission's submissions are available at <<https://www.humanrights.gov.au/commission-submissions-clarke>>.

389 (2012) 201 FCR 389, 412 [110].

390 *McGlade v Lightfoot* (2002) 124 FCR 106, 116-117 [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, 268-269 [98]-[100]; *Jones v Toben* [2002] FCA 1150, [84]; *Obieta v NSW Department of Education and Training* [2007] FCA 86 [223]; *Silberberg v Builders Collective of Australia Inc* (2011) 197 FCR 261, 482 [21].

391 *Jones v Scully* (2002) 120 FCR 243, 269 [99].

In *Creek v Cairns Post Pty Ltd*<sup>392</sup> (*'Creek v Cairns Post'*), 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 article focused on whether the Department's decision was a reaction to the 1997 *'Stolen Generation'* report,<sup>393</sup> which had spoken of the suffering of Aboriginal people as a result of the past practice of removing Indigenous children from their families.

The basis for the complaint was the photographs which accompanied the story. The photograph of the non-Aboriginal couple showed them in their living room with photographs and books behind them. 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 respondent obtained the photograph (which had been taken on an earlier occasion in relation to a different story) from a photographic library.

The applicant complained that the photograph portrayed her as a primitive bush Aboriginal and implied that this was the setting 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.

Kiefel J held that the act in question must have 'profound and serious effects, not to be likened to mere slights'.<sup>394</sup> 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'.<sup>395</sup>

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.<sup>396</sup>

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 section 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.<sup>397</sup>

Kiefel J's statement in *Creek v Cairns Post* that conduct must have 'profound and serious effects not to be likened to mere slights' to be caught by the prohibition in section 18C was cited with approval

<sup>392</sup> (2001) 112 FCR 352.

<sup>393</sup> 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).

<sup>394</sup> (2001) 112 FCR 352, 356-357 [16].

<sup>395</sup> (2001) 112 FCR 352, 355 [12].

<sup>396</sup> (2001) 112 FCR 352, 356 [13].

<sup>397</sup> [2002] FCA 1150, [92].

by French J in *Bropho v Human Rights & Equal Opportunity Commission*.<sup>398</sup> French J also stated, in obiter comments:

The act must be ‘reasonably likely’ to have the prohibited effect. Judicial decisions on s 18C(1) do not appear to have determined whether the relevant likelihood is a greater than even probability or a finite probability in the sense of a ‘real chance’. It might be thought that the threshold of unlawfulness should be defined by reference to the balance of probabilities rather than a lesser likelihood having regard to [the] character of s 18C as an encroachment upon freedom of speech and expression.<sup>399</sup>

## **(b) Subjective effect on applicant**

Evidence of the subjective effect on the applicant of an impugned act may be relevant and is admissible in determining 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’. However, it is ‘not determinative in answering the question’.<sup>400</sup>

In *Horman v Distribution Group Ltd*,<sup>401</sup> 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 section 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.<sup>402</sup>

## **(c) Reasonable victim test**

In *McLeod v Power*,<sup>403</sup> Brown FM described the objective test as one of the ‘reasonable victim’,<sup>404</sup> adopting the analysis of Commissioner Innes in *Corunna v West Australian Newspapers Ltd*.<sup>405</sup> 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.<sup>406</sup>

In *Kelly-Country v Beers*<sup>407</sup> (*‘Kelly-Country’*), the applicant, an Aboriginal man, complained of vilification in relation to a comedy performance (see 3.4.4 above). The applicant described himself as an ‘activist’. Brown FM stated that:

398 (2004) 135 FCR 105, 123. See also *Kelly-Country v Beers* [2004] FMCA 336, [88].

399 (2004) 135 FCR 105, 124 [70].

400 *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].

401 [2001] FMCA 52.

402 [2001] FMCA 52, [55].

403 [2003] FMCA 2.

404 [2003] FMCA 2, [65].

405 [2001] HREOCA 1.

406 [2003] FMCA 2, [69].

407 [2004] FMCA 336.

it is possible that such an activist may search out material for the purpose of being offended and so may be regarded as being unduly susceptible or even an agent provocateur in respect of the material complained of ... . A mere slight or insult is insufficient. This is the so-called 'reasonable victim' test.<sup>408</sup>

His Honour also noted that in applying the 'reasonable victim' test it is necessary to be informed by community standards and consider the context in which the communication is made:

In applying the reasonable victim test, it is obviously necessary to apply a yardstick of reasonableness to the act complained of. This yardstick should not be a particularly susceptible person to be aroused or incited, but rather a reasonable and ordinary person and in addition should be a reasonable person with the racial, ethnic or relevant attributes of the complainant in the matter.

...

[A] joke about a historically oppressed minority group, which is told by a member of a racially dominant majority, may objectively be more likely to lead to offence. As a result, a joke told by an Aboriginal person about other Aboriginal people may not be so likely to transgress the provisions of the RDA, because the teller of the joke itself and its subject are not in a situation of power imbalance, but are each members of the same subset of disadvantaged people ... .<sup>409</sup>

His Honour concluded, however, on the evidence that the act complained of was not unlawful as 'no reasonable Aboriginal person, who was not a political activist' would have been insulted, humiliated or intimidated by it (see below 3.4.5(e)).<sup>410</sup>

#### (d) Personal offence and group claims

Justice Bromberg in *Eatock v Bolt* took a slightly different approach to the 'reasonable victim test' and distinguished between claims made by identified individuals and claims made in relation to a group. His Honour's approach to the objective test was based on the principles developed by the law relating to misleading and deceptive conduct.<sup>411</sup> The distinction was based on the reference in section 18C(1)(a) to an act that is reasonably likely to offend, insult, humiliate or intimidate 'another person or a group of people'.

Where conduct is directed at identified individuals, then the objective test takes into account the characteristics of each of those identified individuals when assessing whether a 'personal offence claim' has been established.<sup>412</sup>

Where conduct is directed at a class of people, rather than at identified individuals, it is necessary to identify a hypothetical representative member of that class whose reactions are being assessed.<sup>413</sup> Bromberg J noted that:

A group of people may include the sensitive as well as the insensitive, the passionate and the dispassionate, the emotive and the impassive. The assessment as to the likelihood of people within a group being offended by an act directed at them in a general sense, is to be made by reference to a representative member or members of the group. For that purpose "ordinary" or "reasonable" members of the group are to be isolated. In that way, reactions which are extreme or atypical will be disregarded.<sup>414</sup>

408 [2004] FMCA 336, [87].

409 [2004] FMCA 336, [90]-[92].

410 [2004] FMCA 336, [111].

411 (2011) 197 FCR 261, 318 [243].

412 (2011) 197 FCR 261, 320 [250].

413 (2011) 197 FCR 261, 318-319 [244], 320 [250].

414 (2011) 197 FCR 261, 321 [251] (references omitted).

Justice Barker in *Clarke v Nationwide News Pty Ltd trading as The Sunday Times*, agreed with Bromberg J's reasoning of the 'reasonable victim test' stating:

it is necessary to consider only the perspective of the ordinary or reasonable member or members of the group, not those at the margins of the group whose view may be considered unrepresentative.<sup>415</sup>

### (e) Context

Context is an important consideration in determining whether a particular act breaches section 18C. For example, in *Hagan v Trustees of the Toowoomba Sports Ground Trust*,<sup>416</sup> 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'. His Honour stated:

There can be no doubt that the use of the word 'nigger' is, in modern Australia, well capable of being an extremely offensive racist act. If someone were, for example, to call a person of indigenous descent a 'nigger', that would almost certainly involve unlawfully racially-based conduct prohibited by the [RDA]. I say 'almost certainly' because it will, I think, always be necessary to take into account the context in which the word is used, even when it is used to refer to an indigenous person.<sup>417</sup>

Drummond J suggested that the use of the word 'nigger' *between* Australian Indigenous people would be *unlikely* to breach the RDA. His Honour cited the views of Clarence Major, to the effect that the use of the word 'nigger' between black people in the USA could be considered 'a racial term with undertones of warmth and goodwill – reflecting, aside from the irony, a tragicomic sensibility that is aware of black history'.<sup>418</sup>

In the case before Drummond J, it was significant that 'nigger' was the accepted nickname of ES Brown who was being honoured in the naming of the stand. In this context, His Honour found that the word had ceased to have any racist connotation.<sup>419</sup>

In *Kelly-Country*, considerations of context played an important part in the reasoning of Brown FM who held that the performance of the respondent in the character of 'King Billy Cokebottle' (see 3.4.4 above), did not contravene section 18C of the RDA. His Honour noted the significance of the fact that Aboriginal people had been 'the subject of racial discrimination and prejudice throughout the European settlement of Australia'. He continued:

However, the setting of the particular communication or act complained of must also be analysed. A statement by an Australian Senator to a journalist employed by a nationally circulating newspaper is clearly different to a joke exchanged between two friends in the public bar of a hotel. The former has a clear political context and the latter is an exchanged act of entertainment. Mr Beers' act and tapes are designed to be entertaining for members of a paying audience, which has a choice whether or not to attend the performances or buy the tapes concerned. They do not have an explicit political content. Clearly, the jokes told by Mr Beers are not

415 (2012) 201 FCR 389, 404 [62] (Barker J).

416 [2000] FCA 1615.

417 [2000] FCA 1615, [7].

418 [2000] FCA 1615, [7], citing Clarence Major, *Dictionary of Afro-American Slang*, 1970.

419 [2000] FCA 1615, [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]. As noted above, the United Nations Committee on the Elimination of Racial Discrimination subsequently found that certain articles of ICERD had been violated: *Hagan v Australia*, Communication No. 26/2002, UN Doc CERD/C/62/D/26/2002, 14 April 2003, [7.1]-[8].



intended to be taken literally. However, any joke by its nature, has the potential to hold at least someone up to scorn or ridicule. Accordingly, there may be situations when a joke does objectively incite racial hatred.<sup>420</sup>

His Honour concluded:

I accept that Mr Beers' act and tapes are vulgar and in poor taste. I also accept that Aboriginal people are a distinct minority within Australian society and so objectively more susceptible to be offended, insulted, humiliated and intimidated because of their disadvantaged status within Australian society. However, Mr Beers' act is designed to be humorous. It has no overt political context and the nature of the jokes or stories within it are intended to be divorced from reality. The act is not to be taken literally or seriously and no reasonable Aboriginal person, who was not a political activist, would take it as such.

King Billy Cokebottle himself does not directly demean Aboriginal people, rather he pokes fun at all manner of people, including Aboriginal people and indeed in many of his stories, Aboriginal people have the last laugh. I do not think that an Aboriginal person, who had paid expecting to hear a ribald comedic performance, would believe that the subject of either the act itself or the recorded tapes was to demean Aboriginal people generally.<sup>421</sup>

In *Campbell v Kirstenfeldt*,<sup>422</sup> Mrs Campbell, an Aboriginal woman, alleged that her neighbour, who was white, abused her and called her names on six separate occasions. These names included 'nigger', 'coon', 'black mole', 'black bastards' and 'lying black mole cunt'. She was also told to 'go back to the scrub were you belong'. The court held all six incidents contravened section 18C of the RDA. The respondent was ordered to make a written apology and damages were awarded to Mrs Campbell.

#### (f) 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 section 18C of the RDA. A true statement can nevertheless be offensive in the relevant sense.<sup>423</sup>

### 3.4.6 Otherwise than in private

Section 18C applies only to acts done 'otherwise than in private'.<sup>424</sup>

Section 18C(2) provides that:

- (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.

Section 18C(3) further provides:

- (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.

<sup>420</sup> [2004] FMCA 336, [99].

<sup>421</sup> [2004] FMCA 336, [111]-[112]. See also his Honour's comments as to the nature of a comedy performance: 'Humour to be effective must often sting and insult. It would, in my view, be unreasonable and necessary consequence of the Racial Discrimination Act for all humour, especially stand-up humour, to be rendered anodyne and innocuous by virtue of the provisions of the Act', [93].

<sup>422</sup> [2008] FMCA 1356.

<sup>423</sup> *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].

<sup>424</sup> As for the other elements of s 18C, the onus is on the applicant to prove that the relevant act was done 'otherwise than in private': see *Gibbs v Wanganeen* [2001] FMCA 14, [7].



Commissioner Innes in *Korczak v Commonwealth (Department of Defence)*<sup>425</sup> (*Korczak*), observed that the focus in section 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'. The Commissioner 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 section 9 of the RDA and article 5 of ICERD.<sup>426</sup>

In both *Gibbs v Wanganeen*<sup>427</sup> (*Gibbs*) and *McMahon v Bowman*,<sup>428</sup> the Federal Magistrates Court 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* noted that section 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'.<sup>429</sup> His Honour took a broad interpretive approach to the provision, stating that '[t]he legislation is remedial and its operation should not be unduly confined'.<sup>430</sup> 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'.<sup>431</sup>

Driver FM found certain comments made in a prison were made 'in private'.<sup>432</sup> In doing so, his Honour considered the Victorian case of *McIvor v Garlick*<sup>433</sup> which addressed the meaning of a public place under the *Summary Offences Act 1966* (Vic) and noted that the case was a material guide to the meaning of the words 'public place' at common law.<sup>434</sup>

He also noted that a prison is a closed community to which access and egress are strictly regulated.<sup>435</sup> His Honour suggested that because prisoners live there, it has some of the attributes of a private home<sup>436</sup> and he concluded that it is not in general a public place, although some parts may be a public place depending on the circumstances. Further, 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.<sup>437</sup> For example, 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.<sup>438</sup> 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'.<sup>439</sup>

425 *Korczak v Commonwealth of Australia* [1999] HREOCA 29.

426 [1999] HREOCA 29, [8.3].

427 [2001] FMCA 14.

428 [2000] FMCA 3.

429 [2001] FMCA 14, [11].

430 [2001] FMCA 14, [12].

431 [2001] FMCA 14, [12].

432 [2001] FMCA 14, [18].

433 [1972] VR 129.

434 [2001] FMCA 14, [13].

435 [2001] FMCA 14, [14].

436 [2001] FMCA 14, [15].

437 [2001] FMCA 14, [14].

438 [2001] FMCA 14, [17].

439 [2001] FMCA 14, [18]. In *McLeod v Power* [2003] FMCA 2, Brown FM cited with approval the decision in *Gibbs v Wanganeen* [2001] FMCA 14 and the analysis in *Korczak v Commonwealth (Department of Defence)* [1999] HREOCA 29, in drawing a distinction between the nature of an act and where it takes place: [65], [72]-[73]. His Honour 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: [70]-[73]. Note,

In *McMahon v Bowman*, 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 section 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'.<sup>440</sup> It was not necessary to prove that the people who were present in the street at the time of the incident heard what occurred.<sup>441</sup>

In *McGlade v Lightfoot*,<sup>442</sup> 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'.<sup>443</sup> 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'.<sup>444</sup>

In the substantive hearing in that matter,<sup>445</sup> 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'.<sup>446</sup>

It has also been held that the distribution of leaflets to people in a certain area, including placement of material in their letterboxes, was an act done 'otherwise than in private'.<sup>447</sup>

In *Jones v Toben*,<sup>448</sup> 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'.<sup>449</sup> In that case the respondent, Dr Frederick Toben, 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.<sup>450</sup> Justice Branson made orders that required Dr Toben to delete the offending material from a website which he controlled and prohibited him from publishing any further anti-Semitic material.

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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 the intentions of the actor are arguably not relevant. In *Sidhu v Raptis* [2012] FMCA 338, [19], Smith FM did not follow Brown FM on the question of the definition of a 'public place', describing his Honour's comments in *McLeod v Power* as clearly wrong.

440 [2000] FMCA 3, [26].

441 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. In *Chambers v Darley* [2002] FMCA 3, [10] Baumann FM referred approvingly to the analysis of Raphael FM.

442 (2002) 124 FCR 106.

443 (2002) 124 FCR 106, [26].

444 (2002) 124 FCR 106, [34]. Note, however, that these views were expressed as being provisional and subject to re-consideration at the final hearing of this matter, [37].

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

446 *McGlade v Lightfoot* (2002) 124 FCR 106, 116 [38]-[40].

447 *Hobart Hebrew Congregation v Scully* [2000] HREOCA 38.

448 [2002] FCA 1150.

449 [2002] FCA 1150, [74].

450 [2002] FCA 1150, [74]. Her Honour's findings on this point were not challenged on appeal: *Toben v Jones* (2003) 129 FCR 515.

The decisions in *Jones v Toben*<sup>451</sup> (at first instance) and in *Toben v Jones*<sup>452</sup> (on appeal) were followed in *Jeremy Jones v The Bible Believers' Church*<sup>453</sup> (see 3.4.7(c) below) and *Silberberg v Builders Collective of Australia*<sup>454</sup> (discussed at 3.4.4).

In subsequent proceedings,<sup>455</sup> Dr Toben was found guilty of 24 occasions of wilful and contumacious contempt of court as a result of publishing anti-Semitic material on the World Wide Web in contravention of the orders made by Justice Branson in 2002 and in breach of an undertaking given by Dr Toben to Justice Moore in November 2007.

Dr Toben was subsequently sentenced to three months imprisonment for 24 counts of criminal contempt.<sup>456</sup> Dr Toben's appeal against his conviction was dismissed by the Full Court of the Federal Court.<sup>457</sup>

In *Campbell v Kirstenfeldt*,<sup>458</sup> Lucev FM held that incidents where a man called his neighbour names, including 'niggers', 'coons', 'black mole', 'black bastards' and 'lying black mole cunt', were not taken to be done in private. The court found that the incidents:

- occurred over a neighbourhood fence;
- were at least capable of being heard between one property and another;
- were capable of being heard in public because they were said to people either on a public footpath or in a public reserve; or
- given that each of the houses faced onto a footpath and road, capable of being heard in a public place, being either the footpath, or the road or the park reserve.

Lucev FM said exchanges in these circumstances were not made in private, but exchanges heard by the complainant and members of her family, people who were not members of her family, or 'generally capable of being heard in neighbourhood'.<sup>459</sup>

In *Noble v Baldwin & Anor*<sup>460</sup> Barnes FM considered whether a statement made in a conversation between two co-workers in an office, referring to the applicant as 'latte coloured', was made 'otherwise than in private'. The office in this case was not a public place, nor in sight or hearing of the public and the conversation was not communicated to the public. Barnes FM stated that the fact that the conversation took place in a workplace does not of itself mean that the act in question was done otherwise than in private.<sup>461</sup> It was held that the statement occurred as part of a private conversation which was intended to be a private conversation. Accordingly, the statement was not made otherwise than in private and section 18C did not apply.

### 3.4.7 Exemptions

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

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451 [2002] FCA 1150.

452 (2003) 129 FCR 515.

453 [2007] FCA 55.

454 (2007) 164 FCR 475, 481 [19].

455 *Jones v Toben* [2009] FCA 354.

456 *Jones v Toben (No 2)* [2009] FCA 477.

457 *Toben v Jones* [2009] FCAFC 104.

458 [2008] FMCA 1356.

459 [2008] FMCA 1356, [29].

460 [2011] FMCA 283, [142]-[168].

461 [2011] FMCA 283, [165].

### 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.

#### (a) Onus of proof

The weight of authority suggests that the respondent bears the onus of proving the elements of section 18D.<sup>462</sup>

However, in *Bropho v Human Rights & Equal Opportunity Commission*<sup>463</sup> ('*Bropho*'), French J, in obiter comments, suggested that 'the incidence of the burden of proof' was not 'a question that should be regarded as settled'.<sup>464</sup> This was based on his Honour's view that section 18D was not 'in substance an exemption'<sup>465</sup> (see further 3.4.7(b) below). French J concluded by suggesting that any burden on a respondent may only be an evidentiary one:

If the burden of proof does rest upon the person invoking the benefit of s 18D, then that burden would plainly cover the proof of primary facts from which assessments of reasonableness and good faith are to be made. But the process of making such assessments is not so readily compatible with the notion of the burden of proof.<sup>466</sup>

In *Kelly-Country v Beers*<sup>467</sup> ('*Kelly-Country*'), the issue of the onus of proof was not explicitly raised, but Brown FM appears to have accepted that the onus of proof is on a respondent to satisfy section 18D.<sup>468</sup>

#### (b) A broad or narrow interpretation?

The question of whether the exemptions to racial hatred in section 18D should be broadly or narrowly construed was considered in *Bropho*. In that matter, the Nyungah Circle of Elders claimed that a cartoon published in the West Australian newspaper breached section 18C as being offensive to Aboriginal people. At first instance, Commissioner Innes found that the cartoon fell within the exemption for artistic works in section 18D(a).<sup>469</sup> This was upheld on review under the *Administrative Decisions*

<sup>462</sup> *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) 129 FCR 515, 528 [41] (Carr J). It is also noted that in an application for Dr Toben to be punished for contempt (*Jones v Toben* [2009] FCA 354), Lander J rejected Dr Toben's argument that the orders of Branson J should be read subject to the ongoing application of the exemptions in s 18D of the RDA. This was because the issue in contempt proceedings was whether Dr Toben complied with Branson J's orders. Justice Lander found the application of s 18D was irrelevant to that inquiry and, in any event, no evidence was tendered to bring Dr Toben within the exemption in s 18D: [2009] FCA 354 [93], [95], [97], [101].

<sup>463</sup> (2004) 135 FCR 105.

<sup>464</sup> (2004) 135 FCR 105, 126-127 [75].

<sup>465</sup> (2004) 135 FCR 105, 127 [76].

<sup>466</sup> (2004) 135 FCR 105, 128 [77].

<sup>467</sup> [2004] FMCA 336.

<sup>468</sup> [2004] FMCA 336, [125].

<sup>469</sup> *Corunna v West Australian Newspapers Ltd* [2001] HREOCA 1.

(*Judicial Review*) Act 1977 (Cth) by RD Nicholson J,<sup>470</sup> who held that section 18D should be broadly interpreted:

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.<sup>471</sup>

On appeal, French J agreed with the broad approach to the exemptions in section 18D. His Honour reasoned that section 18C was, in fact, an exception to the general principle recognised in international instruments and the common law that people should enjoy freedom of speech and expression. Section 18D was therefore 'exemption upon exception'.<sup>472</sup> French J stated:

Against that background s 18D may be seen as defining the limits of the proscription in s 18C and not as a free speech exception to it. It is appropriate therefore that s 18D be construed broadly rather than narrowly.<sup>473</sup>

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.<sup>474</sup>

In *Kelly-Country*, Brown FM (who did not make reference to the decision in *Bropho* on this issue) held that as part of remedial legislation, the exemption in section 18D should be narrowly construed:

Essentially, those who would incite racial hatred or intolerance within Australia should not be given protection to express their abhorrent views through a wide or liberal interpretation of the exceptions contained within section 18D. A broad reading of the exemptions contained in section 18D could potentially undermine the protection afforded by the vilification provisions contained in section 18C of the RDA.<sup>475</sup>

## **(c) Reasonably and in good faith**

### **(i) Objective and subjective elements**

Courts have approached 'reasonableness' and 'good faith' as separate elements of the exemption in section 18D. It appears that whether an act is 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.

In *Bryl v Nowra*,<sup>476</sup> 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

470 *Bropho v Human Rights & Equal Opportunity Commission* [2002] FCA 1510.

471 [2002] FCA 1510, [31]. See also the discussion of this issue in *Bryl v Nowra* [1999] HREOCA 11.

472 (2004) 135 FCR 105, 125 [72].

473 (2004) 135 FCR 105, 125 [73]. The other members of the court, Lee and Carr JJ, did not express any view on this issue.

474 See, for example, S Akmeemana and M 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) *Australian Journal of Human Rights* 265.

475 [2004] FMCA 336, [116].

476 *Bryl v Nowra* [1999] HREOCA 11.

work reflect the true situation, is not capable of grounding an adverse finding of bad faith for the purposes of section 18D.<sup>477</sup>

RD Nicholson J in *Bropho v Human Rights & Equal Opportunity Commission*<sup>478</sup> appeared to disagree with that formulation and suggest that the test required by section 18D was purely an objective one:

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 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.<sup>479</sup>

However, on appeal to the Full Court, both French and Lee JJ held that the expression 'reasonably and in good faith' required a subjective and objective test.<sup>480</sup> Carr J expressed his agreement with the primary Judge.<sup>481</sup>

On the objective test of 'reasonableness', French J noted the relevance of proportionality:

There are elements of rationality and proportionality in the relevant definitions of reasonably. A thing is done 'reasonably' in one of the protected activities in par (a), (b) and (c) of s 18D if it bears a rational relationship to that activity and is not disproportionate to what is necessary to carry it out. It imports an objective judgment. In this context that means a judgment independent of that which the actor thinks is reasonable. It does allow the possibility that there may be more than one way of doing things 'reasonably'. The judgment required in applying the section, is whether the thing done was done 'reasonably' not whether it could have been done more reasonably or in a different way more acceptable to the court. The judgment will necessarily be informed by the normative elements of ss 18C and 18D and a recognition of the two competing values that are protected by those sections.<sup>482</sup>

Lee J stated that reasonableness can only be judged against the possible degree of harm that a particular act may cause. His Honour cited, with apparent approval, the decision of the NSW Administrative Decisions Tribunal in *Western Aboriginal Legal Service Ltd v Jones*<sup>483</sup> to the effect that the greater the impact of an act found to be otherwise in breach of section 18C, the more difficult it will be to establish that the particular act was reasonable.<sup>484</sup>

477 [1999] HREOCA 11.

478 [2002] FCA 1510.

479 [2002] FCA 1510, [33], [36].

480 (2004) 135 FCR 105, 132-133 [96]-[102] (French J), 142 [141] (Lee J). Note that Lee J was in dissent as to the result of the appeal. It appears, however, that his approach to the legal issues in the case is substantially consistent with that of French J. A similar approach was 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 on appeal on the basis of procedural issues relating to the identity of the complainant: *Jones v Western Aboriginal Legal Service Ltd* (EOD) [2000] NSWADTAP 28.

481 (2004) 135 FCR 105, 149 [178]. Note that special leave to appeal against the decision of the Full Court of the Federal Court was refused by the High Court: *Bropho v Human Rights & Equal Opportunity Commission* [2005] HCATrans 9.

482 (2004) 135 FCR 105, 128 [79].

483 [2000] NSWADT 102.

484 (2004) 135 FCR 105, 142 [141]. Similarly in *Toben v Jones* (2003) 129 FCR 515, Carr J held that the appellant had not acted 'reasonably and in good faith' in publishing material expressing views about the Holocaust, and stated: 'In the context of knowing that Australian Jewish people would be offended by the challenge which the appellant sought to make, a reasonable person acting in good faith would have made every effort to express the challenge and his views with as much

Barker J in *Clarke v Nationwide News Pty Ltd trading as The Sunday Times* determined that the test of reasonableness in section 18C was the same as in section 18D finding that:

if the respondent is unable to make out that it was reasonable for it to publish a comment, because the comment objectively gave offence for the purpose of para (a) of s 18C(1) and was made “because of” race for the purposes of para (b) of s 18C(1), then the respondent will be taken to have contravened s 18C and will not be entitled to claim any exemptions under s 18D because its act of publication will not have been done “reasonably”.<sup>485</sup>

On the question of ‘good faith’, French J in *Bropho* held that section 18D:

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

...

[G]ood faith may be tested both subjectively and objectively. Want of subjective good faith, ie seeking consciously to further an ulterior purpose of racial vilification may be sufficient to forfeit the protection of s 18D. But good faith requires more than subjective honesty and legitimate purposes. It requires, under the aegis of fidelity or loyalty to the relevant principles in the Act, a conscientious approach to the task of honouring the values asserted by the Act. This may be assessed objectively.<sup>486</sup>

His Honour continued:

Generally speaking the absence of subjective good faith, eg dishonesty or the knowing pursuit of an improper purpose, should be sufficient to establish want of good faith for most purposes. But it may not be necessary where objective good faith, in the sense of a conscientious approach to the relevant obligation, is required. In my opinion, having regard to the public mischief to which s 18C is directed, both subjective and objective good faith is required by s 18D in the doing of the free speech and expression activities protected by that section.<sup>487</sup>

Lee J adopted a similar approach:

The question whether publication was an act done in good faith must be assessed, in part, by having regard to the subjective purpose of the publisher but overall it is an objective determination as to whether the act may be said to have been done in good faith, having due regard to the degree of harm likely to be caused and to the extent to which the act may be destructive of the object of the Act.<sup>488</sup>

...

Having regard to the context provided by the Act, the requirement to act in good faith imposes a duty on a person who does an act because of race, an act reasonably likely to inflict the harm referred to in s 18C, to show that before so acting that person considered the likelihood of the occurrence of that harm and the degree of harm reasonably likely to result. In short the risk of harm from the act of publication must be shown to have been balanced by other considerations. The words “in good faith” as used in s 18D import a requirement that the person doing the act exercise prudence, caution and diligence, which, in the context of the Act would mean due care to avoid or minimize consequences identified by s 18C.<sup>489</sup>

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restraint as was consistent with the communication of those views’: 528 [44].

485 (2012) 201 FCR 389, 422 [198].

486 (2004) 135 FCR 105, 131-132 [95]-[96] (French J).

487 (2004) 135 FCR 105, 133 [101].

488 (2004) 135 FCR 105, 142 [141].

489 (2004) 135 FCR 105, 143 [144].



In *Kelly-Country*, Brown FM acknowledged that ‘reasonableness’ has ‘an overall objective flavour’ while ‘good faith’ is ‘more subjective’.<sup>490</sup> His Honour found that the respondent’s comedy performance (see 3.4.4 above) was done ‘in good faith’. His Honour accepted the evidence of the respondent that he ‘personally does not intend to hold Aboriginal people up as objects of mockery or contempt’ and means ‘no particular spite towards Aboriginal people and, indeed, many people of indigenous background have enjoyed his performances’.<sup>491</sup>

In *Jeremy Jones v The Bible Believers’ Church*<sup>492</sup> the court rejected the respondent’s submission that material published on the internet denying the existence of the Holocaust had been published in good faith, noting that the deliberate use of provocative and inflammatory language together with a careless disregard for the effect of such language upon the people likely to be hurt by it was a clear indication of a lack of good faith on the respondent’s behalf. Conti J cited with approval the statement by French J in *Bropho v Human Rights & Equal Opportunity Commission* that the expression ‘reasonably and in good faith’ required a subjective and objective test.<sup>493</sup>

## (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*,<sup>494</sup> 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’.<sup>495</sup> The conflict between artistic license, 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).<sup>496</sup>

Moral and ethical considerations, expressive of community standards, are relevant in determining what is reasonable.<sup>497</sup>

In *Bropho*, French J similarly noted that the context in which an act is performed will be relevant in determining its reasonableness, offering the following example:

The publication of a genuine scientific paper on the topic of genetic differences between particular human populations might, for one reason or another, be insulting or offensive to a group of people. Its discussion at a scientific conference would no doubt be reasonable. Its presentation to a meeting convened by a racist organisation and its use to support a view that a particular group of persons is morally or otherwise ‘inferior’ to another by reason of their race or ethnicity, may not be a thing reasonably done in relation to par (b) of s 18D.<sup>498</sup>

490 [2004] FMCA 336, [131].

491 [2004] FMCA 336, [131].

492 [2007] FCA 55.

493 [2007] FCA 55, [49] citing French J in *Bropho v Human Rights & Equal Opportunity Commission* (2004) 135 FCR 105, 132-133 [96], [102].

494 [1999] HREOCA 11.

495 [1999] HREOCA 11.

496 [1999] HREOCA 11.

497 [1999] HREOCA 11.

498 (2004) 135 FCR 105, 128 [80].



Also relevant to questions of context, Lee J considered whether or not the publication of a range of views could effectively counter-balance the publication of an offensive view. His Honour stated:

Contemporaneous, or prior, publication of anodyne material would not, in itself, make an act of publication done because of race and involving racially offensive material, an act done reasonably and in good faith. A publisher of a catholic range of opinions could not rely upon past publication of diverse material to show that it acted reasonably and in good faith by publishing, because of race, a work or material that is offensive, insulting, humiliating or intimidating to persons of that race, if it acts without regard to whether the act of publication would cause the harm the Act seeks to prevent, and does not attempt to show how the risk of harm from the otherwise prohibited act, was counterbalanced, or outweighed, by matters showing the act to have been done reasonably and in good faith.<sup>499</sup>

In *Kelly-Country*, Brown FM considered the application of the exemption in section 18D to the comedy performance of the non-Aboriginal respondent, in which he portrayed an apparently Aboriginal character ‘King Billy Cokebottle’ (see 3.4.4 above) and stated:

In the particular context of this case, I bear in mind that Mr Beers was appearing as the character of King Billy Cokebottle, who in many ways is a grotesque caricature. As such, the character has more licence than a politician or social commentator to express views. In the context of a stand-up comedy performance, the offence implicit in much of Mr Beers’ material does not appear to me to be out of proportion. I do not believe that there is a high degree of gratuitous insult, given that the comedic convention of stand-up is to give offence or make jokes at the expense of some member or members of the community. In this regard, the character does not use slang terms, which are likely to give particular offence to any particular ethnic or racial group. In my view, Mr Beers keeps his performance within the constraints and conventions of stand-up comedy and when viewed objectively, it is reasonable.<sup>500</sup>

#### **(d) Section 18D(a): artistic works**

French J in *Bropho* considered the coverage of the term ‘artistic work’ in section 18D(a). It was accepted in that case that a cartoon was an ‘artistic work’. His Honour noted that the Commissioner who had first heard the matter ‘appeared to accept ... that the term did not require a distinction to be made between “real” and “pseudo” artistic works’<sup>501</sup> and went on to note that the term ‘does seem to be used broadly’.<sup>502</sup> His Honour further stated that ‘[i]t must be accepted that artistic works cover an infinite variety of expressions of human creativity’.<sup>503</sup>

In *Kelly-Country*, Brown FM had no doubt that a comedy performance fell within the term ‘artistic works’, noting that the explanatory memorandum makes specific reference to ‘comedy acts’.<sup>504</sup>

#### **(e) 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*.<sup>505</sup> 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

499 (2004) 135 FCR 105, 128 [80]. 142 [142].

500 [2004] FMCA 336, [127].

501 (2004) 135 FCR 105, 114 [40].

502 (2004) 135 FCR 105, 134 [104].

503 (2004) 135 FCR 105, 134 [106].

504 [2004] FMCA 336, [121].

505 *Walsh v Hanson* [2000] HREOCA 8.

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.<sup>506</sup>

In *Jeremy Jones v The Bible Believers' Church*,<sup>507</sup> the applicant claimed that the respondent discriminated against Jewish people by publishing on the Bible Believers' Church website a denial (amongst other things) of the existence of the Holocaust. The respondent claimed an exemption under section 18D of the RDA ('acts done reasonably and in good faith') arguing that matters about which the complaints had been made formed part of an academic or public interest discussion in relation to 'Zionist' policies and practices. Conti J dismissed the claim, holding:

I have not been able to identify, much less rationalise, however, the existence of any such discussion in the context of the present proceedings and of the conduct complained of by the application which has led thereto.<sup>508</sup>

#### **(f) 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 section 18D was considered by Kiefel J in *Creek v Cairns Post Pty Ltd*.<sup>509</sup> Her Honour suggested, in obiter, that defamation law was a useful guide in applying section 18D(c):

[Section 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.<sup>510</sup>

In *Eatock v Bolt*,<sup>511</sup> Bromberg J also considered that it was appropriate to look to the law of defamation to determine whether something was 'fair comment'. His Honour noted that the defence of fair comment is only available where the comment is based on facts which are true or protected by privilege.<sup>512</sup> In addition, the comment must be recognisable as comment and the facts upon which the comment is based must be expressly stated, referred to or notorious.<sup>513</sup> The purpose of this requirement is so that the recipient is put in a position to judge whether the comment is well founded.

506 [2000] HREOCA 8.

507 [2007] FCA 55.

508 [2007] FCA 55, [63].

509 (2001) 112 FCR 352.

510 (2001) 112 FCR 352, 360 [32].

511 (2011) 197 FCR 261.

512 (2011) 197 FCR 261, 343 [354].

513 (2011) 197 FCR 261, 343 [355].

Further, the maker of the comment must be acting honestly. Honesty requires that the maker of the comment genuinely believes the comment made.<sup>514</sup> If the maker knew that the comment was untrue or was recklessly indifferent to the truth or falsity of the comment, the maker would be acting dishonestly.<sup>515</sup> This is separately expressed in section 18D(c)(ii) in the requirement that the comment ‘is an expression of a genuine belief held by the person making the comment’.

### 3.5 Victimisation

Section 27(2) of the RDA prohibits victimisation in the following manner:

- (2) A person shall not:
  - (a) refuse to employ another person; or
  - (b) dismiss, or threaten to dismiss, another person from the other person’s employment; or
  - (c) prejudice, or threaten to prejudice, another person in the other person’s employment; or
  - (d) intimidate or coerce, or impose any pecuniary or other penalty upon, another person; by reason that the other person:
    - (e) has made, or proposes to make, a complaint under this Act or the *Australian Human Rights Commission Act 1986*;
    - (f) has furnished, or proposes to furnish, any information or documents to a person exercising or performing any powers or functions under this Act or the *Australian Human Rights Commission Act 1986*; or
    - (g) has attended, or proposes to attend, a conference held under this Act or the *Australian Human Rights Commission Act 1986*.

Penalty for an offence against subsection (2):

- (a) in the case of a natural person—\$2,500 or imprisonment for 3 months, or both; or
- (b) in the case of a body corporate—\$10,000.

There is limited case law concerning section 27(2).<sup>516</sup> However, the provision is in similar terms to section 94 of the SDA and section 42 of the DDA, discussed at 4.8 and 5.6 respectively.

Cases prior to 2011 (that considered the equivalent provisions in the SDA and DDA) have held that these victimisation provisions may give rise to civil and/or criminal proceedings.<sup>517</sup> This is because the definition of ‘unlawful discrimination’ in section 3 of the AHRC Act specifically includes conduct that is an offence under section 27(2) of the RDA.

However, in three cases since 2011, the Federal Court has cast doubt on whether either the Federal Court or the Federal Circuit Court has jurisdiction to hear an application under section 46PO of the AHRC Act if the alleged unlawful discrimination is an act of victimisation.<sup>518</sup> For further discussion on this issue of whether an application alleging victimisation may be brought as a civil claim pursuant to section 46PO of the AHRC Act see 4.8.

514 (2011) 197 FCR 261, 343 [357].

515 (2011) 197 FCR 261, 343 [357] referring to *Cheng v Tse Wai Chun* (2000) 3 HKCFAR 339, 352.

516 See, for example, *Shaikh v Campbell & Nivona Pty Ltd* [1998] HREOCA 13; *L v Quall* [1998] HREOCA 27; *Hassan v Hume* [2004] FCA 886.

517 See, for example, *O’Connor v Ross (No 1)* [2002] FMCA 210, [11].

518 *Walker v Cormack* (2011) 196 FCR 574, 585-587 [37]-[41]; *Walker v State of Victoria* [2012] FCAFC 38, [98]-[100] (Gray J); *Chen v Monash University* [2016] FCAFC 66, [119]-[124] (Barker, Davies and Markovic JJ). Cf *Dye v Commonwealth Securities Limited (No 2)* [2010] FCAFC 118, [71] (Marshall, Rares and Flick JJ) where the Full Court of the Federal Court previously reached a different view.

### 3.6 Vicarious Liability

An employer can be held vicariously liable for the actions of an employee or agent if during the course of their employment they carry out an act that would be unlawful under Part II<sup>519</sup> or IIA of the RDA.<sup>520</sup> To avoid liability the employer has to show that all reasonable steps have been taken to prevent the employee or agent from doing the act.<sup>521</sup>

In *Gama v Qantas Airways Ltd (No 2)*<sup>522</sup> Qantas was held to be vicariously liable for actions of its employees in discriminating against another employee, Mr Gama, on the basis of his race and disability. Statements made towards Mr Gama that he looked 'like a Bombay taxi driver' and walked up the stairs 'like a monkey' were found to amount to unlawful racial discrimination. Qantas was found to be vicariously liable for each of these incidents on the basis that the remarks were made by, or in the presence of, a supervisor of Mr Gama and therefore condoned.

However, Mr Gama's claim that Qantas was vicariously liable for the actions of its employees in denying or limiting his access to the opportunities for promotion was unsuccessful. While Raphael FM found there 'was a general culture inimical to persons' of certain racial backgrounds, he found there was insufficient evidence to persuade him that there were systemic problems at Qantas or a culture in Mr Gama's workplace leading to the denial of his applications for promotion.<sup>523</sup>

As discussed above at 3.2.2(a)(ii), the above findings of Raphael FM were upheld on appeal to the Full Court of the Federal Court.<sup>524</sup> One of Qantas' grounds of appeal submitted that the following passage by Raphael FM misapplied section 18A of the RDA:

I am satisfied that whilst Mr Hulskamp may not have made the 'walk up the stairs' remark he was the senior employee and he condoned the making of the remark in a way which would place liability on Qantas pursuant to s 18A.<sup>525</sup>

Qantas argued that this effectively treated the failure of an employer to take reasonable steps to prevent unlawful discrimination as a separate ground of liability of itself, rather than as a defence to liability. The Full Court agreed in principle with Qantas' submission, noting:

It is not prima facie unlawful to fail to take steps to prevent discrimination. Rather, s 18A operates to excuse a respondent from liability imposed via s 18A(1) if reasonable steps were taken to prevent its employee or agent from doing the act which would otherwise attract that liability. On its proper construction s 18A would not make Qantas liable for 'condoning' a remark made by an unidentified person.<sup>526</sup>

519 RDA, s 18A(1).

520 RDA, s 18E(1).

521 RDA, ss 18A(2), 18E(2).

522 [2006] FMCA 1767. For further discussion of this case see Christine Fougere, 'Vicarious liability for race and disability discrimination in the workplace', (2007) 45(3) *Law Society Journal* 37.

523 [2006] FMCA 1767, [97].

524 *Qantas Airways Ltd v Gama* (2008) 167 FCR 537. His Honour's findings in relation to disability discrimination, however, were overturned: 565-567 [84]-[92] (French and Jacobson JJ). The Commission was granted leave to appear as intervener in the appeal. The Commission's submissions are available at <[http://www.humanrights.gov.au/legal/submissions\\_court/intervention/qantas\\_v\\_gama.html](http://www.humanrights.gov.au/legal/submissions_court/intervention/qantas_v_gama.html)> and <[http://www.humanrights.gov.au/legal/submissions\\_court/intervention/gama.html](http://www.humanrights.gov.au/legal/submissions_court/intervention/gama.html)>.

525 [2006] FMCA 1767, [78].

526 (2008) 167 FCR 537, 565 [81] (French and Jacobson JJ, with whom Branson J generally agreed, [122]).

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However, the court went on to note that Qantas had not relied on the defence under section 18A(2), so Raphael FM's comments in relation to that defence were of no consequence to his findings on liability. The appeal ground therefore failed.<sup>527</sup>

In *House v Queanbeyan Community Radio Station*<sup>528</sup> a community radio station was found vicariously liable for the racially discriminatory action of its board members in refusing the membership applications of two Aboriginal women.

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527 (2008) 167 FCR 537, 565 [83].

528 [2008] FMCA 897.

# 4 The Sex Discrimination Act

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## Contents

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<b>4.1</b>	<b>Introduction to the SDA.....</b>	<b>96</b>
4.1.1	Scope of the SDA.....	96
4.1.2	Limited application provisions .....	98
	(a) Application of the SDA to external territories .....	99
	(b) Availability of the SDA to male complainants .....	99
	(c) Foreign corporations or trading corporations under section 9(11) of the SDA .....	100
<b>4.2</b>	<b>Direct Discrimination Under the SDA .....</b>	<b>101</b>
4.2.1	Causation, intention and motive.....	101
4.2.2	Direct discrimination on the ground of sex.....	102
4.2.3	Direct discrimination on the ground of marital or relationship status.....	105
4.2.4	Direct discrimination on the ground of pregnancy .....	108
	(a) Relationship between pregnancy and sex discrimination .....	109
	(b) Maternity leave – direct discrimination on basis of characteristic that appertains generally to pregnancy .....	109
4.2.5	Direct discrimination on the ground of breastfeeding .....	116
4.2.6	Direct discrimination on the ground of family responsibilities.....	116
4.2.7	Direct discrimination on the ground of sexual orientation.....	119
4.2.8	Direct discrimination on the ground of gender identity .....	121
4.2.9	Direct discrimination on the ground of intersex status.....	121
<b>4.3</b>	<b>Indirect Discrimination Under the SDA.....</b>	<b>122</b>
4.3.1	Defining the ‘condition, requirement or practice’ .....	124
4.3.2	Disadvantaging .....	127
4.3.3	Reasonableness .....	129
4.3.4	The relationship between ‘direct’ and ‘indirect’ discrimination .....	131
<b>4.4</b>	<b>Special Measures Under the SDA .....</b>	<b>132</b>
<b>4.5</b>	<b>Areas of Discrimination .....</b>	<b>135</b>
4.5.1	Provision of services and qualifying bodies .....	135
4.5.2	Clubs .....	137
<b>4.6</b>	<b>Sexual Harassment.....</b>	<b>138</b>
4.6.1	Conduct of a sexual nature .....	139
4.6.2	Unwelcome conduct.....	140
4.6.3	Single incidents .....	142

---

4.6.4	The 'reasonable person' test .....	142
4.6.5	'Workplace' and 'workplace participant' .....	146
4.6.6	Sexual harassment as a form of sex discrimination .....	148
4.6.7	Sex-based harassment and sex discrimination .....	151
<b>4.7</b>	<b>Exemptions.....</b>	<b>151</b>
4.7.1	Services for members of one sex.....	152
4.7.2	Voluntary bodies .....	153
4.7.3	Acts done under statutory authority .....	154
4.7.4	Competitive sporting activity .....	155
4.7.5	Marital or relationship status exemption for gender reassignment .....	157
<b>4.8</b>	<b>Victimisation.....</b>	<b>157</b>
<b>4.9</b>	<b>Vicarious Liability .....</b>	<b>161</b>
4.9.1	Onus of proof.....	161
4.9.2	'In connection with' employment .....	162
4.9.3	'All reasonable steps' .....	163
4.9.4	Vicarious liability for victimisation.....	166
<b>4.10</b>	<b>Aiding or Permitting an Unlawful Act .....</b>	<b>166</b>



# The Sex Discrimination Act

## 4.1 Introduction to the SDA

### 4.1.1 Scope of the SDA

The *Sex Discrimination Act 1984* (Cth) ('SDA') covers discrimination on the ground of:

- sex (see section 5);
- sexual orientation (defined in section 4(1), and see section 5A);
- gender identity (defined in section 4(1), and see section 5B);
- intersex status (defined in section 4(1), and see section 5C);
- marital or relationship status (defined in section 4(1), and see section 6);
- pregnancy or potential pregnancy ('potential pregnancy' is defined in section 4B, and see section 7);
- breastfeeding (see section 7AA); and
- family responsibilities (defined in section 4A, and see section 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.

Part II, Divisions 1 and 2 of the SDA set out the areas of public life in which it is unlawful to discriminate on the ground of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, and breastfeeding. These include:

- work and superannuation;<sup>1</sup>
- education;<sup>2</sup>
- the provision of goods, services or facilities;<sup>3</sup>
- accommodation and housing;<sup>4</sup>
- buying or selling land;<sup>5</sup>
- clubs;<sup>6</sup>
- the administration of Commonwealth laws and programs;<sup>7</sup> and
- related requests for information.<sup>8</sup>

Discrimination on the ground of family responsibilities is made unlawful only in the area of employment and related requests for information.<sup>9</sup>

Note that, unlike the *Racial Discrimination Act 1975* (Cth) ('RDA'), *Disability Discrimination Act 1992* (Cth) ('DDA') and *Age Discrimination Act 2004* (Cth) ('ADA'),<sup>10</sup> the SDA does not bind the Crown in right of a state unless otherwise expressly provided.<sup>11</sup> This is particularly relevant in relation to the prohibitions on discrimination in work (sections 14-20) which do not expressly provide that the Crown in right of a state is bound by those sections.

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1 SDA, ss 14 to 20.

2 SDA, s 21.

3 SDA, s 22.

4 SDA, s 23.

5 SDA, s 24.

6 SDA, s 25.

7 SDA, s 26.

8 SDA, s 27.

9 SDA, s 7A and Pt II, Div 1.

10 RDA, s 6; DDA, s 14; ADA, s 13.

11 SDA, s 12.

Sexual harassment is also covered by the SDA.<sup>12</sup> Sexual harassment is any unwelcome sexual behaviour which makes a person feel offended, humiliated or intimidated where a reasonable person would have anticipated the possibility of that reaction in all the circumstances.<sup>13</sup> The circumstances to be taken into account include:<sup>14</sup>

- the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin of the person harassed;
- the relationship between the person harassed and the person who engaged in the conduct;
- any disability of the person harassed; and
- any other relevant circumstance.

Like discrimination on the grounds of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy and breastfeeding, sexual harassment is unlawful in a broad range of areas of public life.<sup>15</sup>

The SDA contains a number of permanent exemptions.<sup>16</sup> The SDA also empowers the Australian Human Rights Commission ('Commission') to grant temporary exemptions from the operation of certain provisions of the Act.<sup>17</sup> The precise scope and nature of a temporary exemption is determined by the Commission in each instance. Temporary exemptions are granted for a specified period not exceeding 5 years.<sup>18</sup>

The SDA does not make it a criminal offence to do an act that is unlawful by reason of a provision of Part II.<sup>19</sup> The SDA does, however, create the following specific offences:<sup>20</sup>

- Publishing or displaying an advertisement or notice that indicates an intention to do an act that is unlawful by reason of Part II of the SDA.<sup>21</sup>
- Failing to provide the source of actuarial or statistical data on which an act of discrimination was based in response to a request, by notice in writing, from the President or the Commission.<sup>22</sup>
- Divulging or communicating particulars of a complaint of sexual harassment that has been lodged with the Commission in certain prescribed circumstances.<sup>23</sup>
- Committing an act of victimisation,<sup>24</sup> by subjecting, or threatening to subject, another person to any detriment on the ground that the other person has done, or proposes to do one of the following acts:
  - made a complaint under the SDA or *Australian Human Rights Commission Act 1986* (Cth) ('AHRC Act');
  - brought proceedings under those Acts;

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12 SDA, Pt II, Div 3.

13 SDA, s 28A(1).

14 SDA, s 28A(1A).

15 SDA, ss 28B-28L.

16 SDA, Pt II, Div 4.

17 SDA, s 44. The Commission has developed criteria and procedures to guide the Commission in exercising its discretion under s 44 of the SDA. The Commission's guidelines and further information about the temporary exemptions granted by the Commission are available at: <<https://www.humanrights.gov.au/temporary-exemptions-under-sex-discrimination-act-1984-cth>>.

18 SDA, s 44(3)(c). Application may be made to the Administrative Appeals Tribunal for review of decisions made by the Commission under s 44: s 45.

19 SDA, s 85.

20 SDA, Pt IV.

21 SDA, s 86.

22 SDA, s 87.

23 SDA, s 92.

24 SDA, s 94(1).

- given any information or documents to a person exercising a power or function under those Acts;
- attended a conference or appeared as a witness in proceedings held under those Acts;
- reasonably asserted any rights under those Acts; or
- made an allegation that a person has done an act that is unlawful by reason of a provision of Part II of the SDA.<sup>25</sup>
- Insulting, hindering, obstructing, molesting or interfering with a person exercising a power or performing a function under the SDA.<sup>26</sup>

### 4.1.2 Limited application provisions

Section 9 of the SDA sets out the circumstances in which the Act applies.

Section 9(2) provides that '[s]ubject to this section, this Act applies throughout Australia'. Under section 9(1), 'Australia' includes the external territories. It has been held, however, that the SDA does not have extraterritorial effect.<sup>27</sup>

Section 9(3) provides that the SDA 'has effect in relation to acts done within a Territory'. Other than in sections 9(17) and (18) of the SDA, 'Territory' is defined as not including the Australian Capital Territory and the Northern Territory.<sup>28</sup>

Section 9(4) provides:

- (4) The prescribed provisions of Part II, and the prescribed provisions of Division 3 of Part II, have effect as provided by subsection (3) of this section and the following provisions of this section and not otherwise.

The prescribed provisions of Part II set out the areas of public life in which discrimination is unlawful under the SDA (but do not include discrimination in relation to registered organisations, the administration of Commonwealth laws and programs and requests for information).<sup>29</sup> The prescribed provisions of Division 3 of Part II are the provisions relating to sexual harassment and the areas of public life in which sexual harassment is unlawful under the SDA (but do not include sexual harassment in relation to registered organisations and the administration of Commonwealth laws and programs).<sup>30</sup>

The effect of section 9(4) of the SDA is to limit the operation of these unlawful discrimination provisions to the particular circumstances set out in section 9(5)-(21). This ensures that the prescribed provisions of Part II are given effect throughout Australia to the extent that they fall within Commonwealth legislative power. The second reading speech for the *Sex Discrimination Bill 1983* (Cth) confirms this understanding of section 9(4).<sup>31</sup> While these circumstances are widely cast, it is nevertheless important for applicants to consider the requirements of section 9 in bringing an application under the SDA.

<sup>25</sup> SDA, s 94(2). Note that the offence also occurs if a person is subjected to a detriment on the ground that the 'victimiser' believes that the person has done, or proposes to do, any of the things listed.

<sup>26</sup> SDA, s 95.

<sup>27</sup> See *Brannigan v Commonwealth* (2000) 110 FCR 566.

<sup>28</sup> SDA, s 4(1). Note that it does not follow that the SDA does not apply to acts done within the ACT or NT. It will do so in the circumstances set out in the remainder of s 9.

<sup>29</sup> SDA, s 9(1).

<sup>30</sup> SDA, s 9(1).

<sup>31</sup> *South Pacific Resort Hotels Pty Ltd v Trainor* (2005) 144 FCR 402, 405-406 [16]-[17] (Black CJ and Tamberlin J, Kiefel J agreeing).

## (a) Application of the SDA to external territories

In *South Pacific Resort Hotels Pty Ltd v Trainor*,<sup>32</sup> the Full Court of the Federal Court held that the SDA applies generally to acts done in external territories, such as Norfolk Island.

The Full Court in *Trainor* found that section 9(3) was unqualified in its terms and dealt with the application of the SDA generally. The fact that subsection (3) precedes those parts of section 9 that deal only with the prescribed provisions, and precedes subsection 9(4) itself, demonstrates that subsection (4) is not the starting point for a consideration of the applicability of the prescribed provisions in a territory such as Norfolk Island. Rather, subsection 9(4) operates structurally to separate the limitations on the applicability of the prescribed provisions throughout the remainder of the Commonwealth from the unqualified operation of the SDA, including the prescribed provisions, 'in relation to acts done within a Territory'.<sup>33</sup> There is therefore no additional requirement for an act done in a territory (as defined) to also fall within the scope of section 9(5)-(21) in order for the SDA to apply.<sup>34</sup>

The Full Court applied the same reasoning in order to find that section 106 of the SDA, which provides for vicarious liability, applied in the Territory of Norfolk Island because section 106 is included in the provisions with which section 9(3) is concerned.<sup>35</sup>

## (b) Availability of the SDA to male complainants

Section 9(10) provides that the various prescribed provisions in Part II of the SDA have effect to the extent that the provisions give effect to a relevant international instrument. Section 4 of the SDA defines 'relevant international instrument' to mean:

- (a) the *Convention on the Elimination of All Forms of Discrimination Against Women* ('CEDAW');<sup>36</sup>
- (b) the *International Covenant on Civil and Political Rights* ('ICCPR');<sup>37</sup>
- (c) the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR');<sup>38</sup>
- (d) the *Convention on the Rights of the Child* ('CRC');<sup>39</sup>
- (e) the International Labour Organization ('ILO') Convention (No. 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value;<sup>40</sup>
- (f) the ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation;<sup>41</sup>
- (g) the ILO Convention (No. 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities;<sup>42</sup>
- (h) the ILO Convention (No. 158) concerning Termination of Employment at the initiative of the Employer.<sup>43</sup>

32 (2005) 144 FCR 402.

33 (2005) 144 FCR 402, 406 [19] (Black CJ and Tamberlin J, Kiefel J agreeing).

34 (2005) 144 FCR 402, 406 [19] (Black CJ and Tamberlin J, Kiefel J agreeing).

35 (2005) 144 FCR 402, 407 [22] (Black CJ and Tamberlin J, Kiefel J agreeing).

36 [1983] ATS 9. Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

37 [1980] ATS 23. Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 13 November 1980).

38 [1976] ATS 5. Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 10 March 1976).

39 [1991] ATS 4. Opened for signature 2 September 1990, 1577 UNTS 3 (entered into force 16 January 1991).

40 [1975] ATS 45. Opened for signature 28 May 1953, 165 UNTS 303 (entered into force 10 December 1975).

41 [1974] ATS 12. Opened for signature 25 June 1958, 362 UNTS 32 (entered into force 25 June 1974).

42 [1991] ATS 7. Opened for signature 23 June 1981, 1331 UNTS 295 (entered into force 30 March 1991).

43 [1994] ATS 4. Opened for signature 22 June 1982, 412 UNTS 159 (entered into force 26 February 1994).

Previously, section 9(10) of the SDA provided that the various prescribed provisions in Part II of the SDA have effect in relation to discrimination against women, to the extent that the provisions give effect to CEDAW. The application of section 9(10) as worded prior to the amendments of 21 June 2011 was considered in relation to a claim of marital status discrimination by the Full Court of the Federal Court in *AB v Registrar of Births, Deaths and Marriages*.<sup>44</sup>

A majority of the Full Court of the Federal Court held that CEDAW is not concerned with marital status discrimination per se, but is concerned with discrimination on the basis of marital status that also involves discrimination against women.<sup>45</sup> The words ‘in relation to discrimination against women’ in the previous section 9(10) therefore only gave effect to provisions prohibiting discrimination on the ground of marital status when such discrimination also involved discrimination against women.<sup>46</sup> In the State Act in question in this case, the criterion for discrimination was not sex, but marriage, and had the applicant been a married man the result would have been the same.

The Full Court specifically noted that the previously worded section 9(10) was different from the other application provisions in section 9 and that the other application provisions give section 22 (and the other prescribed provisions of Part II) effect on a gender neutral basis.<sup>47</sup>

In the Commission’s view, amended section 9(10) of the SDA will now generally apply the provisions of the SDA equally to men and women. This is because the majority of the rights contained within CEDAW apply the rights in the ICCPR and the ICESCR to the situation of disadvantage experienced by women. Men relying on section 9(10) of the SDA to establish its application should ensure that the situation engages the rights and freedoms set out in one of the international instruments set out above. The decision in *AB v Registrar of Births, Deaths and Marriages*<sup>48</sup> will be confined to situations that engage the rights and freedoms set out in the CEDAW.

### (c) Foreign corporations or trading corporations under section 9(11) of the SDA

The remaining provisions, section 9(5)-(9) and section 9(11)-(21), provide that the various prescribed provisions in Part II of the SDA have effect in a number of specified situations, which reflect heads of Commonwealth legislative power.

For example, section 9(11) provides that the prescribed provisions of Part II have effect in relation to discrimination by a foreign corporation, a trading or financial corporation formed within the limits of the Commonwealth or a person in the course of the person’s duties as an officer or employee of such a corporation.<sup>49</sup>

In *Dudzinski v Griffith University*,<sup>50</sup> a male complainant successfully established that Griffith University was a trading corporation for the purposes of section 9(11) of the SDA thereby bringing his complaint within the application of the Act. In *Eleven Fellow Members of the McLeod Country Golf Club v McLeod Country Golf Club*,<sup>51</sup> the complaint brought by male complainants was dismissed by Commissioner Carter who found that the McLeod Country Golf Club was not a trading corporation and the provisions of Part II of the SDA had no application to the Club.

44 (2007) 162 FCR 528.

45 *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528, 558 [108] (Kennedy J). Note that s 6 of the SDA has since been amended to broaden the definition to ‘discrimination on the basis of marital or relationship status’.

46 (2007) 162 FCR 528, 558 [109] (Kennedy J).

47 (2007) 162 FCR 528, 532 [7] (Black CJ), 559 [112] (Kennedy J).

48 (2007) 162 FCR 528.

49 This provision reflects s 51(xx) of the *Constitution*, which confers upon the Commonwealth Parliament power to make laws with respect to ‘foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth’.

50 [2000] HREOCA 22.

51 [1995] HREOCA 25.

## 4.2 Direct Discrimination Under the SDA

### 4.2.1 Causation, intention and motive

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 a different sex.

The definitions of direct discrimination on the ground of sexual orientation (section 5A – see 4.2.7 below), gender identity (section 5B – see 4.2.8 below), intersex status (section 5C – see 4.2.9 below), marital or relationship status (section 6 – see 4.2.3 below), pregnancy or potential pregnancy (section 7 – see 4.2.4 below), breastfeeding (section 7AA – see 4.2.5 below) and family responsibilities (section 7A – see 4.2.6 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 the direct discrimination provisions 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.

In *Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd*<sup>52</sup> (*‘Mt Isa Mines’*), Lockhart J considered the meaning of ‘by reason of’, and discussed various tests to determine if the respondent’s conduct was discriminatory. 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.<sup>53</sup>

Lockhart J continued:

In my view the Act requires that when an inquiry is being held into alleged discrimination prohibited by section 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.

...

[I]n 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*<sup>54</sup> 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

52 (1993) 46 FCR 301.

53 (1993) 46 FCR 301, 321-322.

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

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*)<sup>55</sup> 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.<sup>56</sup>

The issue of causation under the DDA was considered in detail by the High Court in *Purvis v New South Wales (Department of Education and Training)*.<sup>57</sup> The court held there that the appropriate approach is to consider, in light of all the circumstances surrounding the alleged discrimination, what was the 'real reason' or 'true basis' for the treatment.<sup>58</sup>

It is, however, important to note that section 8 of the SDA provides that if an act is done by reason of two or more particular matters that include the relevant ground of discrimination, then it is taken to be done by reason of that ground, regardless of whether that ground is the principal or dominant reason for the doing of the act.

Later, in *Sterling Commerce (Australia) Pty Ltd v Iliff*,<sup>59</sup> Gordon J noted that 'the test of discrimination is not whether the discriminatory characteristic is the "real reason" or the "only reason" for the conduct but whether it is "a reason" for the conduct'.<sup>60</sup> While her Honour took the view that the Federal Magistrate at first instance<sup>61</sup> had 'impermissibly emphasised the motive or driving reason behind the [employer's] conduct, instead of focusing on whether the conduct occurred because of [the employee's] sex, pregnancy or family responsibilities',<sup>62</sup> her Honour did not consider that this affected the ultimate outcome of the case. Her Honour did not, however, discuss the decision in *Purvis* upon which the court at first instance based its analysis.<sup>63</sup>

## 4.2.2 Direct discrimination on the ground of sex

Allegations of direct sex discrimination have been raised largely in the context of cases involving pregnancy discrimination (see 4.2.4 below), sexual harassment (see 4.6.5 below) and sex-based harassment (see 4.6.6 below).

<sup>55</sup> *James v Eastleigh Borough Council* [1990] 2 AC 751.

<sup>56</sup> (1993) 46 FCR 301, 324-326. Applied in *Commonwealth v Human Rights and Equal Opportunity Commission* (1997) 77 FCR 371, 390-392; *Thomson v Orica Australia Pty Ltd* [2002] FCA 939, [159]-[161]; *Stanley v Service to Youth Council Inc* (2014) 225 FCR 317, 323 [11]; *Poppy v Service to Youth Council Inc* [2014] FCA 656, [54].

<sup>57</sup> (2003) 217 CLR 92.

<sup>58</sup> (2003) 217 CLR 92, 163 [236] (Gummow, Hayne and Heydon JJ), 101-103 [13]-[14] (Gleeson CJ), 143-144 [166] (McHugh and Kirby JJ).

<sup>59</sup> [2008] FCA 702.

<sup>60</sup> [2008] FCA 702, [48].

<sup>61</sup> *Iliff v Sterling Commerce (Australia) Pty Ltd* [2007] FMCA 1960.

<sup>62</sup> *Sterling Commerce (Australia) Pty Ltd v Iliff* [2008] FCA 702, [49].

<sup>63</sup> *Iliff v Sterling Commerce (Australia) Pty Ltd* [2007] FMCA 1960, [125] and [146].



In *Ho v Regulator Australia Pty Ltd*,<sup>64</sup> the FMC considered an allegation of direct sex discrimination contrary to section 5(1)(a). In that case the applicant alleged, amongst other things, that she had been discriminated against on the basis of her sex because she had been asked to change the towels in the men's washroom. Driver FM found that the request had been made because 'it was a job that needed doing and it was a job that had always been done by "one of the girls"'.<sup>65</sup> Accordingly, his Honour found that the request had been made on the basis of Mrs Ho being a woman, in breach of section 5(1)(a) of the SDA.<sup>66</sup> Driver FM stated that:

The request would not have been made if Mrs Ho had been a man. Appropriate comparators in the circumstances are the male employees in the workplace. They were not and would not have been asked to undertake this menial task. It follows that in making the request to Mrs Ho that she change the towels in the men's washroom, Mrs Kenny treated Mrs Ho less favourably than a man would have been treated in the same circumstances.<sup>67</sup>

In *Evans v National Crime Authority*,<sup>68</sup> 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).

In addition to a finding that the applicant had been constructively dismissed on the basis of her family responsibilities contrary to section 14(3A) (see 4.2.6 below), Raphael FM also made a finding of direct sex discrimination (the responsibility to care for children being a 'characteristic that appertains generally to women').<sup>69</sup> On appeal in *Commonwealth v Evans*<sup>70</sup> Branson J overturned the finding of direct sex discrimination.<sup>71</sup> Her Honour found there was no evidence before the court that showed how a male employee who took the same or comparable amounts of leave as the applicant would have been treated. Branson J stated 'it is not illegitimate for an employer, all other things being equal and provided indirect discrimination is avoided, to favour for re-employment an employee who takes limited leave over an employee who regularly takes a lot of leave, albeit that it is leave to which he or she is entitled'.<sup>72</sup> The situation was distinguished from *Thomson v Orica Australia Pty Ltd*<sup>73</sup> in which there was a family leave policy which required a certain standard of treatment (see 4.2.4(b)).

In *Poniatowska v Hickinbotham*,<sup>74</sup> the applicant was employed as a building consultant selling house and land packages on behalf of Hickinbotham Homes. During her employment the applicant made a number of complaints about conduct that occurred in the workplace, including complaints of sexual harassment. The applicant alleged that the subsequent termination of her employment was because she had made complaints of sexual harassment. Mansfield J found that the applicant had been directly

64 [2004] FMCA 62. Note that the Federal Magistrates Court ('FMC') was renamed the Federal Circuit Court of Australia ('FCC') in 2013.

65 [2004] FMCA 62, [151].

66 [2004] FMCA 62, [157].

67 [2004] FMCA 62, [151].

68 [2003] FMCA 375.

69 [2003] FMCA 375, [101]-[105]. Note that s 14(3A) has since been repealed and replaced with s 7A.

70 [2004] FCA 654.

71 But upheld Raphael FM's finding of discrimination on the ground of family responsibilities.

72 [2004] FCA 654, [71].

73 [2002] FCA 939.

74 [2009] FCA 680.

discriminated against on the basis of her sex in breach of section 5(1)(a) and section 14(2)(c). His Honour stated:

Ms Poniatowska was not treated as a victim of sexual harassment but as a problem to be dealt with. ...

In my judgment, the employer then determined that she was a person who did not 'fit' its work environment because she was a female who would not tolerate sexual harassment and the robust work environment. I have found that the employer then gave her three warning letters and the suspension letter as a means of setting the scene for the termination of her employment. In those processes, as my findings indicate, she was treated differently from the way the employer would have treated a male person. ...

...

Whilst no male persons are shown to have complained of sexual harassment or of exposure to discomforting sexually explicit language, clearly those engaging in the sexual harassment or the sexually explicit language were treated differently than Ms Poniatowska. If a male employee had complained of sexual harassment or of discomforting sexually explicit language, how would ESA have treated that employee? Necessarily, that question must be answered on a theoretical basis because there is no evidence of any such complaint by a male employee having been made. I am satisfied quite firmly that, in that event, a male complainant would have been treated differently. I reach that view partly based upon how the males who had engaged in sexual harassment were treated. I also reach that view because I consider that the evidence overall shows ESA, through Mr M Hickinbotham, was unsympathetic to Ms Poniatowska's complaints but was prepared to be much more sympathetic to the situation of [the male employees who engaged in the sexual harassment]. There is an underlying sense, and a strong one, that Ms Poniatowska as a complainant female was a potential ongoing impediment to the smooth functioning of the business of Homes and the better solution to her circumstances was that her employment should not continue; I do not consider on the whole of the evidence and my sense of the views of Mr M Hickinbotham in particular that ESA would have taken the same approach to a male employee complaining of such conduct.<sup>75</sup>

On appeal, Stone and Bennett JJ agreed with the reasoning of Mansfield J:

The primary Judge did not err in his choice of comparator, based upon his factual findings. His Honour appreciated that the question posed by section 5 was necessarily to be answered on a theoretical basis. His Honour considered that, if male perpetrators were sympathetically treated, male complainants would not have been terminated. ... It is apparent from the primary Judge's description of this particular working environment that ... his Honour concluded that it was an environment in which women would be targeted and be uncomfortable and, accordingly, more likely to complain than would men. That would lead to the situation that a male employee of this company would not have been sexually harassed in the first place or have found the work environment intolerable. ... It follows that the fact that Ms Poniatowska became a perceived problem as a complainant was because of her sex.<sup>76</sup>

The case raises the issue of the correct chain of reasoning when applying sections 5 and 14 of the SDA. In the course of granting a stay while ESA sought special leave to appeal to the High Court, Justice Besanko identified two strands in the reasoning of the majority of the Full Court.<sup>77</sup> First, that it was open to the trial judge to draw the inference that the respondent was treated less favourably than a male would have been treated in similar circumstances. Secondly, that the workplace environment was one in which women would be targeted and be uncomfortable and, accordingly, more likely to complain than men. ESA argued that the trial judge had not made a finding of this nature. The starting point in the second approach may be problematic if the 'cause' of the discrimination was too remote to be properly described as being "by reason of" sex as required by section 5. As ESA did not obtain special leave to appeal the High Court did not take the opportunity to clarify the proper approach to the construction of section 5 of the SDA.

<sup>75</sup> [2009] FCA 680, [311]–[312], [314].

<sup>76</sup> *Employment Services Australia Pty Ltd v Poniatowska* [2010] FCAFC 92, [112].

<sup>77</sup> *Employment Services Australia Pty Ltd v Poniatowska* [2010] FCA 1043, [17]. Special leave was refused: [2011] HCATrans 21.

In *Romero v Farstad Shipping (Indian Pacific) Pty Ltd*, Marshall J at first instance found that alleged bullying of a female employee by a male captain was not engaged in on the basis of the employee's gender.<sup>78</sup> As a result, Ms Romero's claim of sex discrimination failed. On appeal, the Full Court of the Federal Court found that the employer shipping company had failed to comply with its workplace harassment and discrimination policy and as a result breached Ms Romero's contract of employment. There was no challenge on appeal to the finding that the conduct alleged did not amount to sex discrimination.<sup>79</sup>

For an example of the need to clearly identify the correct comparator, in a case where an application alleging sex discrimination was dismissed, see *Gaffney v RSM Bird Cameron (a firm)*.<sup>80</sup>

### 4.2.3 Direct discrimination on the ground of marital or relationship status

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

- (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 or relationship status of the aggrieved person if, by reason of:
  - (a) the marital or relationship status of the aggrieved person; or
  - (b) a characteristic that appertains generally to persons of the marital or relationship status of the aggrieved person; or
  - (c) a characteristic that is generally imputed to persons of the marital or relationship 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 or relationship status.

Section 4 of the SDA defines 'marital or relationship status' as a person's status of being any of the following:

- (a) single;
- (b) married;
- (c) married, but living separately and apart from his or her spouse;
- (d) divorced;
- (e) the de facto partner of another person;
- (f) the de facto partner of another person, but living separately and apart from that other person;
- (g) the former de facto partner of another person;
- (h) the surviving spouse or de facto partner of a person who has died.

The definition of 'de facto partner' has the meaning given to it in the *Acts Interpretation Act 1901* (Cth). It includes relationships between people of the same sex or a different sex.<sup>81</sup>

Prior to 1 August 2013, section 6 of the SDA was limited to discrimination on the basis of 'marital status' which was a more limited definition comprising (a)-(d) above, (e) widowed, and (f) the de facto spouse of another person. The definition of 'de facto spouse' at that time was limited to a person of the 'opposite sex' who lives with a person 'as the husband or wife of that person on a bona fide domestic basis although not legally married to that person'. The cases considered below were handed down prior to 1 August 2013 and deal with the former prohibition of discrimination on the grounds of 'marital status'.

<sup>78</sup> [2014] FCA 439 at [17].

<sup>79</sup> *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* (2014) 231 FCR 403.

<sup>80</sup> [2013] FCA 661 at [146]-[153].

<sup>81</sup> *Acts Interpretation Act 1901* (Cth), ss 2D, 2E and 2F.

Section 6 of the SDA was considered by the then Human Rights and Equal Opportunity Commission, the Federal Court and the Full Court of the Federal Court in what is known as the *Dopking* litigation.<sup>82</sup> In that matter, complaints were made to the Commission 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.

The Commission found that this amounted to direct discrimination on the ground of marital status.<sup>83</sup> 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'.<sup>84</sup> 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.<sup>85</sup>

On review by the Full Court of the Federal Court,<sup>86</sup> it was held by Lockhart and Wilcox JJ (Black CJ dissenting) that the approach taken by the Commission 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.<sup>87</sup>

<sup>82</sup> *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* [1995] HREOCA 3; *Commonwealth v Human Rights and Equal Opportunity Commission* (1995) 63 FCR 74. Note that the wording of s 6 at the time referred to 'marital status', and was amended to refer to 'marital or relationship status' in 2013 by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth).

<sup>83</sup> *Sullivan v Department of Defence* (1992) EOC 92-421. See the new broader definition of discrimination on the ground of 'marital or relationship status' in s 4(1).

<sup>84</sup> [1995] HREOCA 3.

<sup>85</sup> [1995] HREOCA 3.

<sup>86</sup> *Commonwealth v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 191.

<sup>87</sup> (1993) 46 FCR 191, 204-205 (Lockhart J). The matter was remitted to the Commission for consideration of whether or not there was indirect discrimination under the SDA.

Wilcox J also favoured a 'narrow' view of section 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 characteristics that generally appertain, or are imputed, to that marital status.<sup>88</sup>

In *MW v Royal Women's Hospital*,<sup>89</sup> the Commission 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 section 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.<sup>90</sup> The Commissioner stated that compliance with a state law is not a defence under the SDA<sup>91</sup> and the complainants were awarded damages.<sup>92</sup>

A similar issue arose in *McBain v Victoria*.<sup>93</sup> Section 8(1) of the *Infertility Treatment Act 1995* (Vic) provided that to be eligible for fertility treatment a woman had to be either married and living with her husband or living with a man in a de facto relationship. The Federal Court found that section 8 required a provider of infertility treatment to discriminate on the ground of marital status. That section and a number of other provisions were declared by Sundberg J to be inconsistent with section 22 of the SDA and, under section 109 of the *Constitution*, inoperative to the extent of the inconsistency.<sup>94</sup>

The Victorian legislation dealing with assisted reproductive treatment has since been amended. Section 5(e) of the *Assisted Reproductive Treatment Act 2008* (Vic) now provides that persons seeking to undergo artificial insemination or assisted reproductive treatment must not be discriminated against on the basis of their sexual orientation, marital status, race or religion.

A complaint of marital status discrimination in the provision of services under the *Births, Deaths and Marriages Registration Act 1996* (Vic) was considered by the Full Court of the Federal Court in *AB*

88 (1993) 46 FCR 191, 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 section 4.3 below, and again in 2013), his Honour's reasoning on this issue would still appear to be relevant.

89 [1997] HREOCA 6 (extract at (1997) EOC 92-886).

90 [1997] HREOCA 6 (extract at (1997) EOC 92-886, 77,191). See also new broader definition of 'marital or relationship status' in s 4(1) of the SDA.

91 [1997] HREOCA 6 (extract at (1997) EOC 92-886, 77,192).

92 [1997] HREOCA 6 (extract at (1997) EOC 92-886, 77,194). Note that the Commissioner declined to make a declaration of invalidity under s 109 of the *Constitution* on the basis that the Commission was not a court and did not have the power to make a declaration of invalidity (77,193).

93 (2000) 99 FCR 116. Note that proceedings challenging this decision were brought in the High Court (with the then Human Rights and Equal Opportunity Commission intervening) but they were dismissed without consideration of the merits: *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372. See the Commission's submissions on the substantive issues at <<https://www.humanrights.gov.au/commission-submission-ivf>>.

94 Note that Kenny J in *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528, 550 [77] commented that Sundberg J in *McBain v Victoria* did not have any occasion in that case to consider the effect of ss 9(4) and (10) of the SDA and that while the issue was subsequently mentioned by the unsuccessful applicants for prerogative writs in argument before the High Court (*Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, 380) it was not otherwise discussed (see further 4.1.2(b) above).

*v Registrar of Births, Deaths & Marriages*.<sup>95</sup> Section 30C(3) of the state legislation relevantly provides that the Registrar cannot make an alteration to a person's birth registration after that person has undergone sex affirmation surgery if the person is married.

Kenny J found that, were it not for the limited application provisions in the SDA, section 30C(3) of the state legislation would have been inconsistent with section 22 of the SDA because it required the Registrar to treat the applicant less favourably than an unmarried person and would therefore be invalid to the extent of that inconsistency in accordance with section 109 of the *Constitution*.<sup>96</sup> However, none of the relevant provisions of section 9 operated to give the SDA effect in the circumstances of this case.

Only section 9(10) (at that time limited only to CEDAW) was relevant to the activities of the Registrar. As discussed in more detail at 4.1.2(b) above, that provision could only have given operation to section 22 in relation to discrimination on the ground of marital status when such discrimination also involved discrimination against women, where men's rights and freedoms were the standards for comparison.<sup>97</sup> The action of the Registrar in refusing to alter the applicant's birth certificate had nothing to do with the applicant being a woman and had the applicant been a man, the result would have been the same. As the criterion for discrimination was not sex, but marriage, the appeal failed.<sup>98</sup>

Other cases have considered claims of unlawful discrimination on the ground of marital or relationship status but the claims were dismissed without significant discussion of the relevant provisions of the SDA.<sup>99</sup>

#### 4.2.4 Direct discrimination on the ground of pregnancy

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

- (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.

Section 4B of the SDA provides a non-exhaustive definition of what is meant by 'potential pregnancy':

A reference in this Act to potential pregnancy of a woman includes a reference to:

- (a) the fact that the woman is or may be capable of bearing children; or
- (b) the fact that the woman has expressed a desire to become pregnant; or
- (c) the fact that the woman is likely, or is perceived as being likely, to become pregnant.

Much of the case law in relation to section 7(1) of the SDA arises from complaints that allege discrimination after a woman has returned to work after taking a period of maternity leave. This is because the taking of a period of maternity leave is a characteristic that appertains generally to women who are pregnant (section 7(1)(b)).<sup>100</sup> These cases are discussed further below (4.2.4(b)).

<sup>95</sup> (2007) 162 FCR 528.

<sup>96</sup> (2007) 162 FCR 528, 549 [75] (Kenny J).

<sup>97</sup> (2007) 162 FCR 528, 558 [108] (Kenny J).

<sup>98</sup> (2007) 162 FCR 528, 558-559 [111] (Kenny J, Gyles J agreeing). See now broader definition of 'marital or relationship status' at s 4(1) of the SDA.

<sup>99</sup> *Dranichnikov v Department of Immigration and Multicultural Affairs* [2002] FMCA 23; *Song v Ainsworth Game Technology Pty Ltd* [2002] FMCA 31.

<sup>100</sup> *Thomson v Orica Australia Pty Ltd* [2002] FCA 939, [165].



## (a) Relationship between pregnancy and sex discrimination

Complaints of discrimination on the basis of pregnancy or potential pregnancy, or on the basis of a characteristic that appertains generally to women who are pregnant or potentially pregnant, raise potentially overlapping claims of sex and pregnancy discrimination. This is because pregnancy and potential pregnancy, and the characteristics that appertain generally to those attributes, have also been said to be characteristics that appertain generally to women.<sup>101</sup> Complaints of discrimination on these grounds may therefore fall within both section 5(1)(b) and section 7(1)(b) of the SDA.

It has been held, however, that section 7 of the SDA operates exclusively of section 5. In *Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd*<sup>102</sup> (*Mt Isa Mines*), Lockhart J 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.<sup>103</sup>

*Mt Isa Mines* has subsequently been applied in cases alleging direct discrimination in relation to return to work after a period of maternity leave. In *Thomson v Orica Australia Pty Ltd*<sup>104</sup> (*Thomson*), for example, 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.<sup>105</sup> However, his Honour considered that he should follow the decision of Lockhart J in *Mt Isa Mines* in relation to the exclusive operation of section 7 and section 5.<sup>106</sup> He therefore concluded that, although he was satisfied the facts of the case would have supported a conclusion of unlawful sex discrimination under sections 5(1)(b) and (c) and 14(2), relief would be limited to that based on the claim of pregnancy discrimination under sections 7(1) and 14(2).<sup>107</sup>

## (b) Maternity leave – direct discrimination on basis of characteristic that appertains generally to pregnancy

There have been a number of cases in this area. These are discussed with particular emphasis on the identification of the ‘comparator’: that is, the person or persons to whom an applicant is to be compared in determining whether or not there has been ‘less favourable treatment’.

101 *Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd* (1993) 46 FCR 301; *Thomson v Orica Australia Pty Ltd* [2002] FCA 939.

102 (1993) 46 FCR 301.

103 (1993) 46 FCR 301, 327–328. Further comments made by his Honour concerning discrimination on the basis of potential pregnancy (which was not a specific ground of discrimination under the SDA at the time) are no longer relevant given that s 7 was amended subsequent to the *Mt Isa Mines* decision so as to make discrimination because of potential pregnancy unlawful.

104 [2002] FCA 939.

105 [2002] FCA 939, [168].

106 [2002] FCA 939, [170]. Allsop J noted that the SDA had been amended since *Mount Isa Mines* to insert the ground of ‘potential pregnancy’ into s 7, although this does not appear to have been relevant to, or an influence on, his Honour’s analysis on this point.

107 See also *Dare v Hurley* [2005] FMCA 844, [104]; *Sheaves v AAPT Ltd* [2006] FMCA 1380; *Cincotta v Sunnyhaven Ltd* [2012] FMCA 110; *Stanley v Service to Youth Council Inc* (2014) 225 FCR 317, 322 [10]; *Poppy v Service to Youth Council Inc* [2014] FCA 656 at [53].



In *Thomson* the applicant had been employed for nine years before taking 12 months maternity leave to which she was entitled under 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 found that the job offered to the applicant on her return from maternity leave was 'of significantly reduced importance and status, of a character amounting to a demotion (although not in official status or salary)'.<sup>108</sup> His Honour considered that the appropriate comparator, for the purposes of section 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 also found that the posited comparator would not have been treated contrary to any policy that had been laid down for his or her treatment.<sup>109</sup> His Honour decided that the applicant had been treated less favourably than another employee in the same or similar circumstances who was not pregnant.<sup>110</sup>

Allsop J also found 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.<sup>111</sup> His Honour found that the applicant was entitled to treat herself as constructively dismissed at common law<sup>112</sup> and that discrimination had occurred contrary to section 14(2)(a)-(d) of the SDA.

*Thomson* was cited with approval in *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd*.<sup>113</sup> The applicant in that matter was employed in the position of manager, technology support, in the respondent'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. She was, however, 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 sections 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'.<sup>114</sup> As such, the employer had engaged in discrimination as defined in section 7(1)(b) of the SDA and was in breach of section 14(2)(a) of the SDA.

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 which gave the applicant the right to return to a comparable

<sup>108</sup> [2002] FCA 939, [53].

<sup>109</sup> [2002] FCA 939, [138].

<sup>110</sup> [2002] FCA 939, [138].

<sup>111</sup> Applying *Burazin v Blacktown City Guardian* (1996) 142 ALR 144, 151. Note that the High Court in *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 held that a term of mutual trust and confidence, such that neither party will, without reasonable cause, conduct itself in a manner likely to destroy or weaken the relationship of trust and confidence between them, ought not to be implied by law in all employment contracts. As a result, the reasoning adopted by Allsop J in *Thompson* on this point may not now be followed.

<sup>112</sup> [2002] FCA 939, [148].

<sup>113</sup> [2003] FMCA 160.

<sup>114</sup> [2003] FMCA 160, [82].

position.<sup>115</sup> However, Driver FM held that by remaining in her position as Business Improvement Facilitator and accepting the offer to work on the new project, the applicant 'forgave' the employer's breach of contract.<sup>116</sup> 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.<sup>117</sup> Driver FM declined to make a finding of constructive dismissal.<sup>118</sup>

In *Mayer v Australian Nuclear Science and Technology Organisation*,<sup>119</sup> 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. The applicant 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 section 7(1) and it was unlawful by section 14(2)(a).<sup>120</sup> His Honour held that the proper comparison to be made was between the applicant and other fixed term contract employees of the respondent who were not pregnant, who intended to take 12 months leave and who had sought to have their contracts extended.<sup>121</sup> Driver FM found that most (if not all) other fixed term contract employees of the respondent who were not pregnant and who had sought to have their contracts extended were granted a contract extension of an equal or greater period than the original term of their employment. His Honour noted that, while 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 held that the applicant was treated less favourably than comparable employees.<sup>122</sup>

His Honour was further satisfied that the applicant's pregnancy was a factor in the decision to grant her a one year extension. The respondent asserted that the dominant factor in considering the length of the extension was the doubt about a business case for the applicant's position. His Honour found that a factor in that uncertainty was doubt in the respondent's mind whether, and if so on what basis, the applicant 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'.<sup>123</sup>

In *Ilian v ABC*,<sup>124</sup> the applicant took a period of two years and four months leave during which time she gave birth to two children. The leave comprised predominantly maternity leave, but also included long service leave, recreation leave and sick leave.<sup>125</sup> Upon her return to work, the applicant's employer failed to allow her to return to the position she had held before the commencement of her leave.

115 [2003] FMCA 160, [81]. Driver FM found that the statutory obligations contained in s 66 of the *Industrial Relations Act 1996* (NSW) in relation to parental leave were part of the respondent's maternity leave policy; were well known to employees; and gave business efficacy to the employment contract and should properly be regarded as forming an implied term of it ([81]).

116 [2003] FMCA 160, [87].

117 [2003] FMCA 160, [86].

118 [2003] FMCA 160, [88].

119 [2003] FMCA 209.

120 [2003] FMCA 209, [60].

121 [2003] FMCA 209, [58].

122 [2003] FMCA 209, [61].

123 [2003] FMCA 209, [62].

124 [2006] FMCA 1500.

125 McInnes FM characterised the leave taken by the applicant as maternity leave. His Honour stated that '[i]t would be unduly technical to characterise the total absence as anything other than relating to the two pregnancies and births': [2006] FMCA 1500, [180].

The applicant alleged that her employer's conduct was because of her pregnancies and the taking of maternity leave, and brought a claim of both sex and pregnancy discrimination pursuant to sections 5 and 7 of the SDA.

McInnes FM upheld the applicant's claim under section 7(1)(b) of the SDA, accepting that the applicant was treated less favourably than a comparator on the ground of her pregnancy. In relation to the issue of a comparator, McInnes FM stated:

It is sufficient for the Court to find as it has found that the Respondent's usual practice for employees who have taken leave of an extended nature is that they return to their previous duties.<sup>126</sup>

McInnes FM held that the reason for the less favourable treatment was the applicant's pregnancies and the taking of maternity leave and that the respondent had therefore contravened section 7 of the SDA.<sup>127</sup>

The application of Allsop J's approach in *Thomson* to the issue of the comparator led to the dismissal of a complaint of discrimination in *Iliff v Sterling Commerce (Australia) Pty Ltd*.<sup>128</sup> In that case, the applicant was employed by the respondent for two years prior to becoming pregnant in April 2004. Following discussions with her manager, it was agreed that the applicant would return to work on a part time basis before resuming her full time duties, subject to the changing needs of the business and potential restructuring. Upon attempting to return to work, the applicant was informed that her position no longer existed and that she was to be made redundant. She was advised that changes had occurred within the structure of the respondent's business and that the employee who had replaced her in her absence was better qualified for the new tasks these changes entailed.

Burchardt FM concluded that if the applicant had not gone on maternity leave it was *more probable* than otherwise that she would have continued in her employment, notwithstanding the various changes that took place in relation to the conduct of the business.<sup>129</sup> However, while it was clear that the applicant would not have been dismissed if she had not taken maternity leave, this did not necessarily mean that the *reason* for her dismissal was the fact that she was on maternity leave.

Relying on *Thomson* and *Purvis v New South Wales (Department of Education & Training)*,<sup>130</sup> Burchardt FM decided that the comparator against whom the applicant's treatment should be compared was a person who went on unpaid leave in December 2004 with an enforceable understanding that they were entitled to return to work following the end of that leave in 2005.<sup>131</sup> Despite taking an unfavourable view of the manner in which the respondent company dealt with the applicant, his Honour held that the *real reason* why the applicant was not permitted to return to work was because management had formed the view that the person who was employed to replace the applicant during her maternity leave was a better employee for the job. His Honour expressed the view that the same treatment would have been accorded to an employee on study leave or a male employee on unpaid leave even if such leave had involved a right to return to work.<sup>132</sup> Accordingly, this element of the sex discrimination claim failed.

Burchardt FM concluded, however, that the respondent had unlawfully discriminated against the applicant in requiring her to sign a release before it would pay her a redundancy payment. This was

<sup>126</sup> [2006] FMCA 1500, [185].

<sup>127</sup> Applying *Thomson*, having found a contravention of s 7 of the SDA, McInnes FM did not consider it necessary to consider the claim pursuant to s 5.

<sup>128</sup> [2007] FMCA 1960.

<sup>129</sup> [2007] FMCA 1960, [106].

<sup>130</sup> (2003) 217 CLR 92.

<sup>131</sup> [2007] FMCA 1960, [119]-[122].

<sup>132</sup> [2007] FMCA 1960, [133]. In his analysis, his Honour appears to rely on the taking of maternity leave as a characteristic appertaining to women (see, for example, references to the sex of the applicant at [133] and [146]) rather than to pregnancy under s 7(1)(b) although this does not appear, however, to impact on the outcome of the case.

based on a finding that the respondent wanted a release from the applicant in order to try and prevent her from seeking to enforce her rights pursuant to the return to work provisions contained in the *Workplace Relations Act 1996* (Cth). His Honour concluded that the reason for the respondent's action was therefore the taking of maternity leave.<sup>133</sup>

Both the appeal and cross-appeal against Burchardt FM's decision were dismissed.<sup>134</sup> In responding to an argument that Burchardt FM did not correctly identify the comparator, Gordon J gave further consideration to Allsop J's findings in Thomson and noted that:

The issue is whether Allsop J's finding that the employer would not have treated the comparator contrary to any other company policy was premised on the factual finding in that case that the Orica supervisor was prejudiced against women taking maternity leave. In my view, that factual finding did inform Allsop J's assessment that Orica treated the employee in question contrary to its own company policy (which was the relevant issue in that case) because of the maternity leave.<sup>135</sup>

In relation to the matter before her Honour, Gordon J found that there was nothing to suggest that the management at Sterling Commerce had a negative attitude towards maternity leave. In this context, her Honour was 'less likely to find that a reason Sterling Commerce failed to reinstate Ms Iliff was that she took maternity leave'.<sup>136</sup> In addition, her Honour accepted that the evidence before Burchardt FM did not suggest that Sterling Commerce would have treated the comparator with an equivalent right to return to work any differently than it did Ms Iliff and her Honour therefore dismissed that ground of the cross-appeal.<sup>137</sup>

In *Ho v Regulator Australia Pty Ltd*,<sup>138</sup> the applicant alleged, amongst other things, that she had been discriminated against on the basis of her pregnancy. Driver FM found that the applicant's supervisor had made it clear to the applicant that her pregnancy was unwelcome and that she would be required to prove her entitlement to maternity leave. She was required to attend a meeting with an independent witness to discuss her request for leave as well as a change in her work performance which had followed the announcement of her pregnancy.

Driver FM held as follows:

I find that in subjecting Mrs Ho to the meeting on 25 February 2002 the respondents discriminated against Mrs Ho on account of her pregnancy. The appropriate comparators are employees of the first respondent who were not pregnant but who had a condition requiring leave on the production of a medical certificate. It is hard to imagine an employee requiring leave on production of a medical certificate being summoned to a meeting before an independent witness to discuss their need for leave and an asserted decline in work performance and attitude since the medical condition became known. I find that such an employee would not have been subjected to an analysis of their work performance or been summoned to a meeting with an independent witness to justify a request for leave. By subjecting Mrs Ho to the meeting the respondents breached s.7(1)(a) of the SDA.<sup>139</sup>

133 [2007] FMCA 1960, [138]-[149]. His Honour further held that the respondent had breached the return to work provisions contained in the *Workplace Relations Act 1996* (Cth) and imposed the maximum penalty available under the legislation – \$33,000.

134 *Sterling Commerce (Australia) Pty Ltd v Iliff* [2008] FCA 702.

135 [2008] FCA 702, [44].

136 [2008] FCA 702, [45].

137 [2008] FCA 702, [45].

138 [2004] FMCA 62.

139 [2004] FMCA 62, [155].

In *Howe v Qantas Airways Ltd*,<sup>140</sup> the applicant was employed by the respondent as a customer service manager when she became pregnant. The applicant was earning \$95,000 per annum, with a base salary of \$64,000 in that position. The enterprise agreement regulating the applicant's employment required her to cease flying duties 16 weeks after the date of conception. The applicant registered her interest in available ground duties and was offered a position in the engineering department, performing photocopying and filing duties, earning about \$30,000 per annum. The applicant commenced unpaid maternity leave rather than take this position. The applicant alleged that the respondent had unlawfully discriminated against her on the ground of her pregnancy by refusing her request to access her accumulated sick leave entitlements and/or by failing to pay the applicant her base salary when she was required to cease flying by reason of her pregnancy.

Driver FM found that the proper comparison to be made was between the applicant and an employee of the respondent who was not pregnant but required to cease flying duties by reason of a medical condition. This hypothetical comparator was covered by the enterprise agreement that regulated the applicant's employment. The enterprise agreement provided that a flight attendant who, through personal illness, was unfit for flying but was fit for non-flying duty may take sick leave or, if a temporary ground staff position was available and accepted by the flight attendant, he or she must be paid the rate of pay prescribed in the relevant award.

Therefore, as the comparator would have the option of performing ground duties or taking sick leave, Driver FM found that the refusal of sick leave to the applicant amounted to less favourable treatment and constituted discrimination in breach of sections 7(1) and 14(2)(b) of the SDA. However, the offer of a rate of pay applicable to the engineering department position was not discriminatory by reference to this same hypothetical comparator.

In *Dare v Hurley*<sup>141</sup> the applicant alleged that she was dismissed from her employment either because she was pregnant or because of her request for maternity leave. The respondent contended that the applicant's employment was terminated because she had acted inappropriately by deleting documentation from the company's computer system, by installing password protection on documents contrary to company policy and by reporting in sick by means of an SMS message.

Driver FM considered that the appropriate hypothetical comparator for the purposes of section 7(1) of the SDA was an employee of the respondent subject to the same terms of employment: that is, one who had expressed a wish to take a period of unpaid leave; whose work performance was not assessed as unsatisfactory prior to the leave request; and who password protected two documents without instruction and reported in sick by means of an SMS message.<sup>142</sup> His Honour found that in dismissing the applicant the respondent treated her less favourably than the hypothetical comparator would have been treated because of her need for maternity leave: a characteristic that appertains to women who are pregnant. His Honour held that the respondent acted unlawfully in dismissing the applicant in breach of sections 7(1) and 14(2)(c) of the SDA.<sup>143</sup>

In *Fenton v Hair and Beauty Gallery Pty Ltd*,<sup>144</sup> the applicant attended her workplace after an absence due to illness related to her pregnancy. Driver FM found that the applicant was discriminated against

<sup>140</sup> [2004] FMCA 242. The Sex Discrimination Commissioner appeared as amicus curiae in this matter. The submissions of the Sex Discrimination Commissioner are available at: <[http://www.humanrights.gov.au/legal/submissions\\_court/amicus/howe\\_submissions\\_fifth.html](http://www.humanrights.gov.au/legal/submissions_court/amicus/howe_submissions_fifth.html)>. The Commissioner's supplementary submissions are available at: <[http://www.humanrights.gov.au/legal/submissions\\_court/amicus/howe\\_supplementary\\_submissions.html](http://www.humanrights.gov.au/legal/submissions_court/amicus/howe_supplementary_submissions.html)>.

<sup>141</sup> [2005] FMCA 844.

<sup>142</sup> [2005] FMCA 844, [104].

<sup>143</sup> [2005] FMCA 844, [116].

<sup>144</sup> [2006] FMCA 3.

on the ground of pregnancy when she was sent home by her employer despite being 'fit, ready and able to work'. His Honour stated:

The fact was that Ms Fenton had presented for work, was not sick and wanted to work. Ms Hunt had decided not to take the risk of permitting Ms Fenton to work because she did not want a repetition of the events of 18 December 2003 [on which day the applicant had been ill and had to leave work]. Ms Hunt's motives may have been benign (she was genuinely concerned for Ms Fenton's welfare) but Ms Fenton was treated less favourably than the hypothetical comparator would have been in the same circumstances. Ms Fenton was denied a week's salary that she was entitled to earn. A valued employee with Ms Fenton's skills and experience who was temporarily unfit for work but then presented for work fit at a time when her services were sorely needed, would not have been turned away. It was Ms Fenton's pregnancy that caused Ms Hunt to send Ms Fenton home because of her concern for her welfare. However, the decision should have been left for Ms Fenton. In sending Ms Fenton home and thereby depriving her of a week's salary, Ms Hunt discriminated against Ms Fenton by reason of her pregnancy contrary to s. 7(1) and s.14(2)(b) of the SDA. Ms Hunt denied Ms Fenton access to paid employment for a week which was a benefit associated with her employment. Alternatively, the denial of paid employment was a detriment for the purposes of s.14(2)(d).<sup>145</sup>

In two related cases in 2014, *White J* in the Federal Court found that the termination of the employment of two women while they were on unpaid parental leave and maternity leave was not relevantly related to their pregnancy, leave or family responsibilities.

In *Stanley v Service to Youth Council Inc*,<sup>146</sup> Ms Stanley was employed as a facilities manager at SYC. Her position was made redundant while she was on unpaid parental leave. *White J* held that the redundancy came about because Ms Stanley's role had been absorbed by others in the property and assets department. This was part of a larger reorganisation of the business unrelated to Ms Stanley's pregnancy.<sup>147</sup> *White J* held that Ms Stanley was treated no differently from a hypothetical employee of comparable experience who took 12 months' leave with SYC's consent and had an equivalent entitlement to return to work.<sup>148</sup>

In *Poppy v Service to Youth Council Inc*,<sup>149</sup> Ms Poppy was employed as a marketing manager by SYC. Her position was made redundant while on maternity leave. *White J* held that her duties were successfully divided between existing employees while she was on maternity leave and that the company made a decision to change the way it conducted marketing in a way that no longer required her role. His Honour accepted evidence from SYC that this decision was taken because it would result in cost savings to SYC and that Ms Poppy's pregnancy, maternity leave and family responsibilities played no relevant part in that decision.<sup>150</sup> Based on its experience during Ms Poppy's absence SYC decided that it could manage satisfactorily without her employment, but Ms Poppy was treated no differently from a hypothetical employee of comparable experience who was absent from work for about four months on leave with an entitlement to return to work.<sup>151</sup>

A similar result was reached in *Aitken v Virgin Blue Airlines*.<sup>152</sup>

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145 [2006] FMCA 3, [97].

146 (2014) 225 FCR 317.

147 (2014) 225 FCR 317, 338 [119] and 340 [128].

148 (2014) 225 FCR 317, 340 [132]-[133].

149 [2014] FCA 656.

150 [2014] FCA 656, [132].

151 [2014] FCA 656, [135]-[136].

152 [2013] FCCA 981, [86].

### 4.2.5 Direct discrimination on the ground of breastfeeding

Section 7AA(1) of the SDA defines direct discrimination on the ground of breastfeeding.

Section 7AA(1) of the SDA provides:

- (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 breastfeeding if, by reason of:
  - (a) the aggrieved woman's breastfeeding; or
  - (b) a characteristic that appertains generally to women who are breastfeeding; or
  - (c) a characteristic that is generally imputed to women who are breastfeeding;
 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 breastfeeding.

Section 7AA of the SDA was inserted into the Act on 21 June 2011. Previously, breastfeeding fell under the definition of direct discrimination in section 5(1)(b) of the SDA as 'a characteristic that appertains generally to persons of the sex of the aggrieved person'. In contrast, section 7AA(1) of the SDA is a stand-alone provision for discrimination on the ground of breastfeeding.

Section 7AA(3) of the SDA defines a reference to 'breastfeeding' to include the act of expressing milk. Section 7AA(4) of the SDA clarifies that a reference to breastfeeding includes a single act of breastfeeding and breastfeeding over a period of time.

### 4.2.6 Direct discrimination on the ground of family responsibilities

The definition of discrimination on the ground of family responsibilities appears in section 7A of the SDA. Unlike the other grounds in the SDA, the definition is restricted to direct discrimination and discrimination in specified areas of work (including employees,<sup>153</sup> contract workers,<sup>154</sup> partners,<sup>155</sup> commission agents,<sup>156</sup> qualifying bodies,<sup>157</sup> registered organisations<sup>158</sup> and employment agencies<sup>159</sup>).

Section 7A of the SDA provides:

#### **7A Discrimination on the ground of family responsibilities**

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.

Unlike the other grounds of discrimination in the SDA, there is no provision in section 7A for indirect discrimination based on the imposition of a 'condition, requirement or practice' that disadvantages people with family responsibilities.

<sup>153</sup> SDA, s 14.

<sup>154</sup> SDA, s 16.

<sup>155</sup> SDA, s 17.

<sup>156</sup> SDA, s 15.

<sup>157</sup> SDA, s 18.

<sup>158</sup> SDA, s 19.

<sup>159</sup> SDA, s 20.



In *Song v Ainsworth Game Technology Pty Ltd*<sup>160</sup> ('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.

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. When this condition was not accepted the respondent unilaterally changed the applicant's employment from full-time to part-time employment, 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 timing of meal breaks.<sup>161</sup> His Honour further found that the 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 the previous section 14(3A) of the SDA.<sup>162</sup>

In *Escobar v Rainbow Printing Pty Ltd (No 2)*<sup>163</sup> ('Escobar') 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.<sup>164</sup> Following that conversation, and 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 the previous section 14(3A) of the SDA 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.<sup>165</sup>

In *Evans v National Crime Authority*,<sup>166</sup> 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).

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160 [2002] FMCA 31.

161 [2002] FMCA 31, [72].

162 [2002] FMCA 31, [83].

163 [2002] FMCA 122.

164 [2002] FMCA 122, [33].

165 [2002] FMCA 122, [36]. Some queries have been raised regarding aspects of the reasoning in *Song* and *Escobar*. See Hon John von Doussa QC and Craig Lenahan, 'Barbequed or Burned? Flexibility in Work Arrangements and the Sex Discrimination Act' (2004) 27 *University of New South Wales Law Journal* 892.

166 [2003] FMCA 375.

Raphael FM found that the manager was unhappy with the concept of carer's leave<sup>167</sup> 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.<sup>168</sup> His Honour was also 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.<sup>169</sup> This in turn affected the renewal of the contract.<sup>170</sup> Raphael FM concluded that the applicant had been constructively dismissed on the basis of her family responsibilities, contrary to the previous section 14(3A).<sup>171</sup> In finding that there had been 'less favourable treatment' for the purposes of section 7A, his Honour stated that the proper comparator was an employee without family responsibilities who took personal leave within his or her entitlements.<sup>172</sup>

Raphael FM's finding of discrimination on the ground of family responsibilities was upheld on appeal by Branson J in *Commonwealth v Evans*.<sup>173</sup>

In *Cincotta v Sunnyhaven Limited*,<sup>174</sup> Ms Cincotta claimed that her employer, Sunnyhaven, discriminated against her on the grounds of sex, pregnancy and family responsibilities. Ms Cincotta had worked full time for Sunnyhaven for more than five years. She said that, contrary to usual practice, her employment as a program supervisor was not made permanent following the successful completion of a year in that role, and that this was because of her pregnancy and request for maternity leave. Nicholls FM found that Sunnyhaven made clear on Ms Cincotta's return to work that the only way in which her child care responsibilities could be accommodated was for her to resign as a permanent employee and instead become a casual.<sup>175</sup> His Honour also found that, by reason of the conduct of her supervisor, Ms Cincotta was eventually entitled to consider that she had been constructively dismissed and that 'at least a part of the reason for Ms Cincotta's dismissal, and certainly the vehicle by which it was achieved, was her childcare responsibilities'.<sup>176</sup>

In *Burns v Media Options Group Pty Ltd and Ors*,<sup>177</sup> Mr Burns' partner Ms Mezzomo became ill with cancer which required intensive medical treatment over a relatively short period of time. Mr Burns claimed that his employer provided no flexibility to him in meeting Ms Mezzomo's care needs. Mr Burns claimed discrimination in employment as an 'associate' of a person with a disability under section 15 of the DDA, and also discrimination in employment on the ground of family responsibilities under sections 7A and 14 of the SDA. Nicholls J found that the respondents engaged in a range of discriminatory conduct including telling him not to stay home to care for Ms Mezzomo, pressuring him to come to work and not to leave until he had finished the tasks allocated to him, and imposing a requirement that

167 [2003] FMCA 375, [88].

168 [2003] FMCA 375, [89].

169 [2003] FMCA 375, [88].

170 [2003] FMCA 375, [93]. His Honour also made a finding of direct sex discrimination (the responsibility to care for children being a 'characteristic that appertains generally to women'), [101]-[105]. On appeal in *Commonwealth v Evans* [2004] FCA 654, Branson J overturned the finding of direct sex discrimination. Her Honour found there was no evidence before the court that showed how a male employee who took the same or comparable amounts of leave as the applicant would have been treated. Branson J stated 'it is not illegitimate for an employer, all other things being equal and provided indirect discrimination is avoided, to favour for re-employment an employee who takes limited leave over an employee who regularly takes a lot of leave, albeit that it is leave to which he or she is entitled' ([71]). The situation was distinguished from *Thomson v Orica Australia Pty Ltd* [2002] FCA 939 in which there was a family leave policy which required a certain standard of treatment (see 4.2.4 above).

171 [2003] FMCA 375, [106].

172 [2003] FMCA 375, [108].

173 [2004] FCA 654.

174 [2012] FMCA 110.

175 [2012] FMCA 110, [286].

176 [2012] FMCA 110, [330].

177 [2013] FCCA 79.

he could only take leave at times determined by his employer.<sup>178</sup> His Honour concluded that Mr Burns was dismissed from his employment at least in part because of his family responsibilities.<sup>179</sup>

A number of cases involving issues relating to family responsibilities and requests for flexible working arrangements have included claims of indirect sex discrimination (section 5(2)). These cases are considered at 4.3 below.

## 4.2.7 Direct discrimination on the ground of sexual orientation

Section 5A(1) of the SDA provides:

### 5A Discrimination on the ground of sexual orientation

- (1) For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the aggrieved person's sexual orientation if, by reason of:
  - (a) the aggrieved person's sexual orientation; or
  - (b) a characteristic that appertains generally to persons who have the same sexual orientation as the aggrieved person; or
  - (c) a characteristic that is generally imputed to persons who have the same sexual orientation as 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 who has a different sexual orientation.

Section 4 of the SDA defines 'sexual orientation' as a person's sexual orientation towards:

- (a) persons of the same sex; or
- (b) persons of a different sex; or
- (c) persons of the same sex and persons of a different sex.

In *Bunning v Centacare*, Vasta J held that the definition of 'sexual orientation' describes how a person is, rather than how a person manifests that state of being. As a result, the definition did not encompass discrimination on the basis of polyamorous behaviour (that is, a practice of having multiple sexual relationships at the same time).<sup>180</sup>

Section 5A was inserted into the SDA by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) which commenced operation on 1 August 2013. Prior to this date, some cases brought under other provisions of the SDA which were in fact based on discrimination on the ground of sexual orientation had not been successful.

For example, in *Margan v President, Australian Human Rights Commission*,<sup>181</sup> Mr Margan had lodged a complaint with the Commission that was said to be on behalf of a number of homosexual and bisexual men and women and transgender and intersex persons who claimed unlawful discrimination based on sex and marital status by reason of their inability to register same sex marriages in the states of New South Wales, Queensland, Victoria, South Australia and the Australian Capital Territory. The complaint was terminated by the Commission on the basis that it was misconceived or lacking in substance.

Jagot J in the Federal Court dismissed an application under section 46PO of the AHRC Act on the basis that it had no reasonable prospects of success. Her Honour noted that the alleged discriminatory treatment resulted from the fact that each jurisdiction had legislation providing for the registration of a 'marriage' as defined in the *Marriage Act 1961* (Cth). Her Honour found that there was no discrimination

<sup>178</sup> [2013] FCCA 79, [1721].

<sup>179</sup> [2013] FCCA 79, [1726] and [1736]–[1737].

<sup>180</sup> [2015] FCCA 280, [29] and [42]–[43].

<sup>181</sup> [2013] FCA 109.

on the basis of sex because ‘a man cannot enter into the state of marriage as defined with another man just as a woman cannot enter into the state of marriage with another woman as defined’.<sup>182</sup> Similarly, there was no discrimination on the grounds of relationship status because ‘[t]he marital status of a man wishing to enter into a union ... with another man or of a woman wishing to enter into a union ... with another woman is irrelevant’.<sup>183</sup>

The relevant discrimination was on the grounds of sexual orientation and, at that stage, this was not a proscribed ground of discrimination under the SDA. However, there are reasons to think that the complainants would not have been successful even after the insertion of section 5A into the SDA. First, Jagot J considered that the definition of ‘unlawful discrimination’ in section 3(1) of the AHRC was limited to discretionary ‘acts, omissions or practices’.<sup>184</sup> Secondly, section 40(2A) now provides that nothing in Part II, Division 1 or 2 of the SDA (dealing with discrimination in work and other areas of public life), to the extent that it applies sections 5A, 5B, 5C or 6 of the SDA (dealing with discrimination on the grounds of sexual orientation, gender identity, intersex status or marital or relationship status) affects anything done by a person in direct compliance with the *Marriage Act 1961* (Cth).

Following the insertion of sections 5A, 5B and 5C into the SDA, there is the potential for state and territory laws to be invalid if they are inconsistent with the SDA because they discriminate on the basis of sexual orientation, gender identity or intersex status, and for things done in compliance with such laws to amount to unlawful discrimination under the SDA. However, as a result of regulations passed pursuant to section 40(2B) of the SDA, states and territories were given an initial period of 12 months to ensure that their laws were consistent with these new federal provisions.<sup>185</sup> This period was extended twice and expired on 31 July 2016.<sup>186</sup>

182 [2013] FCA 109, [23]. In rejecting an application for leave to appeal this judgment, Griffiths J said that: ‘The applicant did not adduce any evidence to suggest that he is treated less favourably than a person of the opposite sex who is also in a same sex relationship, let alone that any differential treatment is due to the applicant’s sex, as opposed to his sexual orientation. Moreover, there was no evidence below to suggest that a relevant condition or requirement imposed on males (and not females) or on females (and not males) in a same sex relationship which has the effect of disadvantaging males or females.’ *Margan v Australian Human Rights Commission* [2013] FCA 612, [46].

183 [2013] FCA 109, [27]. In rejecting an application for leave to appeal this judgment, Griffiths J said that: ‘the applicant adduced no evidence to suggest that he is treated less favourably than a person of a different marital status who may wish to marry their same sex partner, or that there is any differential treatment due to the applicant’s marital status, as opposed to his sexual preference. Nor was there any evidence to indicate that a relevant condition or requirement is imposed on people in a de facto relationship in a same sex relationship compared with those in a different marital status.’ *Margan v Australian Human Rights Commission* [2013] FCA 612, [47].

184 [2013] FCA 109, [29]. See also *Margan v Australian Human Rights Commission* [2013] FCA 612, [48]. This reasoning applied *Department of Defence v Human Rights and Equal Opportunity Commission* (1997) 78 FCR 208, 212–216 (*Burgess’ case*). *Burgess’ case* interpreted the meaning of the terms ‘act’ and ‘practice’ in the context of the Commission’s functions in relation to human rights under s 11(1) and Pt II, Div 3 of the AHRC Act. Jagot J in *Margan* appears to apply the same reasoning to the Commission’s functions in relation to unlawful discrimination under Pt IIB of the AHRC Act. There are grounds to consider that this reasoning may not be correct. First, the reasoning in *Burgess’ case* relied on comparing different functions of the Commission in s 11(1) of the AHRC Act. Secondly, ‘unlawful discrimination’ in s 3(1) of the AHRC Act means acts, omissions and practices that are unlawful under federal discrimination law including the SDA. Some provisions of the SDA explicitly encompass discrimination in the course of administering Commonwealth laws and programs (ss 26 and 28L). Thirdly, the exemption in s 40 of the SDA for acts done under particular statutory authority does not extend to all acts done under statutory authority. Now that s 5A has been inserted into the SDA, s 40(2B) anticipates that things done in direct compliance with state and territory laws will only be exempt if specifically prescribed by regulation.

185 Sex Discrimination Regulations 1984 (Cth), reg 5, introduced by the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Regulation 2013 (Cth).

186 By the Sex Discrimination Amendment (Exemptions) Regulation 2014 (Cth) and the Sex Discrimination Amendment (Exemptions) Regulation 2015 (Cth). A narrower exemption was made in the Sex Discrimination Amendment (Exemptions) Regulation 2016 (Cth) which took effect from 17 September 2016 and applied only to the *Human Reproductive Technology Act 1991* (WA) and the *Surrogacy Act 2008* (WA) until 1 August 2017.

## 4.2.8 Direct discrimination on the ground of gender identity

Section 5B(1) of the SDA provides:

### 5B Discrimination on the ground of gender identity

- (1) For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the aggrieved person's gender identity if, by reason of:
- (a) the aggrieved person's gender identity; or
  - (b) a characteristic that appertains generally to persons who have the same gender identity as the aggrieved person; or
  - (c) a characteristic that is generally imputed to persons who have the same gender identity as 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 who has a different gender identity.

Section 4 of the SDA defines 'gender identity' as 'the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth.

Section 5B was inserted into the SDA by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) which commenced operation on 1 August 2013. As at 30 June 2016 there had not been any decided cases dealing with the application of section 5B of the SDA. The Australian Human Rights Commission's conciliation register shows that, during this period, there have been a number of successful conciliations of complaints made on the grounds of gender identity.<sup>187</sup>

Some of the issues faced by gender diverse people were considered by the High Court in *AB v Western Australia*.<sup>188</sup> A unanimous court in that case said:

For many years the common law struggled with the question of the attribution of gender to persons who believe that they belong to the opposite sex. Many such persons undertake surgical and other procedures to alter their bodies and their physical appearance in order to acquire gender characteristics of the sex which conforms with their perception of their gender. Self-perception is not the only difficulty with which transsexual persons must contend. They encounter legal and social difficulties, due in part to the official record of their gender at birth being at variance with the gender identity which they have assumed.<sup>189</sup>

*AB v Western Australia* did not deal with discrimination under the SDA, although one of the functions of the Gender Reassignment Board which made the relevant decisions in the case was to promote equality of opportunity and to provide remedies in respect of discrimination.

## 4.2.9 Direct discrimination on the ground of intersex status

Section 5C(1) of the SDA provides:

<sup>187</sup> Australian Human Rights Commission, *Conciliation Register*, available at <<https://www.humanrights.gov.au/complaints/conciliation-register>>.

<sup>188</sup> (2011) 244 CLR 390.

<sup>189</sup> *AB v State of Western Australia* (2011) 244 CLR 390, 396 [1]. The Australian Human Rights Commission was granted leave to intervene in this case and made submissions about Australia's international law obligations, including the right to equality and non-discrimination under art 26 of the International Covenant on Civil and Political Rights. The Commission's submissions are available at: <<https://www.humanrights.gov.au/intervention-annotated-submissions-behalf-australian-human-rights-commission-intervening>>.

### 5C Discrimination on the ground of intersex status

- (1) For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the aggrieved person's intersex status if, by reason of:
- (a) the aggrieved person's intersex status; or
  - (b) a characteristic that appertains generally to persons of intersex status; or
  - (c) a characteristic that is generally imputed to persons of intersex status;
- 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 who is not of intersex status.

Section 4 of the SDA defines intersex status as the status of having physical, hormonal or genetic features that are:

- (a) neither wholly female nor wholly male; or
- (b) a combination of female and male; or
- (c) neither female nor male.

Section 5C was inserted into the SDA by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) which commenced operation on 1 August 2013. As at 30 June 2016 there had not been any decided cases dealing with the application of section 5C of the SDA.

## 4.3 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 sexual orientation (section 5A(2)), gender identity (section 5B(2)), intersex status (section 5C(2)), marital or relationship status (section 6(2)), pregnancy or potential pregnancy (section 7(2)) and breastfeeding (section 7AA(2)) are set out in similar terms.

These provisions all apply subject to section 7B which provides:

### 7B Indirect discrimination: reasonableness test

- (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), 5A(2), 5B(2), 5C(2), 6(2), 7(2) or 7AA(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:

### 7C Burden of proof

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.

For a brief period between 21 June 2011 and 1 August 2013, the reasonableness test in section 7B of the SDA also included a reference to discrimination on the ground of family responsibilities in section 7A of the SDA. It appears that this reference was included in error. Even during that period, section 7A of the SDA did not expressly define discrimination on the ground of family responsibilities to include indirect discrimination or indicate that section 7A was to have effect subject to the reasonableness test in section 7B. The reference to section 7A has now been removed from section 7B.

The current provisions relating to indirect discrimination were inserted in 1995 and amended in 2011 and 2013. 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 & Technology Organisation*<sup>190</sup> ('Mayer'), Driver FM referred to the second reading speech of the 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.<sup>191</sup>

There are three constituent elements to the current indirect discrimination provisions of the SDA. These are:

- the discriminator imposes, or proposes to impose, a condition, requirement or practice;
- the condition, requirement or practice has, or is likely to have, the effect of disadvantaging persons of the same sex, sexual orientation, gender identity or marital or relationship status as the aggrieved person, persons who (like the aggrieved person) are also of intersex status, or women who (like the aggrieved woman) are also pregnant, potentially pregnant or breastfeeding; and
- the condition, requirement or practice is not reasonable in the circumstances.

These elements are considered below, together with the relevant case law.

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 significant because direct discrimination on the ground of family responsibilities is only unlawful in the area of work.<sup>192</sup> In contrast, discrimination on the ground of sex is unlawful in the employment context more generally, and in many other areas of public life.<sup>193</sup> In addition, invoking the indirect sex discrimination definition in such matters avoids the potential difficulties associated with the causation and comparator elements of the direct family responsibilities discrimination provisions.<sup>194</sup>

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<sup>190</sup> [2003] FMCA 209, [72].

<sup>191</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 1995, 2460 (Hon Michael Lavarch, Attorney-General).

<sup>192</sup> See 4.2.6 above.

<sup>193</sup> See SDA, Pt II, Divs 1 and 2.

<sup>194</sup> Hon John von Doussa QC and Craig Lenihan, 'Barbequed or Burned? Flexibility in Work Arrangements and the Sex Discrimination Act' (2004) 27 *University of New South Wales Law Journal* 892.



### 4.3.1 Defining the ‘condition, requirement or practice’

The words ‘requirement or condition’ should be given a broad or liberal interpretation to enable the objects of the legislation to be fulfilled.<sup>195</sup>

In *Australian Iron & Steel Pty Ltd v Banovic*,<sup>196</sup> Dawson J considered the words ‘requirement or condition’ in the context of the indirect sex discrimination provisions of the *Anti-Discrimination Act 1977* (NSW). Dawson J stated:

it is clear that the words ‘requirement or condition’ should be construed broadly so as to cover any form of qualification or prerequisite demanded by an employer of his employee: *Clarke v Eley (IMI) Kynoch Ltd* (1983) ICR 165, at pp 170-171. Nevertheless, it is necessary in each particular instance to formulate the actual requirement or condition with some precision.<sup>197</sup>

This passage was cited with approval by the High Court in *Waters v Public Transport Corporation*<sup>198</sup> in the context of the indirect discrimination provisions of the *Equal Opportunity Act 1984* (Vic).

In a number of indirect sex discrimination cases involving issues of family responsibilities and requests for part-time work, courts have held that the condition, requirement or practice that employees be available to work full-time is a ‘condition, requirement or practice’ within the meaning of section 5(2) of the SDA.<sup>199</sup> Courts have made this finding in circumstances where the requirement to work full-time formed part of the aggrieved person’s ongoing terms and conditions of employment.<sup>200</sup>

In *Escobar v Rainbow Printing Pty Ltd (No 2)*,<sup>201</sup> (‘*Escobar*’) 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<sup>202</sup> and that in the event he was wrong in relation to this finding, further found that the respondent’s conduct constituted indirect discrimination on the basis of sex.<sup>203</sup> 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.<sup>204</sup> In making this finding, Driver FM cited with approval<sup>205</sup> the decision of the then Human Rights and Equal Opportunity Commission in *Hickie v Hunt & Hunt*<sup>206</sup> (‘*Hickie*’).

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,

195 *Waters v Public Transport Corporation* (1991) 173 CLR 349, 393 (Dawson and Toohey JJ), 406-407 (McHugh J); *Styles v Secretary, Department of Foreign Affairs and Trade* (1988) 84 ALR 408, 422-423; *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209, [72]-[73]; *Clarke v Catholic Education Office* (2003) 202 ALR 340, 351 [44]. See also the discussion of the phrase ‘requirement or condition’ within the indirect discrimination provisions of the DDA (see 5.2.3(c) below).

196 (1989) 168 CLR 165.

197 (1989) 168 CLR 165, 185.

198 (1991) 173 CLR 349, 393 (Dawson and Toohey JJ), 406-407 (McHugh J).

199 *Hickie v Hunt & Hunt* [1998] HREOCA 8, [6.17.10] (extract at (1998) EOC 92-910); *Escobar v Rainbow Printing (No 2)* [2002] FMCA 122, [33] and [37]; *Mayer v Australian Nuclear Science & Technology Organisation* [2003] FMCA 209, [69]-[73].

200 *Mayer v Australian Nuclear Science & Technology Organisation* [2003] FMCA 209.

201 [2002] FMCA 122.

202 See 4.2.6 above.

203 [2002] FMCA 122, [37].

204 [2002] FMCA 122, [33], [37].

205 [2002] FMCA 122, [33].

206 *Hickie v Hunt & Hunt* [1998] HREOCA 8.

an area of her practice was removed from her on the basis that it could not be managed working part-time. Commissioner Evatt stated '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'.<sup>207</sup> The respondent's conduct was found to constitute indirect sex discrimination.

In *Mayer v Australian Nuclear Science & Technology Organisation*,<sup>208</sup> ('Mayer') the applicant similarly wanted to work part-time following a period of maternity leave. The applicant had worked on a full-time basis prior to her maternity leave. Driver FM held as follows:

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. ... In this case discrimination under s.5(2) is established because the respondent insisted upon the applicant working full-time against her wishes.<sup>209</sup>

One exception to this general line of authority is the decision of Raphael FM in *Kelly v TPG Internet Pty Ltd*<sup>210</sup> ('Kelly'). In this case, the applicant complained that 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 was being placed upon Ms Kelly. She was being asked to carry out her contract in accordance with its terms.<sup>211</sup>

In those circumstances, his Honour held that the behaviour of the respondent constituted a refusal to provide the applicant with a benefit. It was not 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'.<sup>212</sup>

The correctness of the decision in *Kelly* was considered by Driver FM in *Howe v Qantas Airways Ltd*<sup>213</sup> ('Howe'). Driver FM disagreed with Raphael FM in *Kelly* on this issue, albeit in obiter comments, for reasons which included the following. First, if Raphael FM was correct in distinguishing the earlier authorities, an employer who consistently provides part-time work but then later refuses to do so can be liable under the SDA (as in *Mayer*) but an employer who has a policy or practice of never permitting reduced

207 [1998] HREOCA 8, [6.17.10].

208 [2003] FMCA 209.

209 [2003] FMCA 209, [71].

210 [2003] FMCA 584.

211 [2003] FMCA 584, [79].

212 [2003] FMCA 584, [83].

213 [2004] FMCA 242. The Sex Discrimination Commissioner appeared as amicus curiae in this matter and made submissions in relation to, inter alia, the correctness of the decision in *Kelly v TPG Internet Pty Ltd* [2003] FMCA 584. The submissions of the Sex Discrimination Commissioner are available at: <[http://www.humanrights.gov.au/legal/submissions\\_court/amicus/howe\\_submissions\\_fifth.html](http://www.humanrights.gov.au/legal/submissions_court/amicus/howe_submissions_fifth.html)> and her supplementary submissions are available at: <[http://www.humanrights.gov.au/legal/submissions\\_court/amicus/howe\\_supplementary\\_submissions.html](http://www.humanrights.gov.au/legal/submissions_court/amicus/howe_supplementary_submissions.html)>.

working hours cannot (as in *Kelly*). This would be an odd result. Secondly, in characterising the refusal of the respondent to allow the applicant to work part-time as a refusal to confer a benefit or advantage, Raphael FM conflated the notion of ‘disadvantage’ in section 5(2) of the SDA with the imposition of a ‘condition, requirement or practice’. They are separate elements of section 5(2) and must remain so if the provision is to operate effectively. Thirdly, Raphael FM did not consider whether the respondent’s insistence on full-time work may have constituted a ‘practice’ within the meaning of section 5(2) irrespective of whether it was a ‘condition or requirement’.<sup>214</sup>

In *State of New South Wales v Amery*<sup>215</sup> (‘*Amery*’) the respondents were employed by the NSW Department of Education as temporary teachers. They alleged that they had been indirectly discriminated against on the basis of their sex under subsections 24(1)(b)<sup>216</sup> and 25(2)(a)<sup>217</sup> of the *Anti-Discrimination Act 1977* (NSW) because, as temporary teachers, they were not entitled to access higher salary levels available to their permanent colleagues for the same work.

Under the *Teaching Services Act 1980* (NSW) (the ‘*Teaching Act*’), the teaching service was divided into permanent employees and temporary employees. Different conditions attached to each under the Act. As well, under the award<sup>218</sup> permanent teachers were paid more than temporary teachers. The award contained 13 pay scales for permanent teachers and 5 for temporary teachers; the highest pay scale for temporary teachers was equivalent to level 8 of the permanent teachers scale.

The respondents alleged that the Department imposed a ‘requirement or condition’<sup>219</sup> on them that they have permanent status to be able to access higher salary levels.

Different approaches were taken to this issue by members of the High Court.

Gleeson CJ agreed with Beazley JA in the NSW Court of Appeal<sup>220</sup> that the relevant conduct of the Department was its practice of not paying above award wages to temporary teachers engaged in the same work as their permanent colleagues. His Honour said that it was in this sense that the Department ‘required’ the respondents to comply with a condition of having a permanent status in order to have access to the higher salary levels available to permanent teachers.<sup>221</sup>

Gummow, Hayne and Crennan JJ (Callinan J agreeing)<sup>222</sup> held that the respondents had not properly identified the relevant ‘employment’.<sup>223</sup> Their Honours held that ‘employment’ referred to the ‘actual employment’ engaged in by a complainant. They stated that:

the term ‘employment’ may, in certain situations, denote more than the mere engagement by one person of another in what is described as an employer-employee relationship. Often the notion of employment takes its content from the identification of the position to which a person has been appointed. In short, the presence of the word ‘employment’ in section 25(2)(a) prompts the question, ‘employment as what?’<sup>224</sup>

214 [2004] FMCA 242, [124].

215 (2006) 230 CLR 174. For discussion of this decision, see Joanna Hemmingway, ‘Implications for Pay Equity in *State of NSW v Amery*’ (2006) 44(5) *Law Society Journal* 44.

216 Section 24(1)(b) defines what amounts to indirect discrimination on the ground of sex.

217 Section 25(2)(a) provides that it is unlawful for an employer to discriminate against an employee on the ground of sex in the terms or conditions of employment which the employer affords the employee.

218 The Crown Employees (Teachers and Related Employees) Salaries and Conditions Award.

219 Note that the *Anti-Discrimination Act 1977* (NSW) definition of indirect discrimination refers to a ‘requirement or condition’ (s 24(1)(b)) and does not include a ‘practice’ as in s 5(2) of the SDA.

220 *Amery v New South Wales (Director General NSW Department of Education and Training)* [2004] NSWCA 404.

221 (2006) 230 CLR 174, 183 [17].

222 (2006) 230 CLR 174, 231 [205].

223 (2006) 230 CLR 174, 196 [69], 198 [78].

224 (2006) 230 CLR 174, 196 [68].

As different conditions attached to permanent and temporary teachers under the *Teaching Act*, their Honours held that the respondents were not employed as ‘teachers’ but as ‘casual teachers’.<sup>225</sup> Hence, the alleged requirement or condition was ‘incongruous’.<sup>226</sup>

Kirby J dissented. His Honour described the approach of Gummow, Hayne and Crennan JJ as ‘narrow and antagonistic’ and inconsistent with the beneficial and purposive interpretive approach to remedial legislation.<sup>227</sup> In particular, Kirby J stated that the majority’s approach gives ‘considerable scope [to] employers to circumvent [discrimination legislation]. ... [A]ll that is required in order to do so is for an employer to adopt the simple expedient of defining narrowly the “employment” that is offered’.<sup>228</sup> His Honour held that the Department imposed a requirement or condition of ‘permanent employment’ on the respondents in order to gain access to the higher salary levels.<sup>229</sup> This was because the terms on which the Department offered employment to the respondents included the ‘relevant terms specifically addressed to non-permanent casual supply teachers ... [which] discriminated against the respondents’.<sup>230</sup> His Honour also reached a different conclusion to Gleeson CJ on the issue of reasonableness on the facts of the case.<sup>231</sup>

### 4.3.2 Disadvantaging

A condition, requirement or practice must have, or be likely to have, the effect of ‘disadvantaging’ persons of the same sex, sexual orientation, gender identity or marital or relationship status as the aggrieved person, persons who (like the aggrieved person) are also of intersex status, or women who (like the aggrieved woman) are also pregnant, potentially pregnant or breastfeeding. The term ‘disadvantaging’ is not defined in the SDA and there is little discussion of the concept in the case law.

As discussed in 4.3.1 above, women who have encountered problems when seeking to work part-time upon return to work from maternity leave have successfully argued that a requirement to work full-time is a condition, requirement or practice that has the effect of disadvantaging women.<sup>232</sup> The courts have accepted, sometimes as a matter of judicial notice without any specific evidence, that this disadvantage stems from the fact that women are more likely to require part-time work to meet their family responsibilities.

The seminal statement to this effect comes from the decision of Commissioner Evatt in *Hickie v Hunt & Hunt*:

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.<sup>233</sup>

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225 (2006) 230 CLR 174, 196 [68].

226 (2006) 230 CLR 174, 196 [69].

227 (2006) 230 CLR 174, 215 [138].

228 (2006) 230 CLR 174, 215 [137].

229 (2006) 230 CLR 174, 216 [142].

230 (2006) 230 CLR 174, 216 [142].

231 (2006) 230 CLR 174, 184-185 [18]-[25] (Gleeson CJ), 222-230 [167]-[195] (Kirby J).

232 *Hickie v Hunt & Hunt* [1998] HREOCA 8, [6.17.10]; *Escobar v Rainbow Printing (No 2)* [2002] FMCA 122, [33] and [37]; *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209, [69]-[73].

233 [1998] HREOCA 8, [6.17.10].

This passage was cited with approval in *Escobar v Rainbow Printing Pty Ltd (No 2)*<sup>234</sup> and in *Mayer v Australian Nuclear Science & Technology Organisation ('Mayer')*.<sup>235</sup> In *Mayer*, Driver FM went on to state, 'I need no evidence to establish that women per se are disadvantaged by a requirement that they work full-time'.<sup>236</sup>

In *Howe v Qantas Airways Ltd*,<sup>237</sup> ('Howe') the issue of whether courts could continue to take judicial notice of this 'disadvantage' in the absence of any evidence was raised by the respondent. Driver FM stated (albeit in obiter comments) that 'it is open to the Court to take judicial notice that as a matter of common observation, women have the predominant role in the care of babies and infant children ... and that it follows from this that any full-time work requirement is liable to disproportionately affect women'.<sup>238</sup> Driver FM went on to state:

The point is that the present state of Australian society shows that women are the dominant caregivers to young children. While that position remains (and it may well change over time) section 5(2) of the SDA operates to protect women against indirect sex discrimination in the performance of that care giving role.<sup>239</sup>

The Commonwealth Sex Discrimination Commissioner appeared as *amicus curiae* in *Howe*.<sup>240</sup> In relation to this issue she submitted that the court could, at the present time, continue to take judicial notice of the fact that a requirement to work full time and without flexibility disadvantages, or is likely to disadvantage, women. She further submitted that that fact is so 'notorious' that it could be the subject of judicial notice without further inquiry.

*Richardson v Oracle Corporation Australia Pty Ltd*<sup>241</sup> was a case dealing primarily with alleged sexual harassment in the workplace. Ms Richardson also claimed that she was subject to indirect discrimination on the ground of her sex, either in the terms and conditions of her employment or by subjecting her to a detriment, or both, under section 14(2)(a) and (d) of the SDA. She alleged that Oracle imposed a requirement on her during the investigation of her complaint that she continue to have contact with the alleged harasser.

On appeal, the Full Court of the Federal Court held that the trial judge was correct to conclude that there was no evidence that a female complainant of sexual harassment would be treated differently from a male complainant in that she would be required to have contact with her harasser while her complaint was being investigated, whereas a male complainant would not be the subject of such a requirement.<sup>242</sup> Ms Richardson submitted on appeal that most complainants of sexual harassment are women and that, therefore, a requirement that a complainant have contact with his or her harasser is one that has the effect of disadvantaging women.<sup>243</sup> The Full Court rejected this argument on the basis that the relevant comparison was not between female complainants of sexual harassment and men generally, but rather between female complainants and male complainants and, on the evidence, there was nothing to suggest a difference in treatment between these two groups.<sup>244</sup>

234 [2002] FMCA 122, [33].

235 [2003] FMCA 209, [70].

236 [2003] FMCA 209, [70].

237 [2004] FMCA 242.

238 [2004] FMCA 242, [112].

239 [2004] FMCA 242, [117].

240 The submissions of the Sex Discrimination Commissioner are available at: <[http://www.humanrights.gov.au/legal/submissions\\_court/amicus/howe\\_submissions\\_fifth.html](http://www.humanrights.gov.au/legal/submissions_court/amicus/howe_submissions_fifth.html)>. The Commissioner's supplementary submissions are available at: <[http://www.humanrights.gov.au/legal/submissions\\_court/amicus/howe\\_supplementary\\_submissions.html](http://www.humanrights.gov.au/legal/submissions_court/amicus/howe_supplementary_submissions.html)>.

241 [2013] FCA 102.

242 (2014) 223 FCR 334, 376 [169] (Besanko and Perram JJ with whom Kenny J agreed on these issues).

243 (2014) 223 FCR 334, 376 [170] (Besanko and Perram JJ with whom Kenny J agreed on these issues).

244 (2014) 223 FCR 334, 376 [171] and 377 [176] (Besanko and Perram JJ with whom Kenny J agreed on these issues).

### 4.3.3 Reasonableness

Section 7B(2) identifies matters that are to be taken into account in determining reasonableness. 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. The onus of establishing that the requirement or condition is reasonable rests on the respondent (section 7C).

The following passage from the decision of Bowen CJ and Gummow J in *Secretary, Department of Foreign Affairs & Trade v Styles*<sup>245</sup> has been described as the ‘starting point’<sup>246</sup> in determining reasonableness:

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.<sup>247</sup>

The following propositions can be distilled in relation to ‘reasonableness’ for the purposes of section 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;<sup>248</sup>
- 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;<sup>249</sup>
- the test is reasonableness, not correctness or ‘whether the alleged discriminator could have made a “better” or more informed decision’;<sup>250</sup> and
- it is not enough, however, that a decision has 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.<sup>251</sup>

In *Escobar v Rainbow Printing Pty Ltd (No 2)*,<sup>252</sup> (‘Escobar’) while not expressly referring to section 7B(2), Driver FM considered some matters relevant to the reasonableness of the requirement or condition. As discussed above (see 4.2.6 and 4.3.1), 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

245 (1989) 23 FCR 251.

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

247 (1989) 23 FCR 251, 263. This passage was also approved by the High Court in *Waters v Public Transport Corporation* (1991) 173 CLR 349, 395-396 (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).

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

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

250 *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 of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78, 112 (Sackville J).

251 *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78, 112-113 (Sackville J).

252 [2002] FMCA 122.



dismissal of her on that basis, was not reasonable.<sup>253</sup> In arriving at this conclusion, his Honour found the following factual matters persuasive:<sup>254</sup>

- 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.<sup>255</sup>

In *Hickie v Hunt & Hunt*,<sup>256</sup> 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'.<sup>257</sup> Such a requirement was 'not reasonable having regard to the circumstances of the case'.<sup>258</sup> 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.<sup>259</sup>

In *Mayer v Australian Nuclear Science & Technology Organisation*,<sup>260</sup> the refusal of the applicant's request to work part-time was also found to be unreasonable. Driver FM 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'.<sup>261</sup> 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. 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.<sup>262</sup>

253 [2002] FMCA 122, [32].

254 [2002] FMCA 122, [32] and [37].

255 It may be questionable whether or not this last factor is a matter relevant to the reasonableness of the requirement or condition per se: rather, it would seem to relate to the manner in which that requirement or condition was imposed.

256 [1998] HREOCA 8.

257 [1998] HREOCA 8, [4.5.28].

258 [1998] HREOCA 8, [4.5.30].

259 [1998] HREOCA 8, [4.5.30].

260 [2003] FMCA 209.

261 [2003] FMCA 209, [75].

262 [2003] FMCA 209, [75]-[76].



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.<sup>263</sup>

As in *Escobar*, his Honour did not make express reference to section 7B(2) when expressing his conclusions on reasonableness.

In *New South Wales v Amery*,<sup>264</sup> the respondents were employed by the Department of Education as temporary teachers and alleged that they had been indirectly discriminated against on the basis of their sex under sections 24(1)(b) and 25(2)(a) of the *Anti-Discrimination Act 1977* (NSW) because, as temporary teachers, they were not entitled to access higher salary levels available to their permanent colleagues for the same work (see discussion at 4.3.1 above).

Gleeson CJ (Callinan and Heydon JJ agreeing)<sup>265</sup> was the only member of the majority to consider the issue of reasonableness. His Honour stated that the question of reasonableness in this case was not whether *teaching* work of a temporary teacher has the same value as that of a permanent teacher, but 'whether, having regard to their respective conditions of employment, it is reasonable to pay one less than the other'.<sup>266</sup>

In light of the 'significantly different' incidents of employment for permanent and temporary teachers, in particular the condition of 'deployability', his Honour held that it was reasonable for the Department to pay permanent teachers more.<sup>267</sup> Furthermore, his Honour held that, it would be impracticable for the Department to adopt the practice of paying above award wages to temporary teachers.<sup>268</sup>

Although compliance with an award does not provide a defence under the *Anti-Discrimination Act 1977* (NSW), Gleeson CJ held that the 'industrial context' may be a relevant circumstance in determining 'reasonableness'.<sup>269</sup> It is relevant to note that the *Anti-Discrimination Act 1977* (NSW) differs from the SDA in this regard: under subsections 40(1)(e) and (g) of the SDA direct compliance with an award provides a complete defence.

#### 4.3.4 The relationship between 'direct' and 'indirect' discrimination

In *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission*,<sup>270</sup> a matter involving a complaint arising under the pre-1995 provisions, Sackville J considered the relationship between 'direct sex discrimination' under section 5(1) and 'indirect discrimination' under section 5(2).

His Honour noted that section 5(2) in both its pre-1995 form and post-1995 form 'addresses "indirect sex discrimination" in the sense of conduct which, although "facially neutral", has a disparate impact

263 [2003] FMCA 209, [77].

264 (2006) 230 CLR 174.

265 (2006) 230 CLR 174, 231 [203] (Callinan J), 233 [210] (Heydon J).

266 (2006) 230 CLR 174, 184 [20].

267 (2006) 230 CLR 174, 184 [19].

268 (2006) 230 CLR 174, 184 [21], 185 [24].

269 (2006) 230 CLR 174, 184-185 [22].

270 (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.

on men and women'.<sup>271</sup> Citing *Waters v Public Transport Corporation*<sup>272</sup> and *Australian Medical Council v Wilson*<sup>273</sup> his Honour concluded that '[i]t seems to have been established that subss 5(1) and (2) are mutually exclusive in their operation'.<sup>274</sup>

In *Mayer v Australian Nuclear Science & Technology Organisation*,<sup>275</sup> a matter involving a complaint arising under the post-1995 provisions, Driver FM also considered the relationship between the direct and indirect provisions of section 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.<sup>276</sup>

The same reasoning would presumably be applied to the direct and indirect discrimination provisions relating to the grounds of sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy and breastfeeding.

This does not, however, prevent applicants from pleading direct and indirect discrimination in the alternative.<sup>277</sup>

## 4.4 Special Measures Under the SDA

Section 7D of the SDA provides that actions which constitute 'special measures' are not discriminatory. This provision 'recognises that certain special measures may have to be taken to overcome discrimination and achieve equality'.<sup>278</sup>

Section 7D of the SDA states:<sup>279</sup>

### **7D Special measures intended to achieve equality**

- (1) A person may take special measures for the purpose of achieving substantive equality between:
  - (a) men and women; or

271 (1997) 80 FCR 78, 97.

272 (1991) 173 CLR 349, a decision under the *Equal Opportunity Act 1984* (Vic).

273 (1996) 68 FCR 46, 55 (Heerey J with whom Black CJ agreed), 74 (Sackville J), a decision under the RDA.

274 (1997) 80 FCR 78, 97.

275 [2003] FMCA 209.

276 [2003] FMCA 209, [71].

277 See, in the context of the DDA, *Minns v New South Wales* [2002] FMCA 60, [245]; *Hollingsdale v Northern Rivers Area Health Service* [2004] FMCA 721. See further 6.8 below.

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

279 Section 7D was inserted in the SDA in December 1995 by the *Sex Discrimination Amendment Act 1995* (Cth). Prior to 1995, s 33 of the SDA related to special measures. That provision was considered in *Eleven Fellow Members of the McLeod Country Golf Club v McLeod Country Gold Club* [1995] HREOCA 25; *Proudfoot v ACT Board of Health* (1992) EOC 92-417; *The Municipal Officers' Association of Australia* [1991] 93 IRCommA; *Australian Journalists Association* [1988] 375 IRCommA. Those cases are, however, of little assistance in the interpretation of s 7D as the section was in substantially different terms.

- (aa) people who have different sexual orientations; or
  - (ab) people who have different gender identities; or
  - (ac) people who are of intersex status and people who are not; or
  - (b) people who have different marital or relationship statuses; 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; or
  - (e) women who are breastfeeding and people who are not breastfeeding; or
  - (f) people with family responsibilities and people without family responsibilities.
- (2) A person does not discriminate against another person under section 5, 5A, 5B, 5C, 6, 7, 7AA or 7A 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 considered for the first time by the Federal Court in *Jacomb v Australian Municipal Administrative Clerical & Services Union*<sup>280</sup> ('*Jacomb*'). In this case, the rules of a union provided that certain elected positions on the branch executive and at the state conference were available only to women. The male applicant alleged that the rules discriminated against men and were unlawful under the SDA. The essence of the applicant's objection to the rules was that the union policy of ensuring 50 per cent representation of women in the governance of the union (which was the basis of the quotas within the rules) exceeded the proportional representation of women in certain of the union branches. Consequently, women were guaranteed representation in particular branches of the union in excess of their membership to the disadvantage of men. The union successfully defended the proceedings on the basis that the rules complained of were special measures within the meaning of section 7D of the SDA.

The special measures provision is limited, in its terms, by a test as to purpose. Section 7D(1) provides that a person may take special measures for the purpose of achieving substantive equality between, amongst others, men and women. The achievement of substantive equality need not be the only, or even the primary purpose of the measures in question (section 7D(3)). It was accepted by Crennan J in *Jacomb* that the test as to purpose is, at least in part, a subjective test.<sup>281</sup> Crennan J stated 'it is the intention and purpose of the person taking a special measure, which governs the characterisation of such a measure as non-discriminatory'.<sup>282</sup> In applying this test, Crennan J was satisfied that the union believed substantive equality between its male and female members had not been achieved and that addressing this problem required women being represented in the governance and high echelons of the union so as to achieve genuine power sharing. Crennan J commented that it 'was clear from the evidence that part of the purpose of the rules was to attract female members to the union, but this does not disqualify the rules from qualifying as special measures under section 7D (subs 7D(3))'.<sup>283</sup>

280 (2004) 140 FCR 149. The Sex Discrimination Commissioner appeared as amicus curiae in this matter and her submissions can be found at: <[http://www.humanrights.gov.au/legal/submissions\\_court/amicus/jacomb.html](http://www.humanrights.gov.au/legal/submissions_court/amicus/jacomb.html)>.

281 (2004) 140 FCR 149, 168 [61], 168-169 [64]. For further discussion see, Julie O'Brien, 'Affirmative Action, special measures and the Sex Discrimination Act' (2004) 27 *University of New South Wales Law Journal* 840.

282 (2004) 140 FCR 149, 165 [47].

283 (2004) 140 FCR 149, 159 [28].

Section 7D also requires the court to consider the special measure objectively. Crennan J appeared to accept the submission of the Sex Discrimination Commissioner (appearing as *amicus curiae*<sup>284</sup>) that section 7D requires the court to assess whether it was reasonable for the person taking the measure to conclude that the measure would further the purpose of achieving substantive equality.<sup>285</sup> In making this determination, the Sex Discrimination Commissioner submitted that the court must at least consider whether the measure taken was one which a reasonable entity in the same circumstances would regard as capable of achieving that goal. The court should not substitute its own decision. Rather, it should consider whether, in the particular circumstances, a measure imposed was one which was proportionate to the goal. Crennan J stated that she was satisfied, on the evidence, that the union rules were a reasonable special measure when tested objectively.<sup>286</sup>

Section 7D(4) provides that the taking, or further taking, of special measures for the purpose of achieving substantive equality is not permitted once that purpose has been achieved. This gives rise to the question: when can it be said that measures are no longer authorised because their purpose has been achieved? Crennan J stated:

Having regard to the inflexibility of the quotas and the express provisions of subs 7D(4), monitoring is important to ensure the limited impact of such measures on persons in the applicant's position. The rules have only been utilised once and there was evidence that elections to the relevant positions were for four-year terms. Accordingly, it is too soon to find that the special measure is no longer needed or that rules 5 and 9 are deprived of their character as a special measure because they have been utilized once. However, rules 5 and 9 cannot remain valid as a special measure beyond the 'exigency' (namely the need for substantive equality between men and women in the governance of the union) which called them forth.<sup>287</sup>

In *Walker v Cormack & Anor*,<sup>288</sup> a male member of a gym operated by the respondent claimed that he was discriminated against on the ground of his sex when he was excluded from an exercise class that he had attended for some time because the respondent changed the class to a women-only class. In assessing whether women-only gym classes were a special measure O'Dwyer FM cited the principles outlined by Crennan J in *Jacomb* and found:

- There is an inequality between men and women as to how they can access the gymnasium services where only mixed classes are provided.
- The evidence presented and the understanding gained by the respondent about the reluctance of some women to access the services if men would be present is evidence of, in my view, a substantive inequality which the special measure of providing female only services addressed. The establishment of the female-only class provided substantive equality in the context of the services provided by the respondent. I am satisfied that the respondent had formed a view that there was an inequality in this regard which he hoped to address by the special measure, and by so adopting it, attract more clients.
- The respondent acted reasonably in assessing the need for the special measure of providing a female-only class and in so doing acted proportionately; having regard to the very many other programs available to males, in particular, to the applicant
- The female-only class is a reasonable 'special measure' when tested objectively.

284 The submissions of the Sex Discrimination Commissioner are available at: [http://www.humanrights.gov.au/legal/submissions\\_court/amicus/jacomb.html](http://www.humanrights.gov.au/legal/submissions_court/amicus/jacomb.html).

285 (2004) 140 FCR 149, 160-161 [34], 168 [62], 169 [65].

286 (2004) 140 FCR 149, 169 [65].

287 (2004) 140 FCR 149, 169 [65].

288 [2010] FMCA 9.

- For the above reasons, the female only class introduced by the respondent is properly classified as non-discriminatory and not, therefore, in breach of the Act.<sup>289</sup>
- The findings of O'Dwyer FM were upheld on appeal to the Federal Court.<sup>290</sup>

## 4.5 Areas of Discrimination

The bulk of the claims that have been brought under the SDA have related to employment. However, the provisions in Part II, Divisions 1 and 2 of the SDA also proscribe discrimination in other areas of public life, including:

- education;<sup>291</sup>
- the provision of goods, services or facilities;<sup>292</sup>
- accommodation and housing;<sup>293</sup>
- buying or selling land;<sup>294</sup>
- clubs;<sup>295</sup>
- the administration of Commonwealth laws and programs;<sup>296</sup> and
- requests for information.<sup>297</sup>

An overview of the limited jurisprudence that has considered those provisions is set out below.

### 4.5.1 Provision of services and qualifying bodies

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

#### **22 Goods, services and facilities**

- (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, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding:
  - (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 firstmentioned 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 firstmentioned 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*<sup>298</sup> ('*Ferneley*'), Wilcox J considered whether the respondent provided 'services' within the meaning of section 22 of the SDA. The respondent had

289 [2010] FMCA 9, [36].

290 *Walker v Cormack* (2011) 196 FCR 574, [36].

291 SDA, s 21.

292 SDA, s 22.

293 SDA, s 23.

294 SDA, s 24.

295 SDA, s 25.

296 SDA, s 26.

297 SDA, s 27.

298 (2001) 115 FCR 306. The Sex Discrimination Commissioner appeared as amicus curiae in this matter and her submissions are available at <[http://www.humanrights.gov.au/legal/submissions\\_court/amicus/ferneley.html](http://www.humanrights.gov.au/legal/submissions_court/amicus/ferneley.html)>.

certain statutory functions under the *Boxing and Wrestling Control Act 1986* (NSW) ('*Boxing Act*'), including under section 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 section 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.<sup>299</sup>

In the proceedings before the Federal Court, the applicant sought, inter alia, a declaration that section 8(1) of the *Boxing Act* was inoperative by reason of inconsistency with section 22 of the SDA and the operation of section 109 of the *Constitution*. 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 section 22. In deciding this question, section 18, which appears in Part II, Division 1 of the SDA, was also relevant. This provides:

#### 18 Qualifying bodies

It is unlawful for an authority or body that is empowered to confer, renew, extend, revoke or withdraw an authorization 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, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities:

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

Section 18 did not apply in this matter, as (unlike section 22) it does not bind the Crown in right of a state. However, Wilcox J held that, as Parliament had included a special provision concerning sex discrimination by authorities empowered to confer an authorisation or qualification needed for engaging in an occupation, section 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 the applicant 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'.<sup>300</sup>

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

<sup>299</sup> (2001) 115 FCR 306, 307-308 [2].

<sup>300</sup> (2001) 115 FCR 306, 319 [64]-[66].

Section 22 also arose for consideration in *MW v Royal Women's Hospital*<sup>301</sup> and *McBain v Victoria*<sup>302</sup> (discussed in 4.2.3 above).

In *AB v Registrar of Births, Deaths & Marriages*,<sup>303</sup> Heerey J held that the refusal to alter the record of the applicant's sex in her birth registration was the refusal of a service. Heerey J stated, in obiter:

'Service' involves an 'act of helpful activity' or 'the supplying of any ... activities ... required or demanded' (Macquarie Dictionary) or 'the action of serving, helping, or benefiting, conduct tending to the welfare or advantage of another' (Shorter Oxford Dictionary). Altering the Birth Register was an activity. The applicant requested the Registrar to perform that activity. The carrying out of that activity would have conferred a benefit on the applicant. The Registrar, because of the terms of the BDM Act, declined the request to carry out that activity. This was the refusal of a service. An activity carried out by a government official can none the less be one which confers a benefit on an individual.<sup>304</sup>

On appeal, the Registrar did not contest Heerey J's finding that the Registrar's conduct in declining the appellant's request to alter her birth registration record was the refusal of a service for the purposes of section 22 of the SDA.<sup>305</sup> In *AB v Registrar of Births, Deaths & Marriages*,<sup>306</sup> Kenny J considered it unnecessary to decide upon this point given her dismissal of the appeal on other grounds.<sup>307</sup> Black CJ, in dissent, agreed with Heerey J's conclusion on this point and concluded that, 'applying a purposive interpretation of the word "service," the alteration of a person's sex on their birth registration comes within the meaning of that term.'<sup>308</sup>

## 4.5.2 Clubs

Section 25 of the SDA provides:

### 25 Clubs

- (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, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy or breastfeeding:
  - (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, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding:
  - (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.

301 [1997] HREOCA 6.

302 (2000) 99 FCR 116.

303 [2006] FCA 1071. The Sex Discrimination Commissioner appeared as amicus curiae in these proceedings and made submissions, inter alia, on the characterisation of the relevant service: <[http://www.humanrights.gov.au/legal/submissions\\_court/amicus/ab.html](http://www.humanrights.gov.au/legal/submissions_court/amicus/ab.html)>.

304 [2006] FCA 1071, [65]-[66].

305 *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528, 560 [116] (Kenny J).

306 (2007) 162 FCR 528, 560 [116].

307 (2007) 162 FCR 528, 560 [117].

308 (2007) 162 FCR 528, 537-538 [25]-[29] (Black CJ).



In *Ciemcioch v Echuca-Moama RSL Citizens Club Ltd*,<sup>309</sup> 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. This was 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 the conduct breached section 25(1)(a) (refusal of membership). The Commissioner declared that the 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*<sup>310</sup> were made by existing members of a club and were therefore brought under section 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 application of the SDA as it stood at that time depended upon a finding that the club was a trading corporation for the purposes of section 9(13) of the SDA.<sup>311</sup> In dismissing the complaint Commissioner Carter was satisfied the club was not a trading corporation.<sup>312</sup> Commissioner Carter was also satisfied that the club's arrangements came within the special measures exemption under the SDA (see 4.4 above).<sup>313</sup>

## 4.6 Sexual Harassment

Section 28A of the SDA was amended on 21 June 2011. It provides:

### 28A Meaning of sexual harassment

- (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 the possibility that the person harassed would be offended, humiliated or intimidated.
- (1A) For the purposes of subsection (1), the circumstances to be taken into account include, but are not limited to, the following:
  - (a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;
  - (b) the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;

309 [1994] HREOCA 2.

310 [1995] HREOCA 25.

311 See 4.1.2(b) above.

312 [1995] HREOCA 25.

313 [1995] HREOCA 25. Note the special measures provision referred to by Commissioner Carter as s 33 is now contained in s 7D.

- (c) any disability of the person harassed;
- (d) any other relevant circumstance.

(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.

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;<sup>314</sup>
- qualifying bodies;<sup>315</sup>
- educational institutions;<sup>316</sup>
- the provision of goods, services or facilities;<sup>317</sup>
- accommodation;<sup>318</sup>
- buying or selling land;<sup>319</sup>
- clubs;<sup>320</sup> and
- the administration of Commonwealth laws and programs.<sup>321</sup>

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

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

#### 4.6.1 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.<sup>322</sup>

That line of cases was expressly approved by Driver FM in the cases of *Cooke v Plauen Holdings Pty Ltd*<sup>323</sup> and *Johanson v Blackledge*.<sup>324</sup> 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.

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314 SDA, s 28B.

315 SDA, s 28C.

316 SDA, s 28F.

317 SDA, s 28G.

318 SDA, s 28H.

319 SDA, s 28J.

320 SDA, s 28K.

321 SDA, s 28L.

322 *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; *Bebbington v Dove* (1993) EOC 92-543; *Hawkins v Malnet Pty Ltd* (1995) EOC 92-767; *G v R & Department of Health and Community Services* [1993] HREOCA 20; *Djokic v Sinclair* (1994) EOC 92-643; *Hill v Water Resources Commission* (1985) EOC 92-127; *Freestone v Kozma* (1989) EOC 92-249.

323 [2001] FMCA 91, [24].

324 [2001] FMCA 6, [84].

Similarly, in the case of *Aleksovski v Australia Asia Aerospace Pty Ltd*,<sup>325</sup> 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 repeating all of these things the following day; and becoming angry and agitated when the applicant refused to do as he wished.<sup>326</sup>

In *Cooke v Plauen Holdings Pty Ltd*,<sup>327</sup> 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.<sup>328</sup>

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.<sup>329</sup> 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.<sup>330</sup>

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.<sup>331</sup> This view was expressly adopted by Raphael FM in *Shiels v James*<sup>332</sup> in which it was held that incidents relating to the flicking of elastic bands at the applicant were of a sexual nature as they formed part of a broader pattern of sexual conduct.<sup>333</sup>

## 4.6.2 Unwelcome conduct

For a breach of section 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.<sup>334</sup>

In *Aldridge v Booth*,<sup>335</sup> 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.<sup>336</sup>

325 [2002] FMCA 81.

326 [2002] FMCA 81, [81]-[85].

327 [2001] FMCA 91.

328 [2001] FMCA 91, [26].

329 [2001] FMCA 91, [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 4.6.6 below.

330 [2001] FMCA 91, [29].

331 See, for example, *Harwin v Pateluch* [1995] HREOCA 23 (extract at (1995) EOC 92-770).

332 [2000] FMCA 2.

333 [2000] FMCA 2, [72].

334 *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].

335 (1988) 80 ALR 1.

336 (1988) 80 ALR 1, 5, cited with approval in *Hall v Sheiban* (1989) 20 FCR 217, 247 (Wilcox J).

In *Elliott v Nanda*,<sup>337</sup> the applicant alleged that she was sexually harassed during her employment at a medical centre by the director of the centre, who was also a medical doctor. 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.<sup>338</sup>

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 the 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.<sup>339</sup>

It should be noted that this statement of the test appears to introduce an objective element, contrary to the weight of authority.

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*,<sup>340</sup> 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 some of the activities complained about 'crossed that line'.<sup>341</sup>

In *Wong v Su*,<sup>342</sup> 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*,<sup>343</sup> 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.<sup>344</sup>

The applicant's response to the conduct complained of was also considered in *San v Dirluck Pty Ltd*.<sup>345</sup> In this case the applicant alleged she was sexually harassed during her employment at a butcher shop by her manager, Mr Lamb. Raphael FM found that the conduct of Mr Lamb, which involved regularly greeting the applicant with the question 'How's your love life?' and on one occasion stating 'I haven't

337 (2001) 111 FCR 240.

338 (2001) 111 FCR 240, 277 [107].

339 (2001) 111 FCR 240, 277 [108].

340 [2001] FMCA 52.

341 [2001] FMCA 52, [64].

342 [2001] FMCA 108.

343 [2003] FMCA 93.

344 [2003] FMCA 93, [34].

345 [2005] FMCA 750.

seen an Asian come before', was conduct of a sexual nature and unwelcome. Relevantly, Raphael FM stated:

I do not subscribe to the theory put forward by the respondents that because Ms San did not make many direct complaints to Mr Lamb and did on occasion answer him back that this indicated that she accepted the remarks as ordinary employee banter. Firstly ... it appeared to be directed almost exclusively at Ms San and secondly I accept Ms San's evidence and the submissions made on her behalf that she saw Mr Lamb, who was for a time the manager of the premises, as a person in a superior position to her to whom she would have, at least to some extent, to defer. It would not be easy for her to tell him that she found the remarks unwelcome. I accept that she took what steps she could personally by answering very shortly and then by responding positively to alleviate the situation.<sup>346</sup>

In *TN v BF*,<sup>347</sup> the applicant Ms TN was a 28 year old woman employed by the company BF. Mr AB, the second respondent, was described as 'the aged founder' of BF who no longer had any management responsibility for the company but attended the company's offices three or four days a week. Ms TN alleged a number of incidents of sexual harassment by Mr AB. Much of her evidence was rejected on credibility grounds. One piece of corroborating evidence was a video she had taken on her mobile phone of Mr AB masturbating while sitting at his desk in his office.<sup>348</sup> Lloyd-Jones J found that Ms TN had not discharged her onus of establishing that the conduct was unwelcome for a number of reasons including that she did not attempt to leave the office and remained to film the conduct for four minutes and 31 seconds, and that in an initial statement to police after her employment was terminated it did not appear that she was offended by the conduct.<sup>349</sup>

### 4.6.3 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*,<sup>350</sup> all three members of the Federal Court in separate judgments expressed the view that the then section 28(3) of the SDA (now replaced by section 28A) was capable of including a single incident. Lockhart J stated that section 28(3) 'provide[d] no warrant for necessarily importing a continuous or repeated course of conduct'.<sup>351</sup> Both Wilcox<sup>352</sup> and French<sup>353</sup> JJ expressed the view that while the ordinary English meaning of the word 'harass' implies repetition, section 28(3) did not contain such an element and did not use the word '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'.<sup>354</sup> This approach has been adopted in other sexual harassment cases.<sup>355</sup>

### 4.6.4 The 'reasonable person' test

Under section 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

<sup>346</sup> [2005] FMCA 750, [23].

<sup>347</sup> [2015] FCCA 1497.

<sup>348</sup> [2015] FCCA 1497, [39].

<sup>349</sup> [2015] FCCA 1497, [100]-[101].

<sup>350</sup> (1989) 20 FCR 217.

<sup>351</sup> (1989) 20 FCR 217, 231.

<sup>352</sup> (1989) 20 FCR 217, 247.

<sup>353</sup> (1989) 20 FCR 217, 279.

<sup>354</sup> (1989) 20 FCR 217, 279.

<sup>355</sup> See, for example, the judgment of Driver FM in *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91, [25], applying *Hall v Sheiban* (1989) 20 FCR 217 and *Leslie v Graham* [2000] HREOCA 28.

person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated’.

On 21 June 2011, the definition of sexual harassment in section 28A of the SDA was amended to include anticipating the ‘possibility’ that the person harassed would be offended and new subsection (1A) was inserted.

Determining whether a reasonable person would have anticipated that the person harassed would be offended, humiliated or intimidated entails an objective test.<sup>356</sup> The inclusion in section 28A(1A) of a non-exhaustive indicative list of the circumstances to take into account when a court makes this assessment is intended to ensure that all relevant circumstances are considered when applying the objective element to the context in which the conduct in question occurred. These circumstances may help to explain why an individual victim felt that the conduct was unwelcome and inappropriate.

Section 28A(1A) of the SDA is modelled on the test in section 119 of the *Anti-Discrimination Act 1991* (Qld).<sup>357</sup> The Queensland Tribunal has said of the test in section 119 of the *Anti-Discrimination Act 1991* (Qld), that it ‘required a consideration of what an independent and reasonable third party would have thought the complainant could feel given the overall context’.<sup>358</sup>

The new test under section 28A of the SDA sets a lower threshold than the previous test which required complainants to establish that ‘a reasonable person, having regard to the circumstances, *would have* anticipated that the person harassed would be offended, humiliated or intimidated’.

The below authorities were decided under the previous section 28A of the SDA. While the new test under section 28A of the SDA sets a lower threshold, the below cases are likely to still be of relevance.

In *Johanson v Blackledge*,<sup>359</sup> Driver FM held that it is not necessary for an applicant 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 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 section 28A and section 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

<sup>356</sup> *Johanson v Blackledge* [2001] FMCA 6, [84]-[85]; *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91, [24]-[25]; *Horman v Distribution Group Ltd* [2001] FMCA 52, [50]; *Wattle v Kirkland* [2001] FMCA 66, [46]; *Aleksovski 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]; *San v Dirluck Pty Ltd* [2005] FMCA 750.

<sup>357</sup> Sex and Age Discrimination Legislation Amendment Bill 2010 Explanatory Memorandum, 2010, 12 [71].

<sup>358</sup> *Smith v Hehir* [2001] QADT 11. The decision in this case was appealed to the Supreme Court of Queensland but this aspect of the complaint was not considered on appeal (*Hehir v Smith* [2002] QSC 92).

<sup>359</sup> [2001] FMCA 6.

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.<sup>360</sup>

In *Horman v Distribution Group Ltd*,<sup>361</sup> 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 said:

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?<sup>362</sup>

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.<sup>363</sup>

Similarly, in *San v Dirluck Pty Ltd*,<sup>364</sup> the respondents' witnesses gave evidence of conduct by the applicant which indicated that she made racist and sexist remarks. Raphael FM stated:

the fact that Ms San may have made these remarks or acted in this way does not excuse any breaches of the Act by others. Her conduct could only go to consideration of whether the sexual remarks directed at her were likely to offend, humiliate or intimidate her.<sup>365</sup>

And further:

a reasonable person having heard the evidence of Ms San that she said to Mr Teasel 'what the fuck is your problem' would not consider that she would have been offended when she was told to 'fuck off' by Mr Lamb. It might also be argued in those circumstances that the use of the word 'fuck' did not constitute conduct of a sexual nature. But the gravamen of the allegations against Mr Lamb is not the simple use of swear words in conversation but the making of remarks of a sexual nature directed at the applicant consistently and almost exclusively.<sup>366</sup>

Raphael FM was satisfied that a reasonable person would have anticipated that the applicant would be offended, humiliated or intimidated by the conduct of the respondent, Mr Lamb.<sup>367</sup> Raphael FM was also satisfied that Mr Lamb's statement 'I haven't seen an Asian come before' constituted unwelcome conduct and such conduct could reasonably be anticipated to have offended the applicant.<sup>368</sup>

360 [2001] FMCA 6, [89].

361 [2001] FMCA 52.

362 [2001] FMCA 52, [51].

363 [2001] FMCA 52, [49].

364 [2005] FMCA 750.

365 [2005] FMCA 750, [27].

366 [2005] FMCA 750, [33].

367 [2005] FMCA 750, [33].

368 [2005] FMCA 750, [34].



In *Font v Paspaley Pearls Pty Ltd*<sup>369</sup> ('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?'<sup>370</sup> 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.<sup>371</sup>

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 apply<sup>372</sup> – 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 section 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.<sup>373</sup>

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 orientation to the victim.<sup>374</sup>

In *Elliott v Nanda*,<sup>375</sup> 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 conduct was such that a reasonable person would have anticipated that the applicant would be at least offended and humiliated by the conduct.<sup>376</sup>

In *Beamish v Zheng*,<sup>377</sup> the applicant complained of a range of conduct by the respondent co-worker, including sexual comments, an attempt to touch her breasts and an offer of \$200 to have sex with him. In finding for the applicant, Driver FM stated:

The workplace in which Mr Zheng and Ms Beamish worked was a fairly rough and tumble place in which lighthearted behaviour was tolerated. In the circumstances, a certain amount of sexual banter could have been anticipated. However, Mr Zheng's conduct was persistent and went beyond anything that could be described as lighthearted sexual banter. Ms Beamish's reactions to his conduct should have made clear that it was unwelcome. In the circumstances, a reasonable person would have anticipated that Ms Beamish would have been offended, humiliated or intimidated by Mr Zheng's persistent conduct. In particular, the attempt to touch her breasts was unacceptable and the offer of money for sex was grossly demeaning.<sup>378</sup>

In *Bishop v Takla*,<sup>379</sup> the applicant complained that her co-worker engaged in a range of conduct which constituted sexual harassment, including sexual remarks and physical contact. One such incident

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369 [2002] FMCA 142.

370 [2002] FMCA 142, [17].

371 [2002] FMCA 142, [130].

372 [2002] FMCA 142, [134].

373 [2002] FMCA 142, [134].

374 [2002] FMCA 142, [134].

375 (2001) 111 FCR 240.

376 (2001) 111 FCR 240, 277 [107]-[109].

377 [2004] FMCA 60.

378 [2004] FMCA 60, [16].

379 [2004] FMCA 74.

involved the respondent telling the applicant that he wanted to come up to a nightclub where she was working in another job, to which the applicant suggested that he come with his girlfriend. He responded that ‘maybe I will come on my own’.<sup>380</sup> Raphael FM found that a ‘reasonable person may well have anticipated that she might be intimidated by this’.<sup>381</sup>

In *Poniatowska v Hickinbotham*,<sup>382</sup> the applicant complained that her co-worker, Mr Flynn, had made requests for sexual favours to her in two emails and a number of subsequent SMS text messages. The applicant had indicated in her response to Mr Flynn’s first email that she did not wish to receive requests for sexual favours from him. Mr Flynn nevertheless persisted to make such requests. Mansfield J stated:

Having indicated her attitude quite clearly, it was apparent, and a reasonable person would have anticipated, that Ms Poniatowska would be offended if the requests were maintained (as they were). It was also apparent, and a reasonable person would have anticipated, that she would be humiliated by such conduct because it conveys an understanding of the potential preparedness of Ms Poniatowska to have a sexual relationship with him, notwithstanding her clearly expressed attitude to the contrary. Even if Mr Flynn did not see the situation that way, and was nevertheless hopeful of establishing a sexual relationship, that does not result in a different conclusion. The test in section 28A is clearly an objective one: see generally *Leslie v Graham* [2002] FCA 32 at [70].<sup>383</sup>

In *Poniatowska v Hickinbotham*,<sup>384</sup> the applicant also complained about another co-worker, Mr Lotito. While at work, the applicant received on her mobile phone an MMS photograph from Mr Lotito showing an act of oral sex by a woman on a man, with the text message ‘U have 2 b better’. Mansfield J found that ‘a reasonable person, having regard to all the circumstances, would have anticipated that Ms Poniatowska would be offended and humiliated by that conduct’.<sup>385</sup>

#### 4.6.5 ‘Workplace’ and ‘workplace participant’

Section 28B of the SDA prohibits sexual harassment in employment and partnership situations. In particular, section 28B(6) provides that it is ‘unlawful for a workplace participant to sexually harass another workplace participant at a place that is a workplace of either or both of those persons’.

Section 28B(7) defines ‘workplace’ as meaning a place at which a workplace participant works or otherwise carries out functions in connection with being a workplace participant.

Section 28B(7) defines ‘workplace participant’ as meaning any of the following: an employer or employee, a commission agent or contract worker, a partner in a partnership.

The scope of the meaning of the terms ‘workplace’ and ‘workplace participant’ was considered by Bromberg J in *Ewin v Vergara (No 3)*.<sup>386</sup> Ms Ewin was employed as an accountant at Living Leisure Australia Ltd (‘LLA’). Mr Vergara was a contract worker for LLA and also worked as an accountant. Mr Vergara was an employee of a recruitment and labour hire firm and was made available to perform work for LLA pursuant to a contract between that firm and LLA.

Ms Ewin’s complaint contained two categories of claims. The first comprised ‘verbal sexual harassment claims’ involving sexual propositions over three days at work and at a pub. The second comprised a

380 [2004] FMCA 74, [11].

381 [2004] FMCA 74, [34].

382 [2009] FCA 680.

383 [2009] FCA 680, [289].

384 [2009] FCA 680.

385 [2009] FCA 680, [298].

386 [2013] FCA 1311.

‘physical sexual harassment claim’ which allegedly occurred on the fourth day. Ms Ewin claimed that she and Mr Vergara attended a work function at the Melbourne Aquarium before heading to a bar across the road with work colleagues. Both later returned to the LLA office. Ms Ewin alleged that while at the LLA office, Mr Vergara subjected her to unwanted sexual intercourse and assault.

Mr Vergara denied the sexual harassment claims and also claimed that, if he did sexually harass Ms Erwin, it was not while working as a ‘workplace participant’ and ‘at a place that is a workplace of both’ of them. Significantly, while harassment of one employee by another pursuant to section 28B(2) is not limited by the place at which it occurs, harassment of one workplace participant by another pursuant to section 28B(6) is only proscribed ‘at a place that is a workplace of either or both of them’.<sup>387</sup>

Bromberg J held that Ms Ewin and Mr Vergara were not fellow employees for the purposes of section 28B(2) because they had different employers but they were both workplace participants within the meaning of section 28B(6).<sup>388</sup> His Honour said:

The ordinary meaning of the phrase ‘a fellow employee’ does not necessarily connote two employees employed by the same employer. Each of Mr Vergara and Ms Ewin had different employers but were both employees working in the same business and vis-a-vis each other capable of being regarded as fellow employees within the ordinary meaning of that phrase. ...

However, the terms of s 28B(2) and the context provided by s 28B more broadly, suggest that a narrower use of the phrase was intended. Whilst the words ‘with the same employer’ in s 28B(2) are principally directed to protecting against harassment between an existing employee and a prospective employee of the same employer, the use of that reference suggests that the need for a common employer was also contemplated as between existing fellow employees.

Ms Ewin’s contention [that section 28B(2) applied to her situation] may have been stronger if s 28B failed to provide any protection for employees of different employers working in the same workplace. It would have been odd if harassment between co-workers of that kind had been excluded from protection. However co-workers employed by different employers working in the same workplace are covered by s 28B(6) and, in my view, it is only s 28B(6) that was intended to provide relief in those circumstances.<sup>389</sup>

Bromberg J rejected submissions from Mr Vergara that the scope of the conduct proscribed by section 28B(6) does not extend to conduct which does not occur during working hours and does not extend to conduct that occurred in common areas of a building such as entrances, lifts, corridors, kitchens and toilets shared by workplace participants with the employees of other workplaces or with the general public. His Honour said:

The definition of ‘workplace’ in s 28B(7) is cast in wide terms. A ‘workplace’ is not confined to the place of work of the participants but extends to a place at which the participants work or otherwise carry out functions in connection with being a workplace participant. Section 28B(6) itself speaks in similar terms of ‘a place that is a workplace’ of both participants. The inclusive definition of ‘place’ in s 28B(7) is also in wide terms and facilitates various means of transport (‘ship, aircraft or vehicle’) being a ‘workplace’ if the other criteria for that definition are satisfied. That wide approach recognises that work or work based functions are commonly undertaken in a wide range of places (including on various means of transport) beyond the principal or ordinary place or places of work of workplace participants from a common workforce. Such places would commonly include the premises of clients, suppliers, associated businesses, conference halls and other venues where work functions are held and in transportation vehicles during work related travel. The underlying policy objective is accommodated by such a construction and such a construction is also consistent with the scope of the other subsections of s 28B.

387 [2013] FCA 1311, [16].

388 [2013] FCA 1311, [17]-[20].

389 [2013] FCA 1311, [18]-[20].

The restriction which limits the operation of s 28B(6) and maintains a sufficient nexus between the place and the workforce is that the place must be ‘a workplace of both’ workplace participants.<sup>390</sup>

When it came to considering the location of the alleged acts of sexual harassment, Bromberg J noted that Ms Ewin and Mr Vergara went to the pub to deal with an incident of sexual harassment that began at the workplace and that the sexual harassment continued there. They were at the pub in connection with being workplace participants and that was sufficient for the pub to fall within the definition of a ‘workplace’.<sup>391</sup> Similarly, conduct that occurred on a journey to or at the premises of LLA’s accountants were done while carrying out functions in connection with being workplace participants.<sup>392</sup>

The findings of Bromberg J that section 28B(6) applied to the conduct that occurred at the pub was upheld on appeal.<sup>393</sup>

#### 4.6.6 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) in the decision of *O’Callaghan v Loder*.<sup>394</sup>

The issue also arose in relation to the SDA in *Aldridge v Booth*,<sup>395</sup> which was heard after the sexual harassment provisions were introduced (sections 28 and 29 as they then were). Spender J held that sexual harassment was a form of sex discrimination.<sup>396</sup> This finding was necessary for reasons relating to the constitutional validity of the sexual harassment provisions of the SDA as CEDAW does not expressly deal with sexual harassment.

Spender J’s decision was approved in *Hall v Sheiban*<sup>397</sup> by French J who held that section 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. The requirements of s 14 relating to discriminatory treatment in the terms and conditions of employment or subjection to detriment are subsumed in the nature of the prohibited conduct.<sup>398</sup>

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 section 14 does not include sexual harassment of the kind to which section 28 is directed would appear contrary to the trend of judicial opinion’.<sup>399</sup>

In *Elliott v Nanda*<sup>400</sup> (*‘Elliott’*), Moore J 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

390 [2013] FCA 1311, [38]-[39].

391 [2013] FCA 1311, [228]-[231].

392 [2013] FCA 1311, [253].

393 *Vergara v Ewin* (2014) 223 FCR 151, [123]-[128] (North and Pagone JJ); White J dissenting on this point at [73]-[90].

394 [1983] 3 NSWLR 89.

395 (1988) 80 ALR 1.

396 (1988) 80 ALR 1, 16-17.

397 (1989) 20 FCR 217.

398 (1989) 20 FCR 217, 277.

399 (1989) 20 FCR 217, 235.

400 (2001) 111 FCR 240.

overseas jurisprudence set out in *Hall v Sheiban* and *O'Callaghan v Loder* on the nature and scope of 'sex discrimination'.<sup>401</sup>

Moore J also cited with approval decisions of the then Human Rights and Equal Opportunity Commission which had clearly proceeded on the basis that conduct is capable of constituting both sex discrimination under sections 5 and 14 and sexual harassment under Division 3 of Part II of the SDA.<sup>402</sup> In the case before him, Moore J was satisfied the conduct of the respondent was in breach of section 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.<sup>403</sup>

The same approach has been taken in a number of other cases.<sup>404</sup>

In *Gilroy v Angelov*,<sup>405</sup> ('*Gilroy*') Wilcox J expressed reservations about whether section 14 applied in cases which involved the sexual harassment of one employee by another.<sup>406</sup> In that case, his Honour found that an employee had sexually harassed another employee within the meaning of section 28A and that their employer was vicariously liable under section 106. The applicant also contended that she had been discriminated against under sections 5 and 14 of the SDA. His Honour expressed reservations about whether section 14 applied and stated that section 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 s 14 did not really fit that case that s 28B was enacted. To my mind, s 28B covers this case.<sup>407</sup>

Similarly, in *Leslie v Graham*<sup>408</sup> ('*Leslie*'), although Branson J agreed that section 14 was capable of extending to conduct that constituted sexual harassment as defined by section 28A,<sup>409</sup> her Honour was not persuaded that section 14 applied in cases which involved the sexual harassment of one employee

401 (2001) 111 FCR 240, 281 [127].

402 (2001) 111 FCR 240, 281-282 [128]. His Honour cited: *W v Abrop Pty Ltd* [1996] HREOCA 11; *Phillips v Leisure Coast Removals Pty Ltd* [1997] HREOCA 21; *Brown v Lemeki* [1997] HREOCA 25; *Biedermann v Moss* [1998] HREOCA 7.

403 (2001) 111 FCR 240, 282 [130]. That finding was necessary because under s 105 of the SDA a person will only be liable for aiding or permitting an act which is unlawful under Div 1 or 2 of Pt II of the SDA. See further discussion of s 105 at 4.10 below.

404 *Horman v Distribution Group Ltd* [2001] FMCA 52; *Wattle v Kirkland* [2001] FMCA 66; *Wattle v Kirkland (No 2)* [2002] FMCA 135, [67] (where Driver FM expressly applied the reasoning of French J in *Hall v Sheiban* (1988) 20 FCR 217, 274-277 and Moore J in *Elliott v Nanda* (2001) 111 FCR 240, 281-282 [125]-[130]); *Font v Paspaley Pearls Pty Ltd* [2002] FMCA 142, [136]-[139]; *Alexander v Cappello* [2013] FCCA 860, [120]; *Arnold v Compass Group (Aust) Pty Ltd* [2014] FCCA 1999, [59]; *Johanson v Blackledge* [2001] FMCA 6. The *Johanson* case involved sexual harassment in the provision of goods and services. Driver FM held that in order to constitute sex discrimination within the meaning of ss 5 and 22 of the SDA, 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 (applying the reasoning in *Jamal v Secretary of Department of Health* (1988) EOC 92-234). Driver FM concluded that this test had been satisfied on the evidence: [2001] FMCA 6, [95]-[96].

405 [2000] FCA 1775.

406 In *Elliott v Nanda* (2001) 111 FCR 240, Moore J distinguished the decision in *Gilroy* on this basis. Moore J stated that 'the circumstances [Wilcox J] was considering differed from the present case, in that the harassment was there perpetrated by an employee, not by the employer'. Moore J went on to state 'to the extent that [Wilcox J] could be taken to have expressed the view that s 28B was enacted because it is artificial to extend s 14 to situations of sexual harassment, I would respectfully disagree' (281 [127]).

407 [2000] FCA 1775, [102].

408 [2002] FCA 32.

409 [2002] FCA 32, [73], citing *Elliott v Nanda* (2001) 111 FCR 240.

by another.<sup>410</sup> In that case, Branson J found that an employee had sexually harassed another employee within the meaning of section 28B and that their employer was vicariously liable for that conduct. However, Branson J went on to state:

while [the SDA] renders unlawful discrimination by an employer on the ground of sex, it does not render unlawful discrimination by a fellow employee on the ground of sex. ... I am not persuaded that [the respondent employee's] sexual harassment of [the applicant] constituted discrimination against her by her employer ...<sup>411</sup>

In *Hughes v Car Buyers Pty Ltd*,<sup>412</sup> Walters FM expressly disagreed with the decision of Branson J in *Leslie* on this issue. Walters FM found that the actions of a fellow employee of the applicant constituted not only sexual harassment, but also sex discrimination within the meaning of section 14(2)(d) of the SDA.<sup>413</sup> Walters FM also found that the respondent employer was vicariously liable for the employee's conduct and had itself unlawfully discriminated against the applicant on the ground of her sex.<sup>414</sup>

Federal Magistrate Rimmer came to a similar view in *Frith v The Exchange Hotel*.<sup>415</sup> His Honour found that although the fellow employee may not, in that case, have discriminated against the applicant on the grounds of sex within the meaning and contemplation of section 14, the effect of section 106 of the SDA is that the employer is deemed to have also done the relevant acts thereby triggering the provisions of section 14.<sup>416</sup>

In *Alexander v Cappello*,<sup>417</sup> Ms Alexander was the subject of sexual harassment at her work at a takeaway café. Driver J found that Ms Alexander had her employment terminated because she made a complaint about the sexual harassment. Ms Alexander claimed that the termination of her employment was an act of sex discrimination (on the basis that it is mostly women who are sexually harassed in the workplace and therefore it is mostly women who make complaints about being sexually harassed). Driver J considered that the argument was 'a strong one' but did not need to decide the issue because the termination amounted to victimisation contrary to section 94 of the SDA.<sup>418</sup> His Honour did find that the sexual harassment itself amounted to discrimination in employment contrary to section 14 of the SDA.<sup>419</sup>

In *Kraus v Menzie*, Mansfield J found that some of the applicant's allegations of sexual harassment by her employer were established but held that this conduct had not caused any real detriment to Ms Kraus.<sup>420</sup> As a result, Mansfield J found that the conduct did not amount to discrimination in employment contrary to section 14(2) because her employer had not subjected her to any detriment in her employment or the terms or conditions of employment which were afforded to her.<sup>421</sup> This finding was upheld on appeal. On this point, the Full Court of the Federal Court said:

Central to his Honour's decision is his acceptance that the appellant was in a personal and intimate relationship with the first respondent, and for the most part a willing participant in the conduct later

<sup>410</sup> Note that Branson J did not refer to the decision in *Gilroy* in her judgment.

<sup>411</sup> [2002] FCA 32, [73].

<sup>412</sup> [2004] FMCA 526, [42]-[43].

<sup>413</sup> [2004] FMCA 526, [41].

<sup>414</sup> [2004] FMCA 526, [44]. Like Branson J in *Leslie*, Walters FM did not refer to the decision in *Gilroy*.

<sup>415</sup> [2005] FMCA 402.

<sup>416</sup> [2005] FMCA 402, [80]. Note Rimmer FM did not refer to the decision of Walters FM in *Hughes v Car Buyers Pty Ltd* [2004] FMCA 526, [42]-[43].

<sup>417</sup> [2013] FCCA 860.

<sup>418</sup> [2013] FCCA 860, [114]-[119].

<sup>419</sup> [2013] FCCA 860, [120]-[131].

<sup>420</sup> [2012] FCA 3, [134]-135].

<sup>421</sup> [2012] FCA 3, [136].

complained of. In effect, he found that the conduct did not create the hostile, demeaning and oppressive workplace environment that is now contended to have existed, and we can see no basis to overturn that finding.<sup>422</sup>

## 4.6.7 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 Pty Ltd*,<sup>423</sup> for example, the applicant complained of the behaviour of her supervisor. This was found not to constitute sexual harassment under the previous test (see 4.6.1 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.<sup>424</sup>

## 4.7 Exemptions

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.<sup>425</sup> 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:

- exemptions are created specific to discrimination on the ground of sex in the areas of genuine occupational qualification,<sup>426</sup> pregnancy, childbirth or breastfeeding,<sup>427</sup> services for members of one sex,<sup>428</sup> accommodation provided solely for persons of one sex who are students at an educational institution,<sup>429</sup> the care of children in the place where the child resides,<sup>430</sup> insurance<sup>431</sup> and combat duties;<sup>432</sup>
- an exemption specific to marital or relationship status discrimination is created in the area of employment or contract work in relation to the care of children in the place where the

422 *Kraus v Menzie* [2012] FCAFC 144, [81]-[84].

423 [2001] FMCA 91.

424 [2001] FMCA 91, [33].

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

426 SDA, s 30.

427 SDA, s 31.

428 SDA, s 32.

429 SDA, s 34(2).

430 SDA, s 35(1).

431 SDA, s 41.

432 SDA, s 43.



child resides and where it is intended that the spouse or de facto partner of the employee or contract worker would also occupy a position as employee or contract worker;<sup>433</sup>

- exemptions are created that apply to discrimination on the grounds of sex, sexual orientation, gender identity, marital or relationship status or pregnancy in relation to employment, contract work or (except in relation to sex) the provision of education or training at an educational institution established for religious purposes;<sup>434</sup>
- section 39 creates an exemption that applies to discrimination on the ground of the person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy, breastfeeding or family responsibilities in connection with the admission to, or the provision of benefits to members of, a voluntary body;
- sections 41A and 41B create exemptions which are specific to discrimination in superannuation on the grounds of either sex, marital or relationship status or family responsibilities;
- section 42 creates an exemption that applies to discrimination on the ground of sex, gender identity or intersex status in certain kinds of competitive sporting activity; and
- section 43A creates an exemption that apply to requests for information or the keeping of records which do not make provision for a person to be identified as being neither male nor female.

The balance of the exemptions in Division 4 are not specific to any particular ground of discrimination but operate in the context of specific areas such as accommodation,<sup>435</sup> charities,<sup>436</sup> religious bodies<sup>437</sup> or an act done under certain kinds of statutory authority.<sup>438</sup>

The exemptions do not apply to the prohibitions of sexual harassment contained in Part II, Division 3 of the SDA.

Note also that section 44 empowers the Australian Human Rights Commission to grant a temporary exemption on the application of a person.<sup>439</sup>

Many of the exemptions are yet to be the subject of any detailed jurisprudence. Significant decisions which have considered those provisions are discussed below.

### 4.7.1 Services for members of one sex

Section 32 of the SDA provides:

#### **32 Services for members of one sex**

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*,<sup>440</sup> the applicant challenged state legislation which prohibited the provision of fertility treatment to unmarried women not living in de facto relationships. This was found to

433 SDA, s 35(2).

434 SDA, s 38(1), (2) and (3).

435 SDA, s 34(1).

436 SDA, s 36.

437 SDA, s 37.

438 SDA, s 40.

439 The Commission has developed criteria and procedures to guide the Commission in exercising its discretion under s 44 of the SDA. The Commission's guidelines and further information about the temporary exemptions granted by the Commission are available at: <<https://www.humanrights.gov.au/temporary-exemptions-under-sex-discrimination-act-1984-cth>>.

440 (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.

be inconsistent with section 22 of the SDA which makes discrimination unlawful on the basis of marital or relationship status in the provision of goods, service and facilities. The state legislation was also found to be invalid under section 109 of the *Constitution* to the extent of the inconsistency (see 4.2.3 above).

As to the exemption in section 32, Sundberg J stated that it did not apply, as the service provided benefit to both men and women. His Honour 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 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.<sup>441</sup>

## 4.7.2 Voluntary bodies

Section 39 of the SDA provides:

### 39 Voluntary bodies

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, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy, breastfeeding or family responsibilities 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 organisation;
- (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 Ltd*<sup>442</sup> ('*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 section 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 the applicant. It argued, however,

<sup>441</sup> (2000) 99 FCR 116, 121 [15].

<sup>442</sup> [2003] FMCA 81. The Sex Discrimination Commissioner appeared as amicus curiae in this case. Her submissions are available at: <[http://www.humanrights.gov.au/legal/submissions\\_court/amicus/netball.htm](http://www.humanrights.gov.au/legal/submissions_court/amicus/netball.htm)>.

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 section 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. The applicant was not, and could not be, a member of AANA.<sup>443</sup> Accordingly the actions of AANA constituted unlawful discrimination under the SDA.

In *Kowalski v Domestic Violence Crisis Service Inc*,<sup>444</sup> 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 services 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.<sup>445</sup> In relation to the issue of section 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.<sup>446</sup>

### 4.7.3 Acts done under statutory authority

Section 40(1) of the SDA relevantly provides:

- (1) Nothing in Division 1 or 2 affects anything done by a person in direct compliance with:
  - (c) a determination or decision of the Commission;
  - (d) an order of a court; or
  - (e) an order, determination or award of a court or tribunal having power to fix minimum wages and other terms and conditions of employment; or
  - (g) an instrument (an **industrial instrument**) that is:
    - (i) a fair work instrument (within the meaning of the *Fair Work Act 2009*); or
    - (ii) a transitional instrument or Division 2B State instrument (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*).

In *Howe v Qantas Airways Ltd*,<sup>447</sup> Driver FM considered the interpretation of section 40(1) of the SDA. In

<sup>443</sup> [2003] FMCA 81, [26].

<sup>444</sup> [2003] FMCA 99.

<sup>445</sup> [2003] FMCA 99, [43]. On appeal in *Kowalski v Domestic Violence Crisis Service Inc* [2005] FCA 12, the appellant succeeded in establishing an error of fact which affected Driver FM’s finding as to what was communicated to the Domestic Violence Crisis Service workers. Madgwick J found that the Domestic Violence Crisis Service workers were probably told that both the appellant and his wife had requested their attendance. However, the court went on to state (at [68]):

The difficulty for the appellant is that, even if it is accepted that both he and his wife requested the DVCS workers’ attendance, the circumstances as a whole must be considered, including that the primary complaint was that the husband was removing property. There is no record in the police log of any complaint by Mr Kowalski of any untoward behaviour at all on the part of his wife.

Madgwick J found that it was highly probable that what was conveyed to the workers was that it was the appellant’s wife that was the complainant. The finding of Driver FM that there had been no discrimination against the appellant on the basis of gender or marital status was therefore upheld.

<sup>446</sup> [2003] FMCA 99, [45].

<sup>447</sup> [2004] FMCA 242. The Sex Discrimination Commissioner appeared as amicus curiae in this matter and made submissions, inter alia, on the proper construction of s 40(1). The submissions of the Sex Discrimination Commissioner are available at: <<https://www.humanrights.gov.au/commission-submission-13>>. The Commissioner’s supplementary submissions are available at: <<https://www.humanrights.gov.au/commission-submission-14>>.

that case, the terms and conditions of the applicant's employment were substantially regulated by an enterprise agreement. The applicant alleged, inter alia, that the respondent had discriminated against her on the grounds of her pregnancy in the course of her employment.<sup>448</sup> The respondent sought to rely on the section 40(1) exemption in response to certain of these allegations made by the applicant. In relation to the interpretation of section 40(1), Driver FM stated:

I accept the submissions ... of the Sex Discrimination Commissioner [appearing as amicus curiae] that s.40(1) of the SDA should not be construed so as to protect acts which are consequential to compliance with an award or certified agreement. ... In my view, s.40(1) of the SDA means what it says. The subsection protects, relevantly, anything done by a person *in direct compliance* (my emphasis) with a certified agreement. ... [I]f the employer exercised a discretion in circumstances where the terms and conditions of employment were silent it could not be said that the respondent acted in direct compliance with the certified agreement.

The limited available authority on the interpretation of s.40(1) and its State equivalents supports a narrow construction. ... In order for there to be 'direct compliance' within the meaning of s.40(1), the action taken by the discriminator must have been 'made necessary' by the clause in the award or certified agreement in issue.<sup>449</sup> (footnotes omitted)

As noted in 4.2.7 above, section 40(2B) provides that the prohibition of discrimination by reference to sexual orientation, gender identity and intersex status does not affect anything done by a person in direct compliance with a law of the Commonwealth, or of a state or territory, that is prescribed by the regulations. When the prohibitions in sections 5A, 5B and 5C were enacted on 1 August 2013, the regulations provided that this exemption applied to all state and territory laws that were in force at that time.<sup>450</sup> The exemption was initially granted only for a period of 12 months. The explanatory statement noted that:

This will allow the laws to be reviewed for consistency with the introduction of protection on the grounds of sexual orientation, gender identity or intersex discrimination in the Sex Discrimination Act. The initial exemption for all laws would sunset on 31 July 2014, after which only specific laws will be prescribed, provided there is a clear policy rationale for their prescription.<sup>451</sup>

The initial 12 month period was extended twice and expired on 31 July 2016.<sup>452</sup>

#### 4.7.4 Competitive sporting activity

Section 42(1) of the SDA creates an exemption for competitive sporting activity as follows:

- (1) Nothing in Division 1 or 2 renders it unlawful to discriminate on the ground of sex, gender identity or intersex status by excluding persons from participation in any competitive sporting activity in which the strength, stamina or physique of competitors is relevant.

It can be observed that the section does not explicitly state whether it applies only to mixed-sex sporting activity or same-sex sporting activity (or both).

448 See further discussion of this case at 4.2.4, 4.3.1 and 4.3.2 above.

449 [2004] FMCA 242, [83]-[84].

450 Sex Discrimination Regulations 1984 (Cth), reg 5.

451 Explanatory Statement, Select Legislative Instrument 2013 No. 197, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Regulation 2013 (Cth).

452 By the Sex Discrimination Amendment (Exemptions) Regulation 2014 (Cth) and the Sex Discrimination Amendment (Exemptions) Regulation 2015 (Cth).

A narrower exemption was made in the Sex Discrimination Amendment (Exemptions) Regulation 2016 (Cth) which took effect from 17 September 2016 and applied only to the *Human Reproductive Technology Act 1991* (WA) and the *Surrogacy Act 2008* (WA) until 1 August 2017.

The female applicant in *Ferneley v The Boxing Authority of New South Wales*<sup>453</sup> was denied registration as a kick boxer by reason of the *Boxing and Wrestling Control Act 1986* (NSW) which only provided for registration of males. The respondent contended that, even if it was found to be providing a service (see above 4.5.1) and thus bound by section 22, the exemption in section 42 of the SDA would apply.

The applicant, on the other hand, submitted that section 42 was intended to apply only:

where the sporting competition involved men and women competing against each other. It was not intended to apply where the competitors were of the same sex. The terms of section 42 are intended to determine when a person of one sex may be excluded, so it implicitly assumes that men and women are competing with each other in the relevant competitive sporting competition. Section 42 is not concerned with same sex sports.<sup>454</sup>

The applicant's argument was supported by the Sex Discrimination Commissioner, who appeared as *amicus curiae*.<sup>455</sup>

In obiter comments, Wilcox J rejected the respondent's argument and held that section 42(1) is only concerned with mixed-sex sporting activities and has no application to same sex sporting activity.<sup>456</sup> His Honour noted:

To apply s 42(1) to same-sex activities leads to strange results. For example, on that basis, a local government authority could lawfully adopt a policy of making its tennis courts, or its sporting ovals, available only to females (or only to males), an action that would otherwise obviously contravene s 22. Yet the authority might not be able to adopt the same policy in relation to the chess-room at its local lending library, and certainly could not do so in relation to the library itself. There would appear to be no rational reason for such a distinction.<sup>457</sup>

In addition, his Honour noted that:

the concept of excluding 'persons of one sex' from participation in an activity implies that persons of the other sex are not excluded; the other sex is allowed to participate. This can be so only in respect of a mixed-sex activity.<sup>458</sup>

Furthermore, Wilcox J found that this approach was consistent with the intention of Parliament.<sup>459</sup>

In 2013, the exemption in section 42 was extended to include not only sex, but also gender identity and intersex status. If the reasoning of Wilcox J in *Ferneley* is applied to these additional grounds, the exemption will apply to competitive activities between people of different sex, different gender identity or different intersex status. That is, it will be lawful to exclude people from participation in such competitive sporting activity on those grounds where strength, stamina or physique of competitors is relevant.

*Ferneley* remains the only case at the federal level to consider the exemption for discrimination in relation to competitive sporting activities in which the strength, stamina or physique of competitors is relevant. There have been a number of state decisions which have considered an exemption in a similar form.<sup>460</sup>

<sup>453</sup> (2001) 115 FCR 306. See discussion of this case at 4.5.1 above.

<sup>454</sup> (2001) 115 FCR 306, 324 [81].

<sup>455</sup> The Sex Discrimination Commissioner made submissions specifically on the proper construction of s 42(1). The submissions of the Sex Discrimination Commissioner are available at: <<https://www.humanrights.gov.au/commission-submission-16>>.

<sup>456</sup> (2001) 115 FCR 306, 325-326 [89]-[94].

<sup>457</sup> (2001) 115 FCR 306, 325-326 [90].

<sup>458</sup> (2001) 115 FCR 306, 326 [91].

<sup>459</sup> (2001) 115 FCR 306, 326 [92].

<sup>460</sup> See *McQueen v Callisthenics Victoria Inc* [2010] VCAT 1736; *Taylor v Moorabbin Saints Junior Football League and Football Victoria Ltd* [2004] VCAT 158; *South v Royal Victorian Bowls Association* [2001] VCAT 207; *Jernakoff v WA Softball*

## 4.7.5 Marital or relationship status exemption for gender reassignment

On 21 June 2011, the exemption for an act done under a statutory authority in section 40 of the SDA was amended to include new subsection (5), which reads:

Nothing in Division 2 renders it unlawful to refuse to make, issue or alter an official record of a person's sex if a law of a State or Territory requires the refusal because the person is married.

A definition of 'official record of a person's sex' was inserted into section 4 of the SDA, which reads:

**official record of a person's sex** means:

- (a) a record of a person's sex in a register of births, deaths and marriages (however described); or
- (b) a document (however described), issued under a law of a State or Territory, the purpose of which is to identify or acknowledge a person's sex.

All of the states and territories have enacted legislative schemes to recognise the assigned sex of persons that have undergone some kind of gender reassignment treatment or surgery.<sup>461</sup> In all jurisdictions, a person must be unmarried to be able to apply for a gender reassignment certificate.<sup>462</sup>

Therefore, this amendment appears to close off any potential complaint of discrimination on the grounds of marital or relationship status brought by married persons who are refused a gender reassignment certificate where they have undergone some kind of treatment or surgery and comply with all other legislative criteria.

## 4.8 Victimisation

Section 94 of the SDA prohibits victimisation, as follows:

### 94 Victimisation

- (1) A person shall not commit an act of victimization against another person.  
Penalty:
  - (a) in the case of a natural person—25 penalty units or imprisonment for 3 months, or both; or
  - (b) in the case of a body corporate—100 penalty units.
- (2) For the purposes of subsection (1), a person shall be taken to commit an act of victimization against another person if the first-mentioned person subjects, or threatens to subject, the other person to any detriment on the ground that the other person:
  - (a) has made, or proposes to make, a complaint under this Act or the *Australian Human Rights Commission Act 1986*; or
  - (b) has brought, or proposes to bring, proceedings under this Act or the *Australian Human Rights Commission Act 1986* against any person; or
  - (c) has furnished, or proposes to furnish, any information, or has produced, or proposes to produce, any documents to a person exercising or performing any power or function under this Act or the *Australian Human Rights Commission Act 1986*; or

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*Association (Inc)* (1999) EOC 92-981; *Robertson v Australian Ice Hockey Federation* [1998] VADT 112; *Commissioner for Equal Opportunity v Parsons* (1990) EOC 92-278.

461 *Births, Deaths and Marriages Registration Act 1995* (NSW) Pt 5A; *Birth Deaths and Marriages Registration Act 1997* (ACT) Pt 4; *Births, Deaths and Marriages Registration Act 1996* (Vic) Pt 4A; *Sexual Reassignment Act 1988* (SA); *Births, Deaths and Marriages Registration Act* (NT) Pt 4A; *Births Deaths and Marriages Registration Act 1999* (Tas) Pt 4A; *Gender Reassignment Act 2000* (WA); *Births Deaths and Marriages Registration Act 2003* (Qld) Pt 4.

462 See Australian Human Rights Commission, Sex Files: the legal recognition of sex in documents and government records: Concluding paper of the sex and gender Diversity project, March 2009, 16, at <<https://www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity/projects/sex-files-legal-recognitionof-sex-documents>>, (viewed 24 June 2016).

- (d) has attended, or proposes to attend, a conference held under this Act or the *Australian Human Rights Commission Act 1986*; or
  - (e) has appeared, or proposes to appear, as a witness in a proceeding under this Act or the *Australian Human Rights Commission Act 1986*; or
  - (f) has reasonably asserted, or proposes to assert, any rights of the person or the rights of any other person under this Act or the *Australian Human Rights Commission Act 1986*; or
  - (g) has made an allegation that a person has done an act that is unlawful by reason of a provision of Part II;
- or on the ground that the first-mentioned person believes that the other person has done, or proposes to do, an act or thing referred to in any of paragraphs (a) to (g), inclusive.

This section is in essentially identical terms to section 42 of the DDA, discussed at 5.6, and the cases relevant under one Act are therefore relevant in applying the other. See also section 27(2) of the RDA, discussed at 3.5, and section 51 of the ADA, discussed at 2.5. Cases prior to 2011 have held that these victimisation provisions may give rise to civil and/or criminal proceedings.<sup>463</sup> This is because the definition of ‘unlawful discrimination’ in section 3 of the AHRC Act specifically includes conduct that is an offence under section 94. For example, in *O’Connor v Ross (No 1)* (which dealt with victimisation under the DDA),<sup>464</sup> Driver FM in the Federal Magistrates Court said:

The jurisdiction of this court is to deal with complaints of discrimination that HREOC has been unable to resolve. The jurisdiction of this court does not extend to the hearing of charges for alleged offences against the DDA or the HREOC Act. It was for that reason that I ordered that the application be amended to delete reference to an offence. That has been done. Mr Abaza submits that the amended application remains objectionable because it continues to assert victimisation contrary to either or both of s 42 of the DDA and s 26 of the HREOC Act. This objection indicates a partial misunderstanding. The DDA provides that it is an offence for a person to commit an act of victimisation. Where victimisation is dealt with as an offence, it will be prosecuted by the Director of Public Prosecutions in a court of competent jurisdiction other than this court. However, a person may also make a complaint of victimisation to HREOC which the Commission will attempt to resolve by conciliation. Where conciliation is unsuccessful, the matter will then be referred for hearing by this court or the Federal Court if application is made. Section 3(1) of the HREOC Act defines unlawful discrimination as acts, omissions or practices that are unlawful under Pt 2 of the DDA and specifically includes any conduct that is an offence under Div 4 of Pt 2 of the DDA. It follows that the applicant was entitled to make a complaint of victimisation to HREOC and that this court has jurisdiction to consider the claim in respect of victimisation where HREOC has been unable to resolve the complaint by conciliation and the President has issued a notice of termination. This court has dealt with such claims on a number of occasions ... I add, for completeness, that my conclusions on this issue have taken into account s 125 of the DDA. The applicant’s right of civil action derives from the HREOC Act, not the DDA.<sup>465</sup>

Once a complaint of unlawful discrimination is terminated, a person affected may make an application to the Federal Court or Federal Circuit Court alleging unlawful discrimination by one or more respondents to the terminated complaint.<sup>466</sup> If the court is satisfied that there has been unlawful discrimination by any respondent, the court may make such orders as it thinks fit, including any of the orders set

<sup>463</sup> See, for example, *Tadawan v South Australia* [2001] FMCA 25; *Aleksovski v AAA Pty Ltd* [2002] FMCA 81; *Font v Paspaley Pearls* [2002] FMCA 142; *O’Connor v Ross (No 1)* [2002] FMCA 210, [11]; *Hassan v Hume* [2004] FCA 886; *Damiano v Wilkinson* [2004] FMCA 891, [22]; *Drury v Andreco Hurl Refractory Services Pty Ltd (No 4)* [2005] FMCA 1226, [43]; *Lee v Smith* [2007] FMCA 59, [211]; *Obieta v NSW Department of Education and Training* [2007] FCA 86, [240] and [259]; *Penhall-Jones v New South Wales* [2007] FCA 925, [10]; *Huang v University of NSW* [2008] FMCA 11, [120]; *Poniatowska v Hickinbotham* [2009] FCA 680, [36]; *Dye v Commonwealth Securities Limited* [2010] FCA 720, [64]; *Reynolds v The Minister for Health* [2010] FMCA 843, [30]; *Dye v Commonwealth Securities Limited (No 2)* [2010] FCAFC 118, [70]-[71] (the Court). See also the later cases of *Noble v Baldwin* [2011] FMCA 283, [282]; *Plunkett v Silverbrook Research Pty Ltd* [2011] FMCA 1012, [152] and [165]-[173]; *Alexander v Cappello* [2013] FCCA 860 and *Forest v HK and W Investments Pty Ltd* [2014] FCCA 209, [111].

<sup>464</sup> [2002] FMCA 210.

<sup>465</sup> [2002] FMCA 210, [11].

<sup>466</sup> AHRC Act, s 46PO(1).



out in section 46PO(4) of the AHRC Act. The statutory framework was also described by French J (as his Honour then was) in *Hassan v Hume* in a case in which victimisation was alleged under section 27 of the RDA.<sup>467</sup>

Section 94(2) requires that the relevant detriment be ‘on the ground that’ the person has done or proposed to do one of the things listed in paragraphs (a)-(g). In *Orford v Western Mining Corporation (Olympic Dam Operations) Pty Ltd*,<sup>468</sup> Commissioner McEvoy held that this required that ‘[t]he action must be taken for the particular prohibited reason and for no other’.<sup>469</sup> However, it would now appear to be settled that the prohibited reason need not be the sole factor, but must be a ‘substantial or operative’ factor in causing the alleged detriment.<sup>470</sup> This is consistent with the approach taken to this issue in applying section 42 of the DDA.<sup>471</sup>

In *Alexander v Cappello*,<sup>472</sup> Driver J identified three separate components to a victimisation claim, and said that each of them needs to be supported by appropriate evidence:

- a) the first component is that the person must be ‘subject to’ or ‘threatened to be subjected to a detriment’;
- b) the second is establishing a detriment; and
- c) the third is demonstrating the causal nexus between any detriment and one of the matters listed in paragraphs s 94(2)(a)-(g) of the SDA.<sup>473</sup>

In three cases since 2011, the Federal Court has cast doubt on whether either the Federal Circuit Court or the Federal Court has jurisdiction to hear an application under section 46PO of the AHRC Act if the alleged unlawful discrimination is an act of victimisation. Without deciding the issue, doubt was first expressed by Gray J in *Walker v Cormack* (in which victimisation was alleged under section 94 of the SDA)<sup>474</sup> and in *Walker v State of Victoria* (in which victimisation was alleged under section 42 of the DDA).<sup>475</sup> In the latter case, his Honour noted that section 49B of the AHRC Act provides that the Federal Court and the Federal Circuit Court have concurrent jurisdiction with respect to civil matters arising under Part IIB or IIC of the AHRC Act. There is no question that the Federal Court and Federal Circuit Court do not have jurisdiction to deal with a criminal prosecution for victimisation under one of the provisions discussed above. The remaining question was whether section 46PO of the AHRC Act permitted an application to be made alleging victimisation as a civil cause of action. Gray J said:

It seems strange that Parliament would confer on any court jurisdiction specifically to determine as part of a civil proceeding whether ‘conduct that is an offence’ under a specified provision has occurred. Courts are used to dealing in civil cases with allegations of conduct that might also be an element of a criminal offence. Trespass to the person is an example. Even so, if the same conduct were to be the subject of criminal proceedings, there would be additional issues, such as the requisite mental element. Courts are also used to dealing with cases in which they may be required to grant certificates pursuant to s 128 of the *Evidence Act 1995* (Cth), or equivalent provisions, so that witnesses may give evidence freely in civil proceedings which, but for such certificates, could be used against them in subsequent criminal proceedings. It would still be an odd step for Parliament to take to require a court to determine in a civil case whether an offence

467 [2004] FCA 886, [20]-[22].

468 [1998] HREOCA 22.

469 [1998] HREOCA 22, [5.1].

470 *Alexander v Cappello* [2013] FCCA 860, [139]; *Obieta v NSW Department of Education and Training* [2007] FCA 86, [240]; *Huang v University of NSW* [2008] FMCA 11, [120]; *Damiano v Wilkinson* [2004] FMCA 891, [22]; *Bailey v Australian National University* (1995) EOC 92-744.

471 See, for example, *Penhall-Jones v New South Wales* [2007] FCA 925, [85].

472 [2013] FCCA 860.

473 [2013] FCCA 860, [140].

474 (2011) 196 FCR 574, [37]-[41].

475 [2012] FCAFC 38, [98]-[100] (Gray J).

has occurred. If there has been a conferral on this court and the Federal Magistrates Court in respect of a complaint of victimisation, that would be the task of the court.

These questions were not argued fully in the present case, and there is no need to answer them. They do need to be the subject of authoritative answer.<sup>476</sup>

There was some confusion in this case because the trial judge appeared to deal with the allegation of victimisation as if it were a criminal charge.<sup>477</sup> At [42] the trial judge said that the applicant had ‘charged the Department with victimisation in contravention of section 42 of the DDA’. At [314] the trial judge said that the applicant had the onus ‘to establish the charge beyond reasonable doubt’. However, if section 46PO permits a civil action for victimisation, the remedies in section 46PO would be available if the court was ‘satisfied that there has been unlawful discrimination’. This would not require the court to determine in a civil case whether an offence has occurred.

The obiter comments of Gray J in *Walker v State of Victoria* were referred to with approval by the Full Court of the Federal Court in *Chen v Monash University*.<sup>478</sup> In that case, the court refused an application to reinstate an appeal following the filing of a notice of discontinuance. One of the factors considered by the court was the applicant’s prospects of success of the proposed appeal.<sup>479</sup> The primary judge had found that he did not have jurisdiction to hear claims of victimisation ‘because victimisation is a criminal offence and the court lacks jurisdiction to deal with such charges’, relying on Gray J’s comments in *Walker v State of Victoria*.<sup>480</sup> Dr Chen appeared in person and sought to argue on appeal that this was an error of law. She submitted that she sought civil not criminal remedies from the court and that the primary judge had failed to take into account other cases such as *Alexander v Cappello* where civil claims for victimisation had been successful.<sup>481</sup> The Full Court of the Federal Court found that there was no error of law in the approach of the trial judge, saying:

At the election of the applicant and, without opposition from the respondents, the allegations that would otherwise have made up the applicant’s claim of victimisation were dealt with as sex discrimination claims which formed part of a course of conduct on the part of the first respondent. There is no appealable error in the approach of the primary judge to this issue. He properly found that there was no jurisdiction in this Court to hear a claim which amounts to a criminal offence and made reference to the authority that was binding on him: *Walker v Victoria*. The applicant was permitted to lead evidence in relation to the matters that she said amounted to victimisation as part of her sex discrimination claims.

The applicant relies on *Alexander v Cappello*, a decision of Judge Driver in the Federal Circuit Court, in which Judge Driver made a finding that a claim of victimisation pursuant to s 94 of the SD Act had been established. Although Judge Driver refers to the judgment of Gray J in *Walker v Victoria*, he did not consider the issue of whether the Federal Circuit Court had jurisdiction to consider a claim for victimisation pursuant to s 94 of the SD Act. We assume the issue was not raised and his attention was not drawn to the relevant remarks of Gray J on that issue in *Walker v Victoria*. In any event, *Alexander v Cappello* was not binding on the primary judge and, if it was brought to his attention, he properly did not follow it.<sup>482</sup>

476 [2012] FCAFC 38, [99]-[100] (Gray J).

477 *Walker v State of Victoria* [2011] FCA 258 (Tracey J).

478 [2016] FCAFC 66, [119]-[124] (Barker, Davies and Markovic JJ).

479 [2016] FCAFC 66, [111].

480 *Chen v Monash University* [2015] FCA 130, [11] (Tracey J).

481 [2016] FCAFC 66, [119].

482 [2016] FCAFC 66, [123]-[124].

The first of the paragraphs cited above suggests that the trial judge properly found that there was no jurisdiction to hear a criminal charge, and that the civil allegations were dealt with as allegations of sex discrimination which meant that there was no prejudice to the appellant. However, the Full Court also expressly found that a claim of victimisation cannot be made to the Federal Court.<sup>483</sup> Again, the Full Court was dealing with a case where a trial judge had assumed that the only way that a victimisation claim could be brought was as a criminal charge. The appellant in this case was not legally represented.

At present there may be some doubt about the status of the Full Court's judgment in *Chen v Monash University* given that another Full Court had previously reached a different view. In *Dye v Commonwealth Securities Limited (No 2)*, the Full Court noted:

[T]he purpose of s 46PO of the AHRC Act is to create a private cause of action ... for unlawful discrimination including a contravention of s 94 of the Sex Discrimination Act. That statutory cause of action attracted the broad range of statutory remedies in s 46PO(4), including a right to damages by way of compensation for any loss or damage suffered because of the conduct of the respondent (s 46PO(4)(f)). Thus, the AHRC Act, read together with s 94 of the Sex Discrimination Act, creates a range of remedies for victimisation that includes damages, being expressly within the definition of unlawful discrimination s 3(1) of the AHRC Act.<sup>484</sup>

It may be that in a future case the Full Court may again be called upon to consider whether an application alleging victimisation may be brought as a civil claim pursuant to section 46PO of the AHRC Act.

## 4.9 Vicarious Liability

Section 106 of the SDA provides:

### 106 Vicarious liability etc.

- (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.
- (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.

### 4.9.1 Onus of proof

The applicant bears the onus of proof for the purposes of section 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 the duties of an agent.<sup>485</sup>

483 [2016] FCAFC 66, [121]. This finding was followed by North J in *Chen v Birbills* [2016] FCA 661, [11].

484 [2010] FCAFC 118, [71] (Marshall, Rares and Flick JJ).

485 *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91, [35].

An employer or principal who seeks to rely on the defence in section 106(2) bears the onus of proof of establishing that it took all reasonable steps to prevent the alleged acts taking place.<sup>486</sup>

### 4.9.2 '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*<sup>487</sup> ('*McAlister*'), Rimmer FM stated that the clear intention of section 106(1) in using the word 'connection' was 'to catch those acts that are properly connected with the duties of an employee'.<sup>488</sup>

Particular attention has been given to the phrase in cases involving acts of sexual harassment by one employee against another in a location away from the actual workplace.

In *Leslie v Graham*<sup>489</sup> ('*Leslie*'), sexual harassment was held to have occurred in the early hours of the morning in a serviced apartment that the complainant and another employee were sharing while attending a work related conference. In considering whether the conduct constituted sexual harassment of one employee by a fellow employee, Branson J<sup>490</sup> noted that when the harassment occurred, the employment relationship of the two people involved was a continuing one, they were sharing the apartment in the course of their common employment and the apartment was accommodation provided to them by their employer for the purpose of attending a conference. Her Honour concluded that the employer was vicariously liable pursuant to section 106(1) of the SDA.

In *South Pacific Resort Hotels Pty Ltd v Trainor*,<sup>491</sup> the Full Court of the Federal Court upheld a first instance decision<sup>492</sup> that found the employer vicariously liable for the actions of its employee who had sexually harassed another employee while off duty in staff accommodation quarters. The Full Court applied the reasoning in *Leslie* and held that there was a sufficient connection between the acts of the perpetrator and his employment. Relevantly, the acts of sexual harassment took place in accommodation occupied (albeit in separate rooms) by both employees because of, and for the purposes of, their common employment.<sup>493</sup> It could not be said that the common employment was unrelated or merely incidental to the sexual harassment of one by the other.<sup>494</sup> In fact, the connection between the employment and the acts in question was even closer than was the case in *Leslie* because a prohibition on staff having visitors in the staff accommodation meant that, absent any special arrangements by the employer, only staff were permitted there. It was therefore only by virtue of being staff that the two employees were in the premises where the acts of sexual harassment occurred.<sup>495</sup>

486 *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91, [35]. See also *Aldridge v Booth* (1988) 80 ALR 1, 12 (Spender J in obiter comments).

487 [2002] FMCA 109.

488 [2002] FMCA 109, [135].

489 [2002] FCA 32.

490 [2002] FCA 32, [71].

491 (2005) 144 FCR 402. For a discussion of this case, see Christine Fougere, 'Where does the workplace end? – Vicarious liability for sexual harassment?' (2005) 43(10) *Law Society Journal* 47.

492 *Trainor v South Pacific Resort Hotels Pty Ltd* [2004] FMCA 374.

493 *South Pacific Resort Hotels Pty Ltd v Trainor* (2005) 144 FCR 402, 409 [39] (Black CJ and Tamberlin JJ with whom Kiefel J agreed).

494 (2005) 144 FCR 402, 409 [39].

495 (2005) 144 FCR 402, 409 [40] (Black CJ and Tamberlin JJ with whom Kiefel J agreed).

Black CJ and Tamberlin JJ held:

The expression 'in connection with' in its context in s 106(1) of the SDA is a broad one of practical application ...

We would add that the expression chosen by the Parliament to impose vicarious liability for sexual harassment would seem, on its face, to be somewhat wider than the familiar expression 'in the course of' used with reference to employment in cases about vicarious liability at common law or in the distinctive context of workers compensation statutes. Nevertheless cases decided in these other fields can have, at best, only limited value in the quite different context of the SDA.<sup>496</sup>

In a separate judgment, Kiefel J referred to extrinsic materials and international jurisprudence to make some general observations about the application of section 106 of the SDA. Her Honour agreed with the majority view that a wide operation should be given to section 106(1) and the words 'in connection with the employment of an employee',<sup>497</sup> and warned against arguments that seek to import the doctrine of vicarious liability in tort into the SDA.<sup>498</sup>

The broad scope of section 106(1) was confirmed in *Lee v Smith*<sup>499</sup> in which the Commonwealth (Department of Defence) was held vicariously liable for the actions of its employees who subjected the applicant, a civilian administrator at a Cairns naval base, to sexual harassment, discrimination, victimisation and ultimately rape by the first respondent. Connolly FM found that the rape:

occurred between two current employees and in my view it arose out of a work situation. The applicant was invited to attend after-work drinks by a fellow employee and indeed the invitation was issued at the behest of the first respondent. Further, the rape itself was the culmination of a series of sexual harassments that took place in the workplace and would not have occurred but for the collusion of ... two fellow employees who made concerted efforts over a period of time to make arrangements for the applicant and first respondent to attend dinner at their residence. The applicant's attendance was clearly because of the original after-works drinks invitation and it was likely that the invitation was provided in that form to ensure the applicant's attendance. There is no doubt that it not only had the potential to adversely affect the working environment but it did so ...<sup>500</sup>

In determining the issue of the application of section 106(1) to the incident of rape, Connolly FM was satisfied that the rape was the culmination of earlier incidents of sexual harassment in the workplace and that the first respondent's conduct was an extension or continuation of his pattern of behaviour that had started and continued to develop in the workplace.<sup>501</sup> The nexus with the workplace was not broken.<sup>502</sup>

### 4.9.3 'All reasonable steps'

A central issue in determining the vicarious liability defence under section 106 is the extent to which an employer must go to prevent sexual harassment. The availability of the defence under section 106(2) should be assessed rigorously with respect to the obligation to take 'all reasonable steps'.<sup>503</sup>

496 (2005) 144 FCR 402, 409-410 [41]-[42] (Black CJ and Tamberlin JJ with whom Kiefel J agreed). Applied in *Lee v Smith* [2007] FMCA 59, [205].

497 (2005) 144 FCR 402, 414 [64].

498 (2005) 144 FCR 402, 414 [65].

499 [2007] FMCA 59. For a discussion of this case, see Alex Newton, 'Beyond the common law: employer held responsible for rape by employee - Is this a new frontier in vicarious liability?' (2007) 45(6) *Law Society Journal* 38.

500 [2007] FMCA 59, [203].

501 [2007] FMCA 59, [206].

502 [2007] FMCA 59, [206].

503 [2007] FMCA 59, [209].

A number of principles can be gleaned from the cases.

- it is not necessary for a respondent to be aware of an incident of harassment for vicarious liability to apply.<sup>504</sup> In *Aldridge v Booth*,<sup>505</sup> Spender J stated, in obiter comments:

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'.<sup>506</sup>

- the requirement of reasonableness applies to the nature of the steps actually taken and not to determining whether it was reasonable to have taken steps in the first place;<sup>507</sup>
- the aim of the defence is to prevent discrimination from occurring. Therefore, some steps must be taken prior to the act of discrimination.<sup>508</sup> This is not to say that an employer's reaction to discrimination is not relevant. Indeed, once an employer is aware of a complaint, the procedures that it has in place to deal with complaints and how it reacts to the complaint will be important;
- the size of the employer will be relevant to the question of whether it took 'all reasonable steps' to prevent the employee or agent from doing the acts complained of, as it is unrealistic to expect all employers, regardless of size, to adhere to a common standard of preventative measures. The employer or principal must take some steps, the precise nature of which will be different according to the circumstances of the employer.<sup>509</sup> In *Johanson v Blackledge*,<sup>510</sup> Driver FM 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.<sup>511</sup>

- even in small businesses employers must have 'done something active to prevent the acts complained of'<sup>512</sup> in order to make out the defence although this does not require a written sexual harassment policy.<sup>513</sup> Examples of the kind of conduct that would assist in making out the defence for a small employer includes:
  - 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;<sup>514</sup>

504 *Boyle v Ozden* (1986) EOC 92-165; *Johanson v Blackledge* [2001] FMCA 6.

505 (1988) 80 ALR 1.

506 (1988) 80 ALR 1, 12.

507 *Johanson v Blackledge* [2001] FMCA 6, [101].

508 *Boyle v Ishan Ozden* (1986) EOC 92-165 at 76,614.

509 *Johanson v Blackledge* [2001] FMCA 6, [101]. See also *McAlister v SEQ Aboriginal Corporation* [2002] FMCA 109, [143]; *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91, [37].

510 [2001] FMCA 6.

511 [2001] FMCA 6, [101].

512 *Gilroy v Angelov* [2000] FCA 1775.

513 *Johanson v Blackledge* [2001] FMCA 6, [103].

514 *Gilroy v Angelov* [2000] FCA 1775, [100].

- informing employees that disciplinary action will be taken against them should they engage in sexual harassment, making available brochures containing information on sexual harassment, advising new staff that it is a condition of their employment that they should not sexually harass a customer or co-worker;<sup>515</sup> and
- the existence of an effective complaint handling procedure to deal with complaints of harassment.<sup>516</sup>
- large corporations will be expected to do more than small businesses in order to be held to have acted reasonably.<sup>517</sup> For example, a clear sexual harassment policy should be in place. It should be available in written form and communicated to all members of the workforce. Continuing education on sexual harassment should also be undertaken; and<sup>518</sup>
- 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).<sup>519</sup>

In *Shiels v James*,<sup>520</sup> the applicant was the only female employee on a building construction site. Raphael FM found in that case that the respondent was unable to satisfy the requirements of section 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;
- 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; and
- the applicant complained to the harasser about the incidents but he, although a senior employee of the company, did not desist from the behaviour.<sup>521</sup>

In *Styles v Clayton Utz (No 3)*, McCallum J held that it is open to an applicant to contend that a failure to take reasonable steps to prevent sexual harassment is to be inferred from a failure to prevent the existence of a workplace hostile to women.<sup>522</sup>

The Australian Human Rights Commission has published a code of practice for employers pursuant to section 48(1)(ga) of the SDA which is aimed at preventing and responding to sexual harassment.<sup>523</sup> This code of practice was referred to by Buchanan J in *Richardson v Oracle Corporation Australia Pty Ltd*.<sup>524</sup> Having regard to the code of practice, his Honour criticised the online training package

515 *Johanson v Blackledge* [2001] FMCA 6, [105].

516 *Johanson v Blackledge* [2001] FMCA 6, [105].

517 *Johanson v Blackledge* [2001] FMCA 6, [101]; *McAlister v SEQ Aboriginal Corporation* [2002] FMCA 109, [143]; *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91, [37].

518 *Aleksovski v Australia Asia Aerospace Pty Ltd* [2002] FMCA 81, [88].

519 *Johanson v Blackledge* [2001] FMCA 6, [99].

520 [2000] FMCA 2.

521 [2000] FMCA 2, [74].

522 [2011] NSWSC 1452, [115].

523 Australian Human Rights Commission, *Sexual Harassment in the Workplace: A Code of Practice for Employers* (2004). At <[https://www.humanrights.gov.au/sites/default/files/content/sex\\_discrimination/workplace/code\\_practice/SH\\_codeofpractice.pdf](https://www.humanrights.gov.au/sites/default/files/content/sex_discrimination/workplace/code_practice/SH_codeofpractice.pdf)> (viewed 25 July 2016). Australian Human Rights Commission, *Effectively preventing and responding to sexual harassment: A Code of Practice for Employers* (2008). At <<https://www.humanrights.gov.au/our-work/sex-discrimination/publications/effectively-preventing-and-responding-sexual-harassment-0>> (viewed 25 July 2016).

524 [2013] FCA 102, [159]–[160].



provided by Oracle on the basis that it made no reference to the legislative foundation in Australia for the prohibition on sexual harassment; made no clear statement that such conduct was unlawful; and made no statement that an employer might also be vicariously liable.<sup>525</sup> Buchanan J said:

The omission of these important and easily included aspects from Oracle's statements of its own policies is a sufficient indication that Oracle had not, before November 2008 at least, taken all reasonable steps to prevent sexual harassment. I do not need to decide if the new policy is now adequate. The previous training package was not.<sup>526</sup>

The trial judge's findings on this point were not challenged on appeal.<sup>527</sup>

#### 4.9.4 Vicarious liability for victimisation

In *Taylor v Morrison*,<sup>528</sup> Phipps FM considered an application for summary dismissal on the grounds that the SDA did not provide for vicarious liability for victimisation contrary to section 94. The Commonwealth argued that section 106, which provides for vicarious liability in relation to some sections of the SDA, did not extend to the proscription of victimisation contained in section 94 of the SDA. 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.<sup>529</sup> Connolly FM in *Lee v Smith*<sup>530</sup> took a similar approach and found that the Commonwealth was liable for the conduct by its employees in accordance with common law vicarious liability and agency.<sup>531</sup>

### 4.10 Aiding or Permitting an Unlawful Act

Section 105 of the SDA provides:

#### **105 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 or 2 of Part II shall, for the purposes of this Act, be taken also to have done the act.

Divisions 1 and 2 of Part II of the SDA deal with discrimination. As a result, section 105 does not apply to sexual harassment (unless the conduct also amounts to discrimination, see 4.6.5 above) or victimisation.<sup>532</sup>

Section 105 of the SDA 'provides a means of bringing about lawful conduct by rendering liable a person who could prevent unlawful conduct from occurring or continuing or who assists, directly or indirectly, in its performance'.<sup>533</sup>

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

<sup>525</sup> [2013] FCA 102, [161].

<sup>526</sup> [2013] FCA 102, [164].

<sup>527</sup> *Richardson v Oracle Corporation Australia Pty Ltd* (2014) 223 FCR 334.

<sup>528</sup> [2003] FMCA 79.

<sup>529</sup> [2003] FMCA 79, [22].

<sup>530</sup> [2007] FMCA 59.

<sup>531</sup> [2007] FMCA 59, [211]–[213].

<sup>532</sup> *Alexander v Cappello* [2013] FCCA 860, [133] (Driver J).

<sup>533</sup> *Alexander v Cappello* [2013] FCCA 860, [135] (Driver J).

In *Howard v Northern Territory*,<sup>534</sup> Sir Ronald Wilson held:

In my opinion, s 105 requires a degree of knowledge or at least wilful blindness or recklessness in the face of the known circumstances in order to attract the operation of the section. That knowledge does not have to go so far as to constitute knowledge of the unlawfulness of the proposed conduct but it must extend to an awareness of, or wilful blindness to, the circumstances which could produce a result, namely discrimination, which the Act declares to be unlawful.<sup>535</sup>

It can be observed that this approach does not necessarily require actual knowledge of the unlawfulness of the acts in question, but does require some actual or constructive knowledge of the surrounding circumstances by the respondent.

In *Elliott v Nanda*,<sup>536</sup> 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, who was also a Director of the medical centre. The applicant obtained employment as a receptionist with the doctor via services provided by the CES. There was evidence indicating that the CES 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.<sup>537</sup>

Moore J cited with approval the decision of Madgwick J in *Cooper v Human Rights and Equal Opportunity Commission*<sup>538</sup> 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.<sup>539</sup> Moore J went on to state:

In my opinion, a person can, for the purposes of s 105, 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.<sup>540</sup>

Moore J held that the CES had permitted the discrimination to take place as the number of complaints of sexual harassment from that workplace 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.<sup>541</sup> 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.<sup>542</sup>

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534 (1995) EOC 92-672.

535 (1995) EOC 92-672, 78,133. Cited, in the context of the DDA, in *Cooper v Human Rights and Equal Opportunity Commission* (1999) 93 FCR 481, 494-495 [43].

536 (2001) 111 FCR 240.

537 Note in this regard that s 105 relates only to Divs 1 and 2 of Pt II of the SDA, discrimination in employment and other areas. It does not extend to Div 3 of Pt II – the sexual harassment provisions.

538 (1999) 93 FCR 481. See 5.4.2 on the DDA for further discussion.

539 (2001) 111 FCR 240, 276-277 [160].

540 (2001) 111 FCR 240, 292-293 [163].

541 (2001) 111 FCR 240, 294-295 [169].

542 (2001) 111 FCR 240, 295 [170].

# 5 The Disability Discrimination Act

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## Contents

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<b>5.1</b>	<b>Introduction to the DDA .....</b>	<b>171</b>
5.1.1	2009 Amendments to the DDA.....	171
5.1.2	Scope of the DDA.....	171
5.1.3	Limited application provisions and constitutionality .....	173
	(a) The Disabilities Convention and Matters of International Concern.....	173
	(b) Discrimination in the course of trade and commerce .....	174
5.1.4	Retrospectivity of the DDA .....	175
5.1.5	Jurisdiction over decisions made overseas .....	175
<b>5.2</b>	<b>Disability Discrimination Defined .....</b>	<b>176</b>
5.2.1	'Disability' defined .....	176
	(a) Identifying the disability with precision .....	176
	(b) Distinction between a disability and its manifestations .....	177
5.2.2	Direct discrimination under the DDA .....	177
	(a) Issues of causation, intention and knowledge.....	178
	(i) Causation and intention.....	178
	(ii) Knowledge.....	181
	(b) The 'comparator' under section 5 of the DDA .....	183
	(i) Early approaches .....	183
	(ii) The Purvis decision.....	184
	(iii) Applying Purvis .....	186
	(iv) The applicant as his or her own comparator? .....	194
	(v) The appropriate comparator – persons with carers, assistants, assistance animals and disability aids.....	195
	(c) 'Adjustments' under section 5(3) of the DDA.....	195
5.2.3	Indirect discrimination under the DDA.....	197
	(a) 2009 changes to indirect discrimination .....	197
	(b) The relationship between 'direct' and 'indirect' discrimination.....	198
	(c) Defining the 'requirement or condition' .....	200
	(i) Distinguishing the requirement from the inherent features of a service .....	202
	(ii) Imposition of the requirement or condition.....	203
	(iii) Requirement 'imposed' by employers.....	205
	(d) Inability to comply with a requirement or condition .....	206
	(i) Serious disadvantage .....	207
	(ii) Practicality and dignity .....	209
	(e) The effect of disadvantaging persons with the disability .....	210
	(i) Defining the group of people with the disability of the aggrieved person ....	210
	(ii) Evidence of disadvantage.....	210
	(f) Reasonableness.....	211
	(i) Education cases .....	213
	(ii) Employment cases .....	215
	(iii) Access to premises .....	217
	(iv) Goods and services.....	218

5.2.4	Reasonable adjustments .....	219
(a)	'Reasonable adjustments' .....	219
(b)	Direct discrimination under section 5(2).....	219
(c)	Indirect discrimination under section 6(2) .....	222
5.2.5	Associates, carers, disability aids and assistance animals .....	223
(a)	Associates .....	223
(b)	Disability aids, carers, assistants and assistance animals .....	224
(c)	Special provisions about assistance animals .....	225
(i)	What is an 'assistance animal'? .....	225
(ii)	Guide and hearing dogs .....	225
(iii)	Other types of assistance animals.....	226
(iv)	Identifying the comparator in cases involving assistance animals.....	226
(v)	Assistance animal exemptions .....	227
5.2.6	Disability standards .....	228
(a)	Transport Standards.....	228
(b)	Education Standards.....	231
(c)	Premises standards.....	232
5.2.7	Harassment .....	233

### **5.3 Areas of Discrimination..... 235**

5.3.1	Employment (section 15).....	235
(a)	Meaning of 'employment' .....	236
(b)	'Arrangements made for the purposes of determining who should be offered employment' .....	237
(c)	'Benefits associated with employment' and 'any other detriment' .....	238
(d)	Inherent requirements .....	239
(i)	Meaning of 'inherent requirements' .....	240
(ii)	Extent to which an employer must assist an aggrieved person to be able to carry out inherent requirements.....	243
(iii)	'Unable to carry out' .....	244
(iv)	Imputed disabilities.....	246
5.3.2	Education.....	248
(a)	'Educational authority' .....	249
(b)	Education as a service? .....	249
(c)	Availability of defence of unjustifiable hardship .....	249
5.3.3	Access to premises .....	250
5.3.4	Provision of goods, services and facilities .....	251
(a)	Defining a 'service' .....	252
(i)	Council planning decisions.....	252
(ii)	Prisons as a service .....	252
(iii)	The detection and prevention of crime as a service .....	254
(iv)	Other disputed services.....	255
(b)	Identifying the service .....	256
(c)	'Refusal' of a service.....	257
(d)	Delay in providing a service or making a facility available .....	258
(e)	Ownership of facilities not necessary for liability .....	259

---

<b>5.4</b>	<b>Ancillary Liability .....</b>	<b>259</b>
5.4.1	Vicarious liability .....	259
5.4.2	Permitting an unlawful act .....	260
<b>5.5</b>	<b>Unjustifiable Hardship and Other Exemptions.....</b>	<b>262</b>
5.5.1	Unjustifiable hardship .....	262
(a)	'More than just hardship' .....	263
(b)	'Any person concerned' .....	264
(c)	Other factors .....	265
5.5.2	Other exemptions to the DDA .....	267
(a)	Annuities, insurance and superannuation .....	267
(b)	Defence force .....	269
(c)	Compliance with a prescribed law .....	270
(d)	Special measures .....	271
<b>5.6</b>	<b>Victimisation.....</b>	<b>273</b>
(a)	Test for causation .....	274
(b)	Threatens to subject to any detriment .....	275

# The Disability Discrimination Act

## 5.1 Introduction to the DDA

### 5.1.1 2009 Amendments to the DDA

Readers should note that the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) made a number of significant changes to the *Disability Discrimination Act 1992* (Cth) ('DDA'). These changes commenced operation from 5 August 2009.

Where an act occurred prior to 5 August 2009, the old provisions of the DDA apply. Care therefore needs to be taken in applying case law dealing with acts, omissions or practices alleged to have occurred before that date. For an archived version of *Federal Discrimination Law* that considers the law prior to 5 August 2009, see: [www.humanrights.gov.au/legal/FDL/archive.html](http://www.humanrights.gov.au/legal/FDL/archive.html).

### 5.1.2 Scope of the DDA

The DDA covers discrimination on the ground of disability, including discrimination because of having a carer, assistant, assistance animal or disability aid.<sup>1</sup> The DDA also prohibits discrimination against a person because their associate has a disability.<sup>2</sup>

'Disability' is broadly defined and includes past, present and future disabilities, including because of a genetic predisposition to that disability, as well as imputed disabilities.<sup>3</sup> 'Disability' also expressly includes behaviour that is a manifestation of the disability.<sup>4</sup>

The definition of discrimination includes both direct<sup>5</sup> and indirect<sup>6</sup> disability discrimination. Following the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), a failure to make reasonable adjustments is also an explicit feature of the definitions of direct and indirect discrimination.<sup>7</sup>

The DDA makes it unlawful to discriminate on the ground of disability in many areas of public life. Those areas are set out in Part 2 Divisions 1 and 2 of the DDA and include:

- employment;<sup>8</sup>
- education;<sup>9</sup>
- access to premises;<sup>10</sup>
- the provision of goods, services and facilities;<sup>11</sup>
- the provision of accommodation;<sup>12</sup>
- the sale of land;<sup>13</sup>

1 See DDA, s 8, which extends the concept of discrimination by treating having a carer, assistant, assistance animal or disability aid in the same way as having a disability. The definition of 'discriminate' includes a note that states that s 8 extends the concept of discrimination.

2 See DDA, s 7, which extends the concept of discrimination to apply to a person who has an associate with a disability in the same way as it applies to a person with the disability. The definition of 'discriminate' includes a note that states that s 7 extends the concept of discrimination.

3 DDA, s 4.

4 DDA, s 4.

5 DDA, s 5.

6 DDA, s 6.

7 See DDA, s 5(2) direct discrimination and s 6(2) indirect discrimination.

8 DDA, s 15.

9 DDA, s 22.

10 DDA, s 23.

11 DDA, s 24.

12 DDA, s 25.

13 DDA, s 26.

- clubs and incorporated associations;<sup>14</sup>
- sport;<sup>15</sup> and
- the administration of Commonwealth laws and programs.<sup>16</sup>

It is unlawful for a person to request information in connection with an act covered by the DDA if:

- people who do not have the disability would not be required to provide the information in the same circumstances; or
- the information relates to disability.<sup>17</sup>

However, it is not unlawful to request information if the purpose of the request was not discriminatory<sup>18</sup> or if it is evidence in relation to an assistance animal.<sup>19</sup>

Harassment of a person in relation to their disability or the disability of an associate is also covered by the DDA (Part 2 Division 3) and is unlawful in the areas of employment,<sup>20</sup> education<sup>21</sup> and the provision of goods and services.<sup>22</sup>

The DDA contains a number of permanent exemptions (see 5.5 below).<sup>23</sup> The DDA also empowers the Australian Human Rights Commission to grant temporary exemptions from the operation of certain provisions of the Act.<sup>24</sup>

The DDA does not make it a criminal offence per se to do an act that is unlawful by reason of a provision of Part 2.<sup>25</sup> The DDA does, however, create the following specific offences:

- committing an act of victimisation,<sup>26</sup> by subjecting or threatening to subject another person to any detriment on the ground that the other person:
  - has made or proposes to make a complaint under the DDA or *Australian Human Rights Commission Act 1986* (Cth) ('AHRC Act');
  - has brought, or proposes to bring, proceedings under those Acts;
  - has given, or proposes to give, any information or documents to a person exercising a power or function under those Acts;
  - has attended, or proposes to attend, a conference or has appeared or proposes to appear as a witness in proceedings held under those Acts;
  - has reasonably asserted, or proposes to assert, any rights under those Acts; or
  - has made an allegation that a person has done an unlawful act under Part 2 of the DDA;<sup>27</sup>

14 DDA, s 27

15 DDA, s 28.

16 DDA, s 29.

17 DDA, s 30(1),(2).

18 See DDA, s 30(3): the prohibition does not apply where a respondent produces evidence that the information was not requested for a discriminatory purpose and that evidence is not rebutted.

19 DDA, s 30(4).

20 DDA, s 35.

21 DDA, s 37. Note that harassment in education is in the context of harassment by a member of staff of a student or prospective student. See also 5.2.6(b) below in relation to the Education Standards.

22 DDA, s 39.

23 See DDA, Part 2, Division 5.

24 DDA, s 55. The Australian Human Rights Commission has developed criteria and procedures to guide the Commission in exercising its discretion under s 55 of the DDA. The Commission's guidelines and further information about the temporary exemptions granted by the Commission are available at: <http://www.humanrights.gov.au/temporary-exemptions-under-disability-discrimination-act-1992-cth>.

25 DDA, s 41.

26 DDA, s 42(1).

27 DDA, s 42(2). Note that the offence also occurs if a person is subjected to a detriment on the ground that the 'victimiser' believes that the person has done, or proposes to do, any of the things listed. See further 5.6 below.



- inciting, assisting or promoting the doing of an act that is unlawful under a provision of Divisions 1, 2, 2A or 3 of Part 2;<sup>28</sup>
- publishing or displaying an advertisement or notice that indicates an intention by that person to do an act that is unlawful under Divisions 1, 2 or 3 of Part 2;<sup>29</sup> and
- failing to provide the source of actuarial or statistical data on which an act of discrimination was based in response to a request, by notice in writing, from the President or Australian Human Rights Commission.<sup>30</sup>

Note that conduct constituting such offences is also included in the definition of ‘unlawful discrimination’ in section 3 of the AHRC Act (see 1.3 above), allowing a person to make a complaint to the Australian Human Rights Commission in relation to it.<sup>31</sup>

### 5.1.3 Limited application provisions and constitutionality

The DDA is intended to ‘apply throughout Australia and in this regard relies on all available and appropriate heads of Commonwealth constitutional power’.<sup>32</sup>

Section 12 of the DDA sets out the circumstances in which the Act applies. Its effect is, amongst other things, to limit the operation of the DDA’s provisions to areas over which the Commonwealth has legislative power under the *Constitution*. While these areas are, particularly by virtue of the external affairs power, potentially very broad, it is nevertheless important for applicants to consider the requirements of section 12 in bringing an application under the DDA.

#### (a) The Disabilities Convention and Matters of International Concern

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, 2A and 3 of Part 2 other than sections 20, 29 and 30.

(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 [ILO 111]; or
- (b) give effect to the [ICCPR]; or
- (ba) give effect to the Disabilities Convention; or
- (c) give effect to the [ICESCR]; or
- (d) relate to matters external to Australia; or
- (e) relate to matters of international concern.

On 17 July 2008 Australia ratified the *Convention on the Rights of Persons with Disabilities*<sup>33</sup> (‘Disabilities Convention’) and, since 5 August 2009, the DDA makes explicit reference to the Disabilities Convention in section 12(8)(ba).

28 DDA, s 43.

29 DDA, s 44.

30 DDA, s 107.

31 Though see the discussion at 5.6. Note also that the offence of failing to provide actuarial or statistical data (DDA, s 107) is not included in the definition of ‘unlawful discrimination’ in s 3 of the AHRC Act.

32 Second reading speech, Disability Discrimination Bill 1992, House of Representatives Hansard, 26 May 1992, p 2750.

33 Opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008).

A number of cases prior to the ratification of the Disabilities Convention had held that preventing disability discrimination was, in any event, a 'matter of international concern'. In *Souliotopoulos v La Trobe University Liberal Club*,<sup>34</sup> for example, Merkel J found that Divisions 1, 2 and 3 of Part 2 of the DDA, but in particular section 27(2), had effect by reason of section 12(8)(e) because the prohibition of disability discrimination is a matter of 'international concern'.

His Honour held that when considering 'matters of international concern', the relevant date at which to consider what matters are of international concern is the date of the alleged contravention of the DDA, not the date of commencement of the DDA (March 1993). His Honour observed that:

[t]he subject matter with which s 12(8) is concerned is, of its nature, changing. Thus, matters that are not of international concern or the subject of a treaty in March 1993 may well become matters of international concern or the subject of a treaty at a later date. Section 12(8) is ambulatory in the sense that it intends to give the Act the widest possible operation permitted by s 51(xxix).<sup>35</sup>

The approach of Merkel J was followed by Yates J in *Robinson and Another v Commissioner of Police, NSW Police Force*<sup>36</sup> and Raphael FM in *Vance v State Rail Authority*.<sup>37</sup>

## (b) Discrimination in the course of trade and commerce

The operation of the limited application provisions of the DDA was also raised in the Federal Court in *Court v Hamlyn-Harris*<sup>38</sup> ('Court'). In that case, the applicant, who had a vision impairment, alleged that his employer had unlawfully discriminated against him by dismissing him. The employer was a sole-trader carrying on business in two states.

In support of his application alleging discrimination in the course of employment (that is, a breach of section 15, which is a limited operation provision), the applicant relied upon section 12(12) of the DDA. That subsection provides:

- (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 section 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*.<sup>39</sup> 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 ...

<sup>34</sup> (2002) 120 FCR 584.

<sup>35</sup> (2002) 120 FCR 584, 592 [31].

<sup>36</sup> [2012] FCA 770, [130]-[135].

<sup>37</sup> [2004] FMCA 240. See also *O'Connor v Ross (No 1)* [2002] FMCA 210 in which it was held that equal access to accommodation for people with disabilities was a matter of 'international concern' and the earlier decisions of the then Human Rights and Equal Opportunity Commission: *Allen v United Grand Lodge of Queensland* (Unreported, Human Rights and Equal Opportunity Commission, Commissioner Carter QC, 12 April 1999) (extract at (1999) EOC 92-985); *Maguire v Sydney Organising Committee for the Olympic Games* (Unreported, Human Rights and Equal Opportunity Commission, Commissioner Carter QC, 18 November 1999) (extract at (2000) EOC 93-041).

<sup>38</sup> [2000] FCA 1870.

<sup>39</sup> (1990) 169 CLR 594.

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 [*Human Rights and Equal Opportunity Commission Act 1986* (Cth)] 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.<sup>40</sup>

It does not appear that Heerey J was referred to other sub-sections of section 12, such as section 12(8), or asked to find that disability discrimination in employment was a matter of 'international concern.'

## 5.1.4 Retrospectivity of the DDA

In *Parker v Swan Hill Police*,<sup>41</sup> 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.<sup>42</sup>

## 5.1.5 Jurisdiction over decisions made overseas

The issue of whether the DDA applies to decisions made overseas to engage in discrimination in Australia arose for consideration in *Clarke v Oceania Judo Union*.<sup>43</sup> Mr Clarke alleged that the respondent discriminated against him, contrary to section 28 of the DDA dealing with sporting activities, on the basis of his disability (blindness) when he was prohibited from:

- competing in the judo Open World Cup tournament held in Queensland; and
- participating in a training camp which followed the tournament unless accompanied by a carer.

The respondent brought an application for summary dismissal, arguing that the appropriate jurisdiction to hear the matter was that of New Zealand, on the basis that this was where the respondent was incorporated and was where the relevant decision to exclude Mr Clarke from the contest was made.

Raphael FM dismissed the respondent's application. His Honour held where relevant act/s of discrimination occurred within Australia, it is irrelevant where the actual decision to discriminate was made.<sup>44</sup>

However, in *Vijayakumar v Qantas Airways Ltd*,<sup>45</sup> Scarlett FM cited *Brannigan v Commonwealth of Australia*<sup>46</sup> as authority for the proposition that the DDA does not apply to acts of discrimination which occur outside of Australia.<sup>47</sup> This decision was upheld by Edmonds J of the Federal Court on appeal.<sup>48</sup>

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40 [2000] FCA 1870, [14]-[15].

41 [2000] FCA 1688.

42 Presumably the same principle concerning retrospective application would apply in the case of the RDA, SDA and ADA.

43 [2007] FMCA 292.

44 The court adopted the submissions of the Acting Disability Discrimination Commissioner, appearing as amicus curiae, on this point. The submissions are available at <<https://www.humanrights.gov.au/commission-submission-8>>.

45 [2009] FMCA 736.

46 (2000) 110 FCR 566.

47 *Vijayakumar v Qantas Airways Ltd* [2009] FMCA 736, [136].

48 *Vijayakumar v Qantas Airways Ltd* [2009] FCA 1121, [33]-[41].

## 5.2 Disability Discrimination Defined

### 5.2.1 'Disability' defined

Section 4(1) 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 (including because of a genetic predisposition to that disability); or
  - (k) is imputed to a person.

To avoid doubt, a **disability** that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.

#### (a) Identifying the disability with precision

The decision of the Full Court of the Federal Court in *Qantas Airways Ltd v Gama*<sup>49</sup> highlights the need to identify the relevant disability with some precision, as well as identifying how the alleged discrimination is based on that particular disability.

Mr Gama suffered from a number of workplace injuries, as well as depression. At first instance,<sup>50</sup> Raphael FM accepted that a derogatory comment in the workplace that Mr Gama climbed the stairs 'like a monkey' constituted discrimination on the basis of race as well as disability. His Honour also held that certain comments about Mr Gama manipulating the workers' compensation system constituted discrimination on the basis of disability.

On appeal, the Full Court of the Federal Court upheld the findings of race discrimination, but overturned the findings of disability discrimination. Whilst the court noted that it was not in dispute that Mr Gama had suffered a number of workplace injuries over a long period of time, the court accepted the submission by Qantas that Raphael FM's reasons

did not identify the relevant disability nor the particular way in which the remarks constituted less favourable treatment because of the disability. Rather the remarks tend to reflect a belief that Mr Gama had made a claim for workers compensation to which he was not entitled.

In our opinion the learned magistrate's findings of discrimination on the grounds of disability cannot be sustained.<sup>51</sup>

49 (2008) 167 FCR 537. The then Human Rights and Equal Opportunity Commission was granted leave to appear as intervener in the appeal and its submissions are available at <<https://www.humanrights.gov.au/quantas-v-gama>> and <<https://www.humanrights.gov.au/commission-submissions-gama>>.

50 *Gama v Qantas Airways Ltd (No 2)* [2006] FMCA 1767.

51 (2008) 167 FCR 537, 567 [91]–[92] (French and Jacobson JJ, with whom Branson J generally agreed, [122]).

Nevertheless, as discussed at 7.2.1(c), despite overturning the finding of a breach of the DDA, the Full Court did not disturb the award of damages in Mr Gama's favour.<sup>52</sup>

## (b) Distinction between a disability and its manifestations

In 2009 the definition of disability in section 4 of the DDA was amended to clarify that a disability includes behaviour that is a symptom or manifestation of the disability.<sup>53</sup>

This amendment codifies the decision of the High Court in *Purvis v New South Wales (Department of Education and Training)*<sup>54</sup> ('*Purvis*') on this point. In *Purvis*, all members of the court (apart from Callinan J who did not express a view)<sup>55</sup> found that the definition of disability in section 4 of the DDA as it then was, included the functional limitations that may result from an underlying condition. The case concerned a child who suffered from behavioural problems and other disabilities resulting from a severe brain injury sustained when he was six or seven months old. The court found that his 'acting out' behaviour, including verbal abuse and incidents involving kicking and punching was a manifestation of his disability and therefore an aspect of his disability.

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 5.2.2(a) below.

However, whether or not particular negative behaviour will be attributed to an underlying disability is a question of fact which may vary from case to case. In *Rana v Flinders University of South Australia*,<sup>56</sup> Lindsay FM noted that the decision in *Purvis* 'establishes beyond doubt ... that no distinction is to be drawn between the disability and its manifestations for the purposes of establishing whether discrimination has occurred'.<sup>57</sup> However, in deciding the matter before him, Lindsay FM found that there was insufficient evidence that the negative behaviour that had caused the respondent to exclude the applicant from certain university courses was, in fact, a manifestation of his mental illness, rather than having some other cause.<sup>58</sup>

## 5.2.2 Direct discrimination under the DDA

Section 5 of the DDA defines 'direct' discrimination. It provides:

### 5 Direct disability discrimination

- (1) For the purposes of this Act, a person (the **discriminator**) **discriminates** against another person (the **aggrieved person**) on the ground of a disability of the aggrieved person if, because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different.
- (2) For the purposes of this Act, a person (the **discriminator**) also **discriminates** against another person (the **aggrieved person**) on the ground of a disability of the aggrieved person if:
  - (a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person;
  - and

52 (2008) 167 FCR 537, 568 [93]-[99] (French and Jacobson JJ), [121] (Branson J).

53 *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), Sch 2, item 6.

54 (2003) 217 CLR 92.

55 (2003) 217 CLR 92, 175 [272].

56 [2005] FMCA 1473.

57 [2005] FMCA 1473, [52].

58 [2005] FMCA 1473, [61]. See also [46].

- (b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.
- (3) For the purposes of this section, circumstances are not **materially different** because of the fact that, because of the disability, the aggrieved person requires adjustments.

Section 5(2) was inserted into the definition of direct discrimination by the 2009 changes to the DDA.<sup>59</sup> That provision is intended to introduce an explicit duty to make reasonable adjustments<sup>60</sup> and is considered further below: see 5.2.4.

The changes to the remainder of section 5 appear unlikely to impact upon its operation. The significant issues that have arisen under sections 5(1) and (3) (previously (2)) are:

- (a) issues of causation, intention and knowledge;
- (b) the 'comparator' under section 5 of the DDA; and
- (c) the concept of 'adjustments' under section 5(3) (previously 'accommodation' under section 5(2)) of the DDA.

## (a) Issues of causation, intention and knowledge

### (i) Causation and intention

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'.<sup>61</sup> 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. 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*<sup>62</sup> ('*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.<sup>63</sup>

In *Purvis v New South Wales (Department of Education and Training)*<sup>64</sup> ('*Purvis*'), 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.<sup>65</sup>

<sup>59</sup> *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), Sch 2, item 17.

<sup>60</sup> Explanatory Memorandum, *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008*, 8 [39].

<sup>61</sup> See DDA, ss 15-29. Note that it is also unlawful to discriminate on the ground of a disability of any of a person's associates: see s 7.

<sup>62</sup> (1991) 173 CLR 349.

<sup>63</sup> (1991) 173 CLR 349, 359, (McHugh J agreeing), 382. Cited with approval for the purposes of the DDA in *Travers v New South Wales* [2001] FMCA 18, [65].

<sup>64</sup> (2003) 217 CLR 92.

<sup>65</sup> (2003) 217 CLR 92, 142-143 [160].

Motive may nevertheless be relevant to determining whether or not an act is done 'because of' disability.<sup>66</sup> In *Purvis*, Gummow, Hayne and Heydon JJ stated:

we 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 – *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'.<sup>67</sup>

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 *Purvis*, McHugh and Kirby JJ stated 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.<sup>68</sup> 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 had 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 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 the 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.<sup>69</sup>

In *Forbes v Australian Federal Police (Commonwealth)*<sup>70</sup> ('*Forbes*'), the Full Court of the Federal Court had to consider whether the Australian Federal Police ('AFP') discriminated against the applicant when it withheld certain information about her depressive illness from a review panel convened to consider her re-employment.

At first instance,<sup>71</sup> Driver FM had held that a relevant issue for the review panel was the apparent breakdown in the relationship between the applicant and the AFP. His Honour held that the information relating to the applicant's illness would have helped to explain that breakdown. He considered that the AFP was therefore under an obligation to put before the review panel information concerning the applicant's illness, as its failure to do so left the review panel 'under the impression that [the appellant] was simply a disgruntled employee'.<sup>72</sup>

66 See, for example, *Forbes v Australian Federal Police (Commonwealth)* [2004] FCAFC 95, [69]; *Ware v OAMPS Insurance Brokers Ltd* [2005] FMCA 664, [112].

67 (2003) 217 CLR 92, 163 [236]. See also 101-102 [13]-[14] (Gleeson CJ).

68 (2003) 217 CLR 92, 143-144 [166].

69 (2003) 217 CLR 92, 101-102 [13], 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 5.2.2(b) below. See also *Tyler v Kesser Torah College* [2006] FMCA 1.

70 [2004] FCAFC 95.

71 *Forbes v Commonwealth* [2003] FMCA 140.

72 [2003] FMCA 140, [28].



On appeal, however, the Full Court of the Federal Court found that his Honour had erred in finding discrimination, as he had not made a finding that the decision of the AFP was ‘because of’ the appellant’s disability. The Full Court stated:

It is, however, one thing for the AFP to have misunderstood its responsibilities to the Panel or to the appellant (if that is what the Magistrate intended to convey). It is quite another to conclude that the AFP’s actions were ‘because of’ the appellant’s depressive illness. The Magistrate made no such finding.

In [*Purvis*], there was disagreement as to whether the motives of the alleged discriminator should be taken into account in determining whether that person has discriminated against another because of the latter’s disability. Gummow, Hayne and Heydon JJ thought that motive was at least relevant. Gleeson CJ thought that motive was relevant and, perhaps, could be determinative. McHugh and Kirby JJ thought motive was not relevant. All agreed, however, that it is necessary to ask **why** the alleged discriminator took the action against the alleged victim.

In the present case, therefore, it was necessary for the Magistrate to ask why the AFP had withheld information about the appellant’s medical condition from the Panel and to determine whether (having regard to s 10) the reason was the appellant’s depressive illness. His Honour did not undertake that task and therefore failed to address a question which the legislation required him to answer if a finding of unlawful discrimination was to be made. His decision was therefore affected by an error of law.<sup>73</sup>

The court further found that the AFP’s decision to withhold the information about the appellant’s medical condition from the review panel was not because of the appellant’s disability, but rather because the AFP believed that she did not have a disability.<sup>74</sup>

The reasoning in *Forbes* was subsequently applied in *Hollingdale v North Coast Area Health Service*,<sup>75</sup> where the applicant was dismissed from her employment because of her refusal to attend work. Driver FM found that the respondent had dismissed the applicant not because of her disability (keratoconus), but because it believed that she was a ‘malingering’:

Ms Hollingdale refused to attend work ... because she claimed she was unfit for work because of her keratoconus. She had a medical certificate certifying that she was unfit for work. The Area Health Service refused to accept it. I find that the Area Health Service believed that Ms Hollingdale was malingering. No other conclusion is reasonably open on the evidence. It was because the Area Health Service believed that Ms Hollingdale was malingering, and therefore had no medical reason for non attendance at work, that she was dismissed. It necessarily follows that her keratoconus was not the reason for her dismissal. Rather, the reason was the belief of the Area Health Service that Ms Hollingdale had no medical condition which prevented her from working. An employer does not breach the DDA by dismissing a malingeringer or someone who is believed to be one [footnote: *Forbes v Commonwealth* [2004] FCAFC 95].<sup>76</sup>

A number of other judgments have referred to or applied a ‘real reason’ or ‘true basis’ test.<sup>77</sup>

In cases where the alleged treatment is based on certain facts or circumstances that are inextricably linked to the complainant’s disability, a court may be more inclined to accept that such treatment is ‘because of’ that disability. For example, in *Wiggins v Department of Defence – Navy*<sup>78</sup> (*‘Wiggins’*) the Navy argued that its refusal to transfer the applicant to other duties was not because of

73 [2004] FCAFC 95, [68]-[70] (emphasis in original). See also [76].

74 [2004] FCAFC 95, [71]-[73].

75 [2006] FMCA 5.

76 [2006] FMCA 5, [159].

77 See eg *Munday v Commonwealth* (No. 2) (2014) 226 FCR 199, 213 [59] (Katzman J); *Kiefel v State of Victoria* [2013] FCA 1398 [81] (Tracey J); *Abela v State of Victoria* [2013] FCA 832, [202] (Tracey J).

78 [2006] FMCA 800.

her disability, but because of her absences from work. McInnis FM rejected this submission, saying that:

the absence was clearly due to the depression and the submissions by the Respondent seeking to distinguish the absence from the disability should not be permitted. The leave taken by the Applicant I am satisfied was due almost entirely to her depressive illness for which she required treatment. It is inextricably related to her disability and in turn it was the disability which effectively caused the concern ... and led to the transfer.<sup>79</sup>

Similarly, in *Ware v OAMPS Insurance Brokers Ltd*,<sup>80</sup> Driver FM stated:

The question is why was Mr Ware demoted? Was it because of or by reason of his disabilities?  
...

Mr Ware's absences from the workplace provided Mr Cocker [of the respondent] with what he regarded as sufficient cause for demotion but the real reason for the demotion was that Mr Cocker had exhausted his capacity to accommodate Mr Ware's condition. To my mind, this establishes a sufficient causal link between the less favourable treatment and Mr Ware's disabilities.<sup>81</sup>

In relation to the applicant's dismissal from employment, his Honour concluded:

To the extent that the termination decision was based upon pre-existing concerns about Mr Ware's performance and behaviour, it was discriminatory. Mr Ware's performance and behaviour were influenced by his disabilities. ... Mr Crocker had accepted (grudgingly) that no summary dismissal action would be taken. Mr Ware would be given the chance to prove himself by reference to specified criteria. He was not given a reasonable opportunity to prove himself and he was not assessed against those criteria. The hypothetical comparator would have been judged against those criteria. Mr Ware was not judged against those criteria essentially because Mr Crocker changed his mind. In dismissing Mr Ware, Mr Crocker recanted the consideration that he gave [the applicant] by reference to his disabilities. The dismissal was therefore because of those disabilities.<sup>82</sup>

Whilst the above decisions all concentrated on discerning the causal basis of the alleged discriminatory treatment, it is important to also recall 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:

**10 Act done because of disability and for other reason**

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.

Accordingly, in circumstances where the alleged discriminator's conduct may be attributable to multiple reasons, only one reason needs to be based on the person's disability to constitute discrimination.

**(ii) 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 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.

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79 [2006] FMCA 800, [170].

80 [2005] FMCA 664.

81 [2005] FMCA 664, [112]-[113].

82 [2005] FMCA 664, [120].

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...<sup>83</sup>

A similar approach was taken by Wilcox J in *Tate v Rafin*.<sup>84</sup> In that case, the applicant had his membership of the respondent club revoked following a 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.<sup>85</sup>

His Honour's reasoning is consistent with the decision of the Full Court in *Forbes* (discussed above), where the court accepted that the respondent had withheld certain information about the applicant's medical condition on the ground that it considered that she did not have a disability and that this did not amount to discrimination 'because of' disability.<sup>86</sup>

However, it is likely that the reasonableness of a respondent's purported disbelief of an applicant's disability will be an important factor in applying the reasoning in *Forbes*. In *Forbes* there were a number of significant factors to support the respondent's disbelief that the applicant had a disability. For example:

- Ms Forbes had lodged a claim for compensation with Comcare alleging that she had suffered a depressive illness as a result of an altercation in the workplace. Comcare rejected that claim on the basis that the medical evidence did not show that she had suffered a compensable injury;
- Ms Forbes sought review of Comcare's refusal. Following reconsideration of Ms Forbes' claim, Comcare affirmed its refusal of the claim;
- Ms Forbes had also lodged a formal grievance in relation to the workplace incident that had allegedly led to her suffering the depressive illness. An internal investigation into her complaint concluded that her allegations were unsubstantiated; and
- a further internal investigation into Ms Forbes' complaints (carried out at Ms Forbes' behest) also concluded that her allegations were unsubstantiated.

In the absence of such factors to support a respondent's disbelief of an aggrieved person's disability, it may be difficult for a respondent to convince the court that the purported disbelief of the disability was genuinely the true basis of the less favourable treatment.

<sup>83</sup> *New South Wales (Department of Education & Training) v Human Rights and Equal Opportunity Commission* [2001] FCA 1199, [35].

<sup>84</sup> [2000] FCA 1582.

<sup>85</sup> [2000] FCA 1582, [67]. 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', see further 5.2.2(b). See also earlier decisions of the then Human Rights and Equal Opportunity Commission in *H v S* [1997] HREOCA 41; *White v Crown Ltd* [1997] HREOCA 43; *R v Nunawading Tennis Club* [1997] HREOCA 60. Cf *X v McHugh*, (*Auditor-General for the State of Tasmania*) (1994) 56 IR 248.

<sup>86</sup> [2004] FCAFC 95, [71]-[73], [76].

In *Zoltaszek v Downer EDI Engineering Pty Ltd (No. 2)*<sup>87</sup> Barnes FM found that the respondent had been unaware that the applicant suffered from any disability until December 2006. Accordingly his Honour held that it had not been established that the respondent had discriminated against the applicant 'on the ground of' his disability as required under section 17 of the DDA prior to that point in time.<sup>88</sup>

Whilst the above cases illustrate that lack of knowledge of the aggrieved person's disability may preclude a finding of discrimination, it is important to also note that imputed or constructive knowledge of the person's disability may suffice. For example, in *Wiggins* the Navy argued that the officer who demoted the applicant did not know the nature and extent of the applicant's disability, only that the applicant had a medical condition confining her to on-shore duties. On this basis, the Navy submitted that it had no relevant knowledge of the applicant's disability.

McInnis FM rejected the Navy's submission. His Honour 'deemed' the officer to have known the nature and extent of the applicant's disability as he **could have** accessed her medical records if he wanted to. This was sufficient to 'establish knowledge in the mind of' the Navy.<sup>89</sup> His Honour stated:

I reject the submission of the Respondent that the Navy does not replace Mr Jager as the actual decision-maker in the context or that the maintenance of information in a file does not equate to operational or practical use in the hands of the discriminator. In my view that is an artificial distinction which should not be permitted in discrimination under human rights legislation. To do so would effectively provide immunity to employers who could simply regard all confidential information not disclosed to supervisors as then providing a basis upon which it could be denied that employees as discriminators would not be liable and hence liability would be avoided by the employer.<sup>90</sup>

## **(b) The 'comparator' under section 5 of the DDA**

Section 5(1) of the DDA requires a comparison to be made between the way in which the discriminator treats (or proposes to treat) a person with a disability and the way in which a person 'without the disability' would be treated in circumstances that are not materially different. That other person, whether actual or hypothetical, is often referred to as the 'comparator'.

Prior to the 2009 changes to the DDA,<sup>91</sup> section 5(1) required a comparison between the aggrieved person and a person without the disability in 'circumstances that **are the same or** not materially different' (emphasis added). The relevant circumstances are now simply 'not materially different' (with 'the same' being removed). It seems unlikely that this change will materially alter the operation of the section.<sup>92</sup>

The issue of how an appropriate comparator is chosen in a particular case has been complicated and vexed 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.

### **(i) Early approaches**

Sir Ronald Wilson suggested in *Dopking v Department of Defence*<sup>93</sup> that:

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

87 [2010] FMCA 938.

88 Ibid at [89]-[95]. This finding was upheld on appeal: *Zoltaszek v Downer EDI Engineering Pty Ltd* [2011] FCA 744.

89 [2006] FMCA 800, [168].

90 [2006] FMCA 800, [168].

91 *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), Sch 2, item 17.

92 This view is supported by comments made by Tracey J in *Abela v State of Victoria* [2013] FCA 832, [204].

93 (1992) EOC 92-421. 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.<sup>94</sup>

This approach was approved in *IW v City of Perth*<sup>95</sup> ('IW') 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. As a consequence, 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. Cases dealt with under the DDA prior to *Purvis* also applied this approach.<sup>96</sup>

A similar approach was adopted by Commissioner Innes in *Purvis v The State of NSW (Department of Education)*.<sup>97</sup> 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 section 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 that disability.

## (ii) The *Purvis* decision

The approach of Commissioner Innes was rejected on review by both Emmett J<sup>98</sup> and the Full Court of the Federal Court.<sup>99</sup> The Full Court found that the proper comparison for the purpose of section 5 of the DDA was

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 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.<sup>100</sup>

The Full Court also noted that the decisions of Toohey and Kirby JJ in *IW* were given in the context of the *Equal Opportunity Act 1984* (WA) which has a different structure to the DDA.

94 (1992) EOC 92-421, 79,005.

95 (1997) 191 CLR 1, 33 (Toohey J), 67 (Kirby J). See also *Human Rights and Equal Opportunity Commission v Mt Isa Mines Ltd* (1993) 46 FCR 301, 327 (Lockhart J); *Commonwealth 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.

96 See, for example, *Commonwealth v Humphries* (1998) 86 FCR 324, 333; *Garity v Commonwealth Bank of Australia* (1999) EOC 92-966.

97 (2000) EOC 93-117.

98 *New South Wales (Department of Education & Training) v Human Rights and Equal Opportunity Commission* [2001] FCA 1199.

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

100 (2002) 117 FCR 237, 248 [29], 249 [32] (emphasis in original).

The majority of the High Court in *Purvis* took the same approach as the Full Court of the Federal Court. While accepting that the definition of disability includes its behavioural manifestations (see 5.2.1 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.<sup>101</sup>

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.<sup>102</sup>

By contrast, McHugh and Kirby JJ (in dissent) applied the earlier approach noted above, stating:

Discrimination jurisprudence establishes that the circumstances of the person alleged to have suffered discriminatory treatment *and which are related to the prohibited ground* are to be excluded from the circumstances of the comparator.<sup>103</sup> (emphasis in original)

Their Honours disagreed with the majority that the application of the comparator test in the circumstances of the case called for a comparison with a person without the student's disability but who had engaged in the same violent behaviour, on the basis that:

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101 (2003) 217 CLR 92, 100-101 [11].

102 (2003) 217 CLR 92, 160-161 [223]-[225] (Callinan J agreed with their Honours' reasoning on this issue, see 175 [273]).

103 (2003) 217 CLR 92, 131 [119].

[the student's] circumstances [are] materially different from those of a person who is able to control his or her behaviour, but who is unwilling to do so for whatever reason. In [the student's] circumstances, the behaviour is a manifestation of his disability – for the 'normal' person it is an act of freewill.<sup>104</sup>

### (iii) Applying *Purvis*

In applying *Purvis*, courts have had close regard to the particular facts of the case in considering how the comparator should be constructed, and how that comparator would have been treated by the respondent in the same or similar circumstances to the applicant. The following cases illustrate the challenges raised by *Purvis* in applying the comparator element of direct discrimination.

In *Power v Aboriginal Hostels Ltd*,<sup>105</sup> 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, concluding:

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.<sup>106</sup>

The same approach had been taken by the FMC in the earlier case of *Randell v Consolidated Bearing Company (SA) Pty Ltd*.<sup>107</sup> 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.

Raphael FM found that the appropriate comparators were other trainees employed by the respondent who had difficulties with their performance.<sup>108</sup> 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*,<sup>109</sup> the applicant had been 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 eventually expelling him.

In determining whether the allegation of direct discrimination had been made out, Raphael FM applied the reasoning of Emmett J in *Purvis*.<sup>110</sup> 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.<sup>111</sup> His Honour ultimately found that there was no direct disability discrimination. In respect of most of the allegations he could not conclude that the treatment of the applicant had been 'less favourable' than that of this hypothetical student.<sup>112</sup>

<sup>104</sup> (2003) 217 CLR 92, 134 [128].

<sup>105</sup> (2003) 133 FCR 254.

<sup>106</sup> (2003) 133 FCR 254, 259 [8].

<sup>107</sup> [2002] FMCA 44.

<sup>108</sup> [2002] FMCA 44, [48].

<sup>109</sup> [2002] FMCA 60.

<sup>110</sup> *New South Wales (Department of Education & Training) v Human Rights and Equal Opportunity Commission* [2001] FCA 1199.

<sup>111</sup> [2002] FMCA 60, [197].

<sup>112</sup> [2002] FMCA 60, [199]-[242]. His Honour stated that in some circumstances he was unable to conclude the treatment was 'because of the aggrieved person's disability' (see [242]).



In *Forbes*, the appellant contended that the decision of the review panel not to reemploy her was based on her absence from work and that this absence was in turn a manifestation of her depressive illness. It was therefore argued that the decision not to reemploy her discriminated against her on the ground of her disability. The Full Court rejected this argument:

The Magistrate found that the appellant's absence from work for a period of over two years was 'clearly important in establishing [the] breakdown' of the relationship between herself and the AFP. If the [DDA] makes it unlawful to refuse re-employment to someone because of their lengthy absence from work, where that absence is due to a disability, the appellant's submission would have force. The difficulty is that the appellant must establish that the AFP treated her less favourably, **in circumstances that are the same or are not materially different**, than it treated or would have treated a non-disabled person. The approach of the majority in [*Purvis*] makes it clear that the circumstances attending the treatment of the disabled person must be identified. The question is then what the alleged discriminator would have done in those circumstances if the person concerned was not disabled.

Here, the appellant was not reappointed because the history of her dealings with the AFP, including her absence from work for nearly three years, showed that the employment relationship had irretrievably broken down. There is nothing to indicate that in the same circumstances, the AFP would have treated a non-disabled employee more favourably. On the contrary, the fact that the Panel did not know of the appellant's medical condition indicates very strongly that it would have refused to reemploy a non-disabled employee who had been absent from work for a long period and whose relationship with the AFP had irretrievably broken down.<sup>113</sup>

The Full Court also made the following comments, with reference to the decision of the High Court in *Purvis*, in relation to the appropriate comparator (see 5.2.2(a) above):

The circumstances attending the AFP's treatment of the appellant would seem to have included the AFP's genuine belief that the appellant, despite her claims to have suffered from a serious depressive illness, did not in fact have such an illness. That belief was in fact mistaken, but it explains the AFP's decision to regard the information concerning the appellant's medical condition as irrelevant to the question of her re-employment. This suggests that the appropriate comparator was an able-bodied person who claimed to be disabled, but whom the AFP genuinely believed (correctly, as it happens) had no relevant disability. If this analysis is correct, it seems that the AFP treated the appellant no less favourably than, in circumstances that were the same or were not materially different, it would have treated a non-disabled officer.<sup>114</sup>

The decision in *Purvis* was also applied in *Fetherston v Peninsula Health*<sup>115</sup> (*'Fetherston'*) in which a doctor's employment was terminated following the deterioration of his eyesight and related circumstances. Heerey J identified the following 'objective features' relevant for the comparison required under section 5, noting that 'one should not "strip out" [the] circumstances which are connected with [the applicant's] disability: *Purvis* at [222], [224]':

- (a) Dr Fetherston was a senior practitioner in the ICU, a department where urgent medical and surgical skills in life-threatening circumstances are often required;
- (b) Dr Fetherston had difficulty in reading unaided charts, x-rays and handwritten materials;
- (c) There were reports of Dr Fetherston performing tracheostomies in an unorthodox manner, apparently because of his visual disability;
- (d) Medical and nursing staff expressed concern about Dr Fetherston's performance of his duties in ways apparently related to his visual problems;

<sup>113</sup> [2004] FCAFC 95, [80]-[81] (emphasis in original).

<sup>114</sup> [2004] FCAFC 95, [76].

<sup>115</sup> [2004] FCA 485.

- (e) In the light of all the foregoing Dr Fetherston attended an independent eye specialist at the request of his employer Peninsula Health but refused to allow the specialist to report to it.<sup>116</sup>

His Honour went on to consider how the respondents would have treated a person without the applicant's disability in those circumstances and held:

The answer in my opinion is clear. Peninsula Health and any responsible health authority would have in these circumstances treated a hypothetical person without Dr Fetherston's disability in the same way. An independent expert assessment would have been sought. A refusal to allow that expert to report must have resulted in termination of employment.<sup>117</sup>

In *Trindall v NSW Commissioner of Police*<sup>118</sup> ('*Trindall*') the applicant complained of disability and race discrimination in his employment as a NSW police officer. The applicant had an inherited condition known as 'sickle cell trait'. He asserted that because of this condition he was given restricted duties and subjected to unnecessary and unreasonable restrictions in his employment. Driver FM held that the appropriate hypothetical comparator was:

- (a) a New South Wales police officer without the sickle cell trait;
- (b) who is generally healthy but who has concerns about his health; and
- (c) who has a low risk of injury of a similar nature to that of a person with the sickle cell trait and who should take reasonable precautions to avoid that risk of injury.<sup>119</sup>

His Honour found that there was no discrimination in the initial informal conditions imposed on the applicant pending further medical assessment.<sup>120</sup> However, the formal conditions subsequently imposed were not compelled by the applicant's medical certificate and were discriminatory, in breach of sections 5 and 15(2)(a) of the DDA.<sup>121</sup>

In *Ware v OAMPS Insurance Brokers Ltd*,<sup>122</sup> the applicant, who suffered from Attention Deficit Disorder and depression, claimed that the respondent had directly discriminated against him in his employment on the basis of his disability contrary to sections 15(2)(c) and 15(2)(d) of the DDA. The respondent claimed that its treatment of the applicant had been because of his poor work performance, not his disability.

Applying *Purvis*, Driver FM held that the proper comparator in this case was:

- (a) an employee of OAMPS having a position and responsibilities equivalent of those of Mr Ware;
- (b) who did not have Attention Deficit Disorder or depression; and
- (c) who exhibited the same behaviours as Mr Ware, namely poor interpersonal relations, periodic alcohol abuse and periodic absences from the workplace, some serious neglect of duties and declining work performance, but with a formerly high work ethic and a formerly good work history.<sup>123</sup>

Driver FM held that the respondent had treated the applicant less favourably by demoting and subsequently dismissing the applicant.<sup>124</sup> This was because the respondent had not demoted or dismissed the applicant with reference to the criteria it had indicated to the applicant by letter that his future performance would be assessed, but some other criteria (namely, his unauthorised absences

<sup>116</sup> [2004] FCA 485, [86].

<sup>117</sup> [2004] FCA 485, [89]. His Honour also held that the applicant must fail because the termination was not *because of* the applicant's disability, because of his refusal to allow the report of the specialist to be released to his employer: [92]-[93].

<sup>118</sup> [2005] FMCA 2.

<sup>119</sup> [2005] FMCA 2, [145].

<sup>120</sup> [2005] FMCA 2, [151]-[151].

<sup>121</sup> [2005] FMCA 2, [169]-[170].

<sup>122</sup> [2005] FMCA 664.

<sup>123</sup> [2005] FMCA 664, [100].

<sup>124</sup> [2005] FMCA 664, [102]-[106].

from the workplace for which he was subsequently granted sick leave).<sup>125</sup> His Honour noted that the applicant's 'relaxed attitude to his attendance' had been 'tolerated' by the respondent for a long time and a work place culture of 'long lunches' was also 'tolerated' by the respondent. His Honour then held that if unauthorised absence was to be 'the predominant consideration' for the future treatment of the applicant, that should have been made clear to the applicant in the respondent's letter which specified the criteria against which the applicant's future performance would be assessed.<sup>126</sup>

Consequently, his Honour held that the applicant had been treated less favourably than the hypothetical comparator in being demoted and subsequently dismissed, as the hypothetical comparator would have been assessed against the specified performance criteria:

If the hypothetical comparator had had the same work restrictions placed on him ... it is reasonable to suppose that those work restrictions would have reflected the concerns of OAMPS and that the hypothetical comparator's performance would have been judged against the criteria stipulated. In the case of [the applicant], the employer, having accepted his return to work on a restricted basis, having regard to his disabilities, treated him unfavourably by demoting him by reference to a factor to which no notice was given in the letter ... setting out the conditions which [the applicant] must meet and the criteria against which his performance would be assessed. I find that the hypothetical comparator would not have been treated in that way.<sup>127</sup>

To the extent that the termination decision was based upon [the applicant's] absence from the workplace on 22 and 24 September 2003, this was less favourable treatment than the hypothetical comparator would have received in the same or similar circumstances because of [the applicant's] disabilities, for the same reasons I have found the demotion decision was discriminatory. The absences were properly explained after the event and a medical certificate was provided. The hypothetical comparator would not have been dismissed for two days absence for which sick leave was subsequently granted.<sup>128</sup>

In *Hollingdale v North Coast Area Health Service*,<sup>129</sup> Driver FM held that it was not discriminatory for the respondent to require the applicant to undergo a medical assessment following a period of serious inappropriate behaviour caused by the applicant's bi-polar disorder. His Honour held that a hypothetical comparator, being an employee in a similar position and under the same employment conditions as the applicant who behaved in the same way but did not have bi-polar disorder,<sup>130</sup> would have been treated the same way:

If such a hypothetical employee had exhibited the inappropriate behaviour of Ms Hollingdale to which a medical cause was suspected (as it was here) medical intervention would almost certainly have been sought. I have no reason to believe that the hypothetical comparator would have been treated any differently than Ms Hollingdale. It was untenable for the Area Health Service to have a mental health employee exhibiting behaviours which might stem from a mental disability and which adversely impacted upon other employees at the workplace.<sup>131</sup>

In *Moskalev v NSW Dept of Housing*,<sup>132</sup> the applicant alleged that the Department directly discriminated against him by refusing to put him on its priority housing register. Driver FM held that the proper comparator was a person without the applicant's disability, who was seeking accommodation of the same kind and who asserted a medical or other reason for requiring that accommodation.<sup>133</sup>

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125 [2005] FMCA 664, [110].

126 [2005] FMCA 664, [110].

127 [2005] FMCA 664, [111].

128 [2005] FMCA 664, [119].

129 [2006] FMCA 5.

130 [2006] FMCA 5, [140].

131 [2006] FMCA 5, [150].

132 [2006] FMCA 876.

133 [2006] FMCA 876, [28].

In *Huemer v NSW Dept of Housing*,<sup>134</sup> the applicant alleged that his tenancy was terminated by the Department because of his mental illness. In rejecting the claim, Raphael FM held that the Department's action was a consequence of numerous complaints about the applicant's anti-social behaviour and the decision to evict him was made by the Consumer Trade and Tenancies Tribunal on the basis that he had breached his tenancy agreement.<sup>135</sup> In relation to whether the applicant was treated less favourably due to anti-social behaviour caused by his disability, Raphael FM applied *Purvis* and concluded that:

The course of action taken in dealing with the manifestation of Mr Huemer's disabilities was taken for the protection of the other tenants of the estate and the staff of [the Department]. It was action of a type similar to that discussed in *Purvis*.<sup>136</sup>

In *Gordon v Commonwealth*,<sup>137</sup> the applicant's provisional employment as a field officer with the Australian Tax Office (ATO) was withdrawn whilst he was completing induction, based on medical reports which showed (inaccurately, as it turned out) that he had severe high blood pressure which was said to affect his ability to drive. The ATO argued that the applicant was dismissed, not because of his high blood pressure, but because he failed to meet one of the pre-employment conditions, namely being certified fit for the position. Heerey J rejected that submission, stating that:

viewed in a practical way, the inescapable conclusion from the evidence is that the real and operative reason for withdrawing the offer was Mr Gordon's imputed hypertension.<sup>138</sup>

It is worth noting that in a decision made under the *Sex Discrimination Act 1984* (Cth) ('SDA'),<sup>139</sup> Gordon J noted that 'the test of discrimination is not whether the discriminatory characteristic is the "real reason" or the "only reason" for the conduct but whether it is "a reason" for the conduct'.<sup>140</sup> Her Honour took the view that the Federal Magistrate at first instance<sup>141</sup> had 'impermissibly emphasised the motive or driving reason behind the [employer's] conduct, instead of focusing on whether the conduct occurred because of [the employee's] sex, pregnancy or family responsibilities'.<sup>142</sup> Her Honour did not, however, discuss the decision in *Purvis* upon which the court at first instance had based its analysis.<sup>143</sup>

In *Razumic v Brite Industries*,<sup>144</sup> the court had to consider the application of the reasoning in *Purvis* to a disability discrimination complaint brought against an employer which predominantly employed staff with disabilities. The applicant sought to argue that the relevant comparator was a person with a disability. Ryan J rejected this argument holding that this argument:

ignores the fact that not all the other disabled employees of the respondent suffered from the same disability as she does. It also ignores the point of the test formulated by the majority in *Purvis* which erects, as the relevant comparator, a person, without the applicant's disabilities, who exhibits the same behaviour as the applicant.<sup>145</sup>

<sup>134</sup> [2006] FMCA 1670.

<sup>135</sup> [2006] FMCA 1670, [8].

<sup>136</sup> [2006] FMCA 1670, [9].

<sup>137</sup> [2008] FCA 603.

<sup>138</sup> [2008] FCA 603, [57].

<sup>139</sup> *Sterling Commerce (Australia) Pty Ltd v Iliff* [2008] FCA 702.

<sup>140</sup> [2008] FCA 702, [48].

<sup>141</sup> *Iliff v Sterling Commerce (Australia) Pty Ltd* [2007] FMCA 1960.

<sup>142</sup> [2008] FCA 702, [49].

<sup>143</sup> [2007] FMCA 1960, [125] and [146].

<sup>144</sup> [2008] FCA 985.

<sup>145</sup> [2008] FCA 985, [69].

Ryan J rejected the applicant's claim of direct disability discrimination holding that he was satisfied that:

had a person without the applicant's disabilities caused the same degree and disruption within the respondent's unique workplace, he or she would have been dismissed long before that decision was taken in relation to the applicant.<sup>146</sup>

In *Varas v Fairfield City Council* ('Varas'),<sup>147</sup> the applicant alleged that she was discriminated against on the basis of an imputed disability (histrionic personality disorder) in relation to her suspension from employment, a requirement that she undergo psychiatric and/or psychological assessments and her termination from employment. Driver FM accepted that the respondent had imputed a disability to the applicant.<sup>148</sup> However, applying *Purvis*, Driver FM held that the employer's decision to suspend and then terminate the applicant's employment was based on the applicant's history of workplace incidents, complaints by co-workers and certain recommendations by a psychologist who had interviewed staff in relation to those complaints.<sup>149</sup>

In relation to the requirement that the applicant undergo further medical assessments, Driver FM held that:

although the Council's directions for Ms Varas to attend Dr Korner were because the Council had imputed to her a histrionic personality disorder (and hypochondriasis) the requests were reasonable in the circumstances and did not constitute a detriment for the purposes of the DDA.<sup>150</sup>

An appeal against Driver FM's finding that the Council did not discriminate against Ms Varas on the basis of an imputed disability was dismissed.<sup>151</sup> In dismissing the appeal, Graham J accepted that the circumstances that led to the termination of Ms Varas's employment was 'her propensity to engage in serious acts of discourtesy, rudeness and intimidating and provocative behaviour towards other staff members and members of the public'. His Honour stated:

[In the applicant's case] that propensity was thought by the Council to have resulted from a disorder; but such a propensity could also exist in other library staff without any disorder. What, for her, may have been thought to have been disturbed behaviour, might, for other library staff have been bad behaviour. Another library staff member 'without the disability' would be another library staff member without disturbed behaviour resulting from a disorder or a perceived disorder, not another library staff member who did not misbehave or use inappropriate language in public areas within the relevant library. There are library staff members who are not thought to have any disorder and who are not disturbed, who behave in an inappropriate manner towards other staff members and members of the public and who use inappropriate language to other staff members and in general conversation in public areas in which they work. If their conduct persisted they would probably be warned and if it continued they would probably be dismissed in less time than elapsed before the appellant was dismissed in this case, especially if they refused to consult with a medical practitioner to whom they had reasonably been referred for assessment.<sup>152</sup>

In *Zhang v University of Tasmania*<sup>153</sup> the Full Court of the Federal Court heard an appeal from the judgment of a single judge who dismissed an application by Ms Zhang claiming unlawful discrimination. The issue on appeal was the applicant's allegation that the University constructively terminated her

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146 [2008] FCA 985, [72].

147 [2008] FMCA 996.

148 [2008] FMCA 996, [87].

149 [2008] FMCA 996, [93]-[94], [116].

150 [2008] FMCA 996, [105].

151 *Varas v Fairfield City Council* [2009] FCA 689.

152 [2009] FCA 689, [89].

153 (2009) 174 FCR 366.

candidature as a graduate student on the basis of her imputed psychological disability. Applying *Purvis*, the majority of the Full Court of the Federal Court held:

the relevant comparator is another PhD candidate manifesting disruptive behaviour to the extent that there was a worsening of relations between her and other university members generally and eventually a breakdown of relations with her supervisor.<sup>154</sup>

Jessup and Gordon JJ then considered whether Ms Zhang's treatment by the University (namely, the imposition of conditions on her continued study and ultimately the constructive termination of her PhD candidature) was less favourable than would have been given to others who did not have a psychological disability.<sup>155</sup> Their Honours noted the paucity of evidence about what happened in other cases where students had manifested similar disruptive behaviour and the University's policies for handling disruptive students.<sup>156</sup> The available evidence from University personnel to the effect that they would have done the same thing with another student in the same circumstances was 'less than satisfactory,' but there was no evidence to suggest that the University would have treated another disruptive student more favourably than Ms Zhang.<sup>157</sup> Consequently, Jessup and Gordon JJ (Gray J dissenting) concluded that there was no error in the primary judge's conclusion that the University did not contravene the DDA.<sup>158</sup>

In *Gibbons v Commonwealth of Australia*,<sup>159</sup> the applicant was an officer of the Australian Federal Police. He claimed that he was discriminated against on the ground of his disability (a personality disorder which was exacerbated by a head injury) in that he was not provided with reasonable adjustment and that his employment was terminated.

Burnett FM noted the dicta in *Fetherston* analysing *Purvis* and stated:

By analogy in this case the comparison required by section 5 is with an officer without the disability, not an officer without inappropriate behavioural responses. Accordingly the treatment of the Applicant is to be compared with the treatment that would have been given, in the same circumstances, to an officer whose similar inappropriate behavioural responses was not disturbed behaviour resulting from a disorder.<sup>160</sup>

Burnett FM noted the respondent's evidence that anyone who had acted in the way that the applicant did after having been given a number of warnings about the offending behaviour would also have had their employment terminated. Burnett FM concluded that the applicant has been treated no less favourably than a comparator without the disability.<sup>161</sup>

In *Flanagan v Murdoch Community Services Inc*<sup>162</sup> the applicant alleged that she had been discriminated against on the basis of her disability by the respondent, her employer. The applicant had an intellectual disability and worked for the respondent as a supported employee at a carwash. The respondent had imposed certain driving conditions following an incident that raised concerns as to the applicant's driving. There was evidence of previous related incidents. Gordon J, applying *Purvis*, held that the relevant comparator was a person displaying the same behaviour as the applicant but without the disability<sup>163</sup>. The relevant comparator was 'a non-supported employee involved in a similar incident with

<sup>154</sup> (2009) 174 FCR 366, 385 [66].

<sup>155</sup> (2009) 174 FCR 366, 385 [67].

<sup>156</sup> (2009) 174 FCR 366, 385 [67].

<sup>157</sup> (2009) 174 FCR 366, 386 [68].

<sup>158</sup> (2009) 174 FCR 366, 386 [69].

<sup>159</sup> [2010] FMCA 115.

<sup>160</sup> [2010] FMCA 115, [112].

<sup>161</sup> [2010] FMCA 115, [118].

<sup>162</sup> 188 FCR 300.

<sup>163</sup> *Ibid*, 318 [68].

a history of related incidents'<sup>164</sup>. On this basis her Honour held that the applicant was treated no less favourably than an employee manifesting the same behaviour with the same history. The application was dismissed.

In *Sluggett v Commonwealth of Australia*<sup>165</sup> the applicant alleged that she had been discriminated against on the basis of her disability, post-polio syndrome, by the respondent employer. The applicant was employed by the Commonwealth Public Service in a variety of roles between 1996 and May 2008, at which time her employment was terminated by involuntary redundancy. The applicant alleged that she was the subject of systematic discrimination in the form of direct and indirect discrimination as well as harassment within the terms of the DDA. A wide range of allegations of direct discrimination were made including allegations that commencing a disciplinary investigation into her conduct and being offered a voluntary redundancy amounted to less favourable treatment because of her disability.

Applying *Purvis*, Brown FM stated that what was required was a comparison between the applicant and a person without her disability but who displayed the same behavioural characteristics. Here this required a comparator who did not suffer from the characteristics of post-polio syndrome but 'displayed the same level of intransigence and obstructive behaviour in the workplace... over the course of her employment'<sup>166</sup>. Brown FM concluded that the comparator would have been treated in the same manner by the management of the respondent employer. The complaint was dismissed. A subsequent appeal to the Federal Court was also dismissed.<sup>167</sup>

In *Matthews v Hargreaves (No. 4)*,<sup>168</sup> the applicant was the CEO of the Shire of Shark Bay, and the respondent was a councillor. The applicant claimed that the respondent had circulated information to councillors and others to the effect that the applicant had hepatitis C, and that this conduct amounted to unlawful discrimination on the ground of disability. The respondent claimed that he was motivated by alleged corrupt conduct of the applicant, and that his actions were unrelated to the applicant's condition. Lucev FM held that the correct comparator was 'another senior Shire employee engaged in allegedly corrupt conduct, but who did not have Hepatitis C'.<sup>169</sup> The applicant's medical condition was unrelated to any allegations of corruption. In those circumstances Lucev FM held that the respondent treated the applicant less favourably than he would have treated the hypothetical comparator. While he held that the respondent's conduct amounted to unlawful discrimination, that conduct was within the scope of a Deed of Settlement previously executed by the applicant and the Shire. In those circumstances, the application was dismissed.<sup>170</sup>

In *Gaffney v RSM Bird Cameron (A Firm)*,<sup>171</sup> the applicant had been a partner in a national accountancy practice. She alleged that she had been compulsorily retired from the firm and that in effecting that retirement the partnership discriminated against her on the basis of sex and disability.<sup>172</sup> She claimed that the firm had imputed a psychiatric disability to her, and had treated her less favourably than it would have treated a person without that imputed disability. Gilmour J found that the firm had not imputed any disability to the applicant. Rather, it had noted that her productivity had been well below expected levels for some time, and that the partnership had attempted to address that with the applicant. His Honour held that the appropriate comparator was:

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164 Ibid, 318 [69].

165 [2011] FMCA 609.

166 Ibid at [733].

167 *Sluggett v Commonwealth of Australia* [2012] FCA 963 (Lander J).

168 [2013] FMCA 4.

169 [2013] FMCA 4, [58].

170 [2013] FMCA 4, [156]-[180].

171 [2013] FCA 661.

172 The applicant also made a number of other claims which are not relevant to the discussion here.



a partner, without the imputed disability, who was well behind the required productivity of a partner; absented themselves from the partnership offices and never returned, would not provide detailed reasons why they would not return to work at those offices; would not indicate if and when they would be returning to such work; and for all this to have continued for nearly 10 months during which time the partner was in receipt of full pay.<sup>173</sup>

His Honour held that there was no evidence the firm treated the applicant less favourably than it would have treated this hypothetical comparator. The disability discrimination complaint was summarily dismissed.

In *Watts v Australian Postal Corp*,<sup>174</sup> Mortimer J, applying *Nojin v Commonwealth*,<sup>175</sup> held that in some circumstances the correct comparator may be a person with a different disability from that of an applicant (rather than a person without any disability).<sup>176</sup>

#### **(iv) The applicant as his or her own comparator?**

In *Varas*, the applicant alleged that the appropriate comparator was herself, arguing that the required comparison should be between how she was treated before and after she was imputed to have a mental illness. Driver FM noted that such an approach was ‘novel’, although open under the DDA:

Ms Varas asserts that she is her own comparator because her behaviour was generally consistent throughout her long period of employment with the Council, where the manner in which she was dealt with by the Council changed markedly during and after 2005 [when she was allegedly imputed with a psychological disability]. While the approach is novel, upon reflection, I think that it is an approach which is open under the DDA. To put the proposition another way, the proposed comparator is an actual employee (namely Ms Varas) who:

- (a) exhibited the same behaviours;
- (b) occupied the same position and performed the same duties;
- (c) demonstrated the same work performance; and
- (d) was not imputed with a disability (prior to 2006).<sup>177</sup>

In applying the above comparator in relation to the termination of the applicant’s employment, the applicant argued that her workplace behaviour had not significantly changed during the relevant period. Prior to being imputed with a disability she was only disciplined for such behaviour whereas after being imputed with a disability she was dismissed. Driver FM held that the comparison put forward by the applicant was ‘too simplistic’,<sup>178</sup> in that it ignored the fact that the applicant’s work performance and behaviour had both significantly declined during 2005 and had resulted in a ‘crisis’ which compelled the respondent to take decisive action.<sup>179</sup> His Honour accepted that, even if the applicant had not been imputed with a disability, it was:

extremely likely that, in the light of the earlier counselling and warnings given to Ms Varas, further disciplinary action would have culminated in her dismissal in 2006.<sup>180</sup>

In dismissing the appeal against the judgment of Driver FM, Graham J noted that characterisation of the appellant as the relevant comparator seemed appropriate.<sup>181</sup>

<sup>173</sup> [2013] FCA 661, [138].

<sup>174</sup> (2014) 222 FCR 220.

<sup>175</sup> (2012) 208 FCR 1.

<sup>176</sup> *Watts v Australian Postal Corp* (2014) 222 FCR 220, 278–279 [250] (Mortimer J).

<sup>177</sup> [2008] FMCA 996, [73].

<sup>178</sup> [2008] FMCA 996, [115].

<sup>179</sup> [2008] FMCA 996, [115].

<sup>180</sup> [2008] FMCA 996, [117].

<sup>181</sup> *Varas v Fairfield City Council* [2009] FCA 689, [81].

**(v) The appropriate comparator – persons with carers, assistants, assistance animals and disability aids**

Special considerations arise where discrimination is alleged to occur because a person with a disability has a carer, assistant, assistance animal or disability aid.<sup>182</sup> Section 8 of the DDA provides that an act done for one of these reasons is, for the purposes of the DDA, done because of the person's disability. The effect of section 8 is discussed at 5.2.5 below.

In *Mulligan v Virgin Australia Airlines Pty Ltd*,<sup>183</sup> the applicant claimed that the respondent airline had refused to allow him to book a ticket on a flight to travel while accompanied in the cabin of the aircraft by an assistance animal (being a dog trained to assist him with a number of disabilities). The airline argued that the appropriate comparator for the purposes of section 5(1) of the DDA was a person without a disability who sought to be bring a dog on a flight. The Full Court of the Federal Court rejected that proposition. It held:

We reject the submission that the proper comparator in the circumstances here is a person without a disability who wishes to bring a dog with them in the cabin, with the consequence that there was no direct discrimination towards Mr Mulligan because the comparator would be subjected to the same policies as the airline applied to Mr Mulligan. This submission fails to take into account the fact that, under the 2009 amendments, Willow [ie, Mr Mulligan's assistance animal] is to be regarded as part of Mr Mulligan's disability. It also fails to give effect to s 5(3), which provides that, for the purposes of s 5, circumstances are not materially different because of the fact that, because of Mr Mulligan's disability (which includes his need for Willow to accompany him), Mr Mulligan requires adjustments so that Willow can accompany him in the cabin.<sup>184</sup>

The correct comparator in these circumstances was:

a person who is without a disability and therefore without a dog and wants to travel with the airline.<sup>185</sup>

The same reasoning would apply in identifying the correct comparator for a person with a disability who has a carer, assistant or disability aid.

**(c) 'Adjustments' under section 5(3) of the DDA**

Section 5(3) of the DDA provides that for the purposes of section 5:

circumstances are not **materially different** because of the fact that, because of the disability, the aggrieved person requires adjustments.

Prior to the 2009 changes to the DDA<sup>186</sup> section 5(2) was worded similarly to what is now section 5(3), although instead of referring to 'adjustments' it referred to 'different accommodation or services that may be required by the person with a disability'. The Explanatory Memorandum to the amending legislation states that the 'new reference to 'adjustments' covers 'accommodation or services'.<sup>187</sup>

<sup>182</sup> 'Carer or assistant,' 'assistance animal' and 'disability aid' are defined in s 9 of the DDA. See 5.2.5 below.

<sup>183</sup> (2015) 234 FCR 207. The AHRC was granted leave to intervene in the proceedings. The written submissions of the Commission are available at <<http://www.humanrights.gov.au/our-work/legal/submissions/submission-court-intervener-and-amicus-curiae>>.

<sup>184</sup> (2015) 234 FCR 207, 247 [149].

<sup>185</sup> (2015) 234 FCR 207, 247 [148(b)]. See also the discussion of the correct comparator in *Forest v Sydney Airport Corporation Ltd* [2014] FCCA 208, [45], discussed at 5.2.5(c).

<sup>186</sup> *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), Sch 2, item 17, commenced operation 5 August 2009.

<sup>187</sup> Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 8 [40].

In *Purvis*, the High Court decided that the former provision did not impose a positive obligation to accommodate a person's disability.<sup>188</sup> From 5 August 2009, the new section 5(2) of the DDA makes explicit that the failure to make reasonable adjustments **can** amount to direct discrimination.<sup>189</sup> (See further 5.2.4.)

The effect of section 5(3) would appear likely to remain the same as the effect of the former section 5(2), as described in *Purvis*. Gummow, Hayne and Heydon JJ 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.<sup>190</sup>

In *Tyler v Kesser Torah College*,<sup>191</sup> a student with behavioural difficulties was temporarily excluded from the respondent school. The school's regular discipline policy was not applied to the student and the court noted as follows:

To that extent, Rabbi Spielman treated Joseph differently from how he would have treated a student without Joseph's disabilities. However, that fact by itself does not establish unlawful discrimination. The College had already decided in consultation with the Tylers that Joseph had special needs that required a special educational programme. These were special educational services for the purposes of s 5(2) of the DDA. The non application of the College's usual discipline policy to Joseph was an element of those special services. It follows, in my view, that the non application of the school's discipline policy to Joseph could not, of itself, be discriminatory for the purposes of s 5(1) of the DDA.<sup>192</sup>

188 *Purvis* (2003) 217 CLR 92, 159 [217]-[218]; *Fetherston* [2004] FCA 485, [77]; *Commonwealth v Humphries* (1998) 86 FCR 324, 335.

189 For a discussion of the case law about whether former s 5(2) imposes a positive obligation to accommodate disability, please see the archived version of *Federal Discrimination Law* at <<https://www.humanrights.gov.au/federal-discrimination-law-archive-older-versions>>.

190 (2003) 217 CLR 92, 159 [217]-[218]. Callinan J appeared to agree with their Honours on this point: (2003) 217 CLR 92, 175 [273]. 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) [2001] FCA 1199, [48]. This point was not considered on appeal by the Full Court of the Federal Court. However the approach of Emmett J was rejected by McHugh and Kirby JJ ((2003) 217 CLR 92, 121-122 [86]-[89]) and also appears to have been implicitly rejected by Gummow, Hayne and Heydon JJ in their joint judgment, 159 [217]-[218]). Such an argument was earlier rejected by Kiefel J in *Commonwealth of Australia v Humphries* (1998) 86 FCR 324.

191 [2006] FMCA 1.

192 [2006] FMCA 1, [104].

Therefore, the appropriate comparator in this case was:

- a student in the same class as Joseph;
- who did not have the same disability;
- who exhibited the same behaviours as Joseph; and
- who was not subject to the College's normal discipline policy because of special needs.

Driver FM noted that:

The last element was necessary because the special services put in place for Joseph could not to be taken as discriminatory because of the operation of s 5(2) of the DDA and without that element, a fair comparison could not be made.<sup>193</sup>

'Reasonable adjustments' for the purposes of the current section 5(2) are discussed below at 5.2.4.

### 5.2.3 Indirect discrimination under the DDA

From 5 August 2009,<sup>194</sup> the definition of indirect discrimination in section 6 of the DDA is as follows:

#### 6 Indirect disability discrimination

- (1) For the purposes of this Act a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of a disability of the aggrieved person if:
  - (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
  - (b) because of the disability, the aggrieved person does not or would not comply, or is not able or would not be able to comply, with the requirement or condition; and
  - (c) the requirement or condition has, or is likely to have, the effect of disadvantaging persons with the disability.
- (2) For the purposes of this Act, a person (the **discriminator**) also **discriminates** against another person (the **aggrieved person**) on the ground of a disability of the aggrieved person if:
  - (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
  - (b) because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and
  - (c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.
- (3) Subsection (1) or (2) does not apply if the requirement or condition is reasonable, having regard to the circumstances of the case.
- (4) For the purpose of subsection (3), the burden of proving that the requirement or condition is reasonable, having regard to the circumstances of the case, lies on the person who requires, or proposes to require, the person with the disability to comply with the requirement or condition.

#### (a) 2009 changes to indirect discrimination

Section 6(2) was introduced into the DDA by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth). It is intended to impose an explicit duty of 'reasonable adjustments' upon people doing acts covered by the DDA.<sup>195</sup> That new obligation is discussed further below: see 5.2.4.

<sup>193</sup> [2006] FMCA 1, [106]-[107].

<sup>194</sup> The date of commencement of the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) which amended s 6: see Sch 2, item 17.

<sup>195</sup> Explanatory Memorandum, *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008*, 9 [41-7].

The 2009 amendments to the DDA also made the following significant changes to section 6:

- the section no longer requires the applicant to prove that a ‘substantially higher proportion of persons without the disability comply or are able to comply’ with the relevant requirement or condition (former section 6(a));
- instead, the section now requires that an applicant prove that the requirement or condition ‘has or is likely to have, the effect of disadvantaging persons with the disability’ (section 6(1)(c));
- the definition of indirect discrimination has been extended to include *proposed* acts of indirect discrimination (see section 6(1)(a) and (2)(a)); and
- the burden of proving the ‘reasonableness’ of the requirement or condition now rests on the alleged discriminator.<sup>196</sup>

The following sections consider the case law relevant to the following issues under the current definition of indirect discrimination:

- the relationship between ‘direct’ and ‘indirect’ discrimination;
- defining the ‘requirement or condition’;
- inability to comply with a requirement or condition.
- ‘disadvantaging persons with the disability’; and
- reasonableness.

Readers interested in the operation of the old indirect discrimination provisions of the DDA can refer to the archived version of *Federal Discrimination Law* online at [www.humanrights.gov.au/legal/FDL/archive.html](http://www.humanrights.gov.au/legal/FDL/archive.html).

## (b) The relationship between ‘direct’ and ‘indirect’ discrimination

In *Waters v Public Transport Corporation*<sup>197</sup> (*‘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*<sup>198</sup> (*‘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.<sup>199</sup>

In *Minns v New South Wales*<sup>200</sup> (*‘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 claim as a direct or indirect discrimination complaint.

196 Please refer to [5.2.3] of previous versions of *Federal Discrimination Law* for a discussion on the former definition of indirect discrimination in s 6 of the DDA, which will remain relevant for acts of alleged discrimination occurring prior to 5 August 2009. See <http://www.humanrights.gov.au/federal-discrimination-law-archive-older-versions>.

197 (1991) 173 CLR 349.

198 (1989) 168 CLR 165, 184, 171.

199 (1991) 173 CLR 349, 393.

200 [2002] FMCA 60.

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*<sup>201</sup> (a case under the *Racial Discrimination Act 1975* (Cth) ('RDA'), in holding that the definitions of direct and indirect discrimination are mutually exclusive, stating: 'that which is direct cannot also be indirect'.<sup>202</sup>

However, Raphael FM stated that this does not prevent an applicant from arguing that the same set of facts constitutes direct and indirect 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.<sup>203</sup>

His Honour relied upon the approach of Emmett J at first instance in *New South Wales (Department of Education & Training) v Human Rights and Equal Opportunity Commission*<sup>204</sup> and that of Wilcox J in *Tate v Rafin*<sup>205</sup> to suggest that 'the same facts can be put to both tests'.<sup>206</sup>

Similarly, in *Hollingdale v Northern Rivers Area Health Service*,<sup>207</sup> the respondent sought to strike out that part of the applicant's points of claim that sought to plead the same incident in the alternative as direct and indirect discrimination. Raphael FM said:

There is, in my view, no obligation upon an applicant to make an election between mutually exclusive direct and indirect disability claims. If both claims are arguable on the facts, they may be pleaded in the alternative. The fact that they are mutually exclusive would almost inevitably lead to a disadvantageous costs outcome for the applicant, but that is the applicant's choice.<sup>208</sup>

The same approach was taken by Katzman J in *Munday v Commonwealth (No 2)*,<sup>209</sup> and by Nicholls J in *Burns v Media Options Group Pty Ltd & Ors*.<sup>210</sup>

In *Purvis v New South Wales (Department of Education and Training)*<sup>211</sup> ('*Purvis*'), the case was only argued before the High Court as one of direct discrimination and the question of the relationship between direct and indirect discrimination was not addressed. 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 former section 5(2) of the DDA.<sup>212</sup> 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 former section 5(2) makes clear that the circumstances of that student are not materially different for the purposes of former section 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.<sup>213</sup>

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201 (1996) 68 FCR 46.

202 [2002] FMCA 60, [173].

203 [2002] FMCA 60, [245].

204 [2001] FCA 1199.

205 [2000] FCA 1582, [69].

206 [2002] FMCA 60, [245].

207 [2004] FMCA 721.

208 [2004] FMCA 721, [19].

209 (2014) 226 FCR 199, 230 [157].

210 [2013] FCCA 79 [1738].

211 (2003) 217 CLR 92.

212 See generally 5.2.2(c) above.

213 (2003) 217 CLR 92, 127 [105].

### (c) Defining the ‘requirement or condition’

The concept of a ‘requirement or condition’ with which an aggrieved person is required to comply has been held to involve ‘the notion of compulsion or obligation’.<sup>214</sup>

The courts have, however, emphasised that the words ‘requirement or condition’ should be construed broadly ‘so as to cover any form of qualification or prerequisite’.<sup>215</sup>

Applicants must nevertheless be careful to ensure that ‘the actual requirement or condition in each instance [is] formulated with some precision’.<sup>216</sup> For example, in *Ferguson v Department of Further Education*,<sup>217</sup> the applicant claimed that the respondent had discriminated against him on the basis of his disability by requiring him to comply with a requirement or condition that he substantially attend his classes, undertake resource based learning and communicate with other students, lecturers and support officers with limited assistance from an Auslan interpreter.<sup>218</sup> Raphael FM ultimately dismissed the application on the basis that, even if the applicant had had the benefit of more assistance there was no evidence that it would have allowed him to complete his course any earlier, as he claimed.<sup>219</sup>

In the course of his reasoning, however, Raphael FM criticised the manner in which the applicant had formulated the relevant requirement or condition in the case:

It may be that if the applicant had somehow incorporated the failure to provide the needs assessment as part of the actual requirement or condition rather than limiting the requirement or condition to attending his classes etc with only limited assistance from an Auslan interpreter a case might have been capable of being made out. An example of such a claim would have been:

TAFE required Mr Ferguson to comply with the requirement or condition that he undertake his learning and complete his course within a reasonable time without the benefit of a needs assessment.

That seems to me to [be] a facially neutral requirement or condition which [the applicant] could have proved that a substantially higher proportion of persons without the disability were able to comply with. He could also have proved that it was not reasonable having regard to the circumstances of his case.<sup>220</sup>

In making those remarks his Honour referred to the comments of Tamberlin J in *Catholic Education Office v Clarke*<sup>221</sup> (‘*CEO v Clarke*’) concerning the importance of the proper characterisation of the condition or requirement from the perspective of the person with the disability.<sup>222</sup>

In *Walker v Victoria (Department of Education and Early Childhood Development)*,<sup>223</sup> Tracey J observed that it is necessary for an applicant to identify relevant requirements or conditions with a degree of precision to allow a respondent to respond to a claim.<sup>224</sup>

<sup>214</sup> *Sluggett v Human Rights and Equal Opportunity Commission* (2002) 123 FCR 561, 577 [56]. See also *Fetherston v Peninsula Health* [2004] FCA 485, [81]; *Hinchliffe v University of Sydney* [2004] FMCA 85, [105]–[106].

<sup>215</sup> *Waters v Public Transport Corporation* (1991) 173 CLR 349, 393 (Dawson and Toohey JJ), 406–407 (McHugh J); *Catholic Education Office v Clarke* (2004) 138 FCR 121, 143 [103]; *Daghlian v Australian Postal Corporation* [2003] FCA 759, [110]; *Hinchliffe v University of Sydney* [2004] FMCA 85, [107]; *Trindall v NSW Commissioner of Police* [2005] FMCA 2, [175]; *Munday v Commonwealth (No. 2)* (2014) 226 FCR 199, 226 [132] (Katzman J); *Mulligan v Virgin Australia Airlines Pty Ltd* (2015) (2015) 234 FCR 207, 248 [153] (Flick, Reeves and Griffith JJ).

<sup>216</sup> *Waters v Public Transport Corporation* (1991) 173 CLR 349, 393 (Dawson and Toohey JJ), 406–407 (McHugh J); *Catholic Education Office v Clarke* (2004) 138 FCR 121, 143 [103]; *Sievwright v Victoria* [2012] FCA 118 [174] (Marshall J); *Nojin v Commonwealth* (2012) 208 FCR 1, 4 [9] (Buchanan J); 52 [176] (Flick J); 70 [234] (Katzmann J); *Mulligan v Virgin Australia Airlines Pty Ltd* (2015) 234 FCR 207, 248 [153].

<sup>217</sup> [2005] FMCA 954.

<sup>218</sup> [2005] FMCA 954, [30].

<sup>219</sup> [2005] FMCA 954, [32], [35].

<sup>220</sup> [2005] FMCA 954, [33].

<sup>221</sup> (2004) 138 FCR 121, 125 [12]–[13].

<sup>222</sup> [2005] FMCA 954, [34].

<sup>223</sup> [2011] FCA 258.

<sup>224</sup> [2011] FCA 258, [194]. Upheld on appeal in *Walker v State of Victoria* [2012] FCAFC 38.



In *Nojin v Commonwealth of Australia*<sup>225</sup> Gray J made a number of comments in regard to how the applicants had formulated the requirement or condition in that case. The applicants were persons with disabilities employed in Australian Disability Enterprises. Each underwent an assessment to determine the level of wages they would receive for the work they performed. The assessment was conducted using the Business Services Wage Assessment Tool ('BSWAT').

Gray J stated:

The possibility that the definition of s 6 of the [DDA] can be applicable beyond the realm of general requirements or conditions imposed on an entire class of person, with and without disabilities, must be approached with caution. If a disabled person is the only person required to comply with a particular requirement or condition, because it is not applied to any other person, there is no real comparator group, only a notional one. Similarly, if the only people required to comply with a particular requirement or condition are people all of whom are disabled, there is no real comparator group for the purposes of s 6(a).<sup>226</sup>

The applicants argued that certain aspects of the BSWAT, including the assessment of various 'competencies', were discriminatory in respect of persons with intellectual disabilities compared to supported employees without an intellectual disability. Gray J found that it was difficult to treat parts of the BSWAT as a requirement or condition without regard to its impact as a whole. His Honour noted that whilst people with an intellectual disability might not perform as well in the competencies assessed, people with a physical disability may be less productive on the productivities assessed because of their disability. Gray J stated that the comparison simply on the basis of competencies was an unreal comparison because competency testing was only one part of the BSWAT.

Gray J held that the only requirement or condition with which the applicants were required to comply was that their wage levels be determined by assessment using the BSWAT and that they were able to comply with this requirement or condition. The applications were dismissed.

The decision of Gray J was overturned on appeal by the Full Court of the Federal Court.<sup>227</sup> All three judges held that Gray J had incorrectly identified the requirement or condition that had been imposed on the applicants. All judges agreed with the applicants that the requirement that had been imposed upon them was that in order to secure a higher wage, they were required to undergo a wage assessment using the BSWAT. The court held, contrary to Gray J, that there was nothing 'artificial' in identifying the term or condition in this way. While there was no 'requirement' on the applicants to seek a higher wage, they could not do so without being assessed under the BSWAT.<sup>228</sup> A majority of the court went on to hold that the applicants' claims of indirect discrimination were made out, because disabled workers who were not intellectually disabled would be more likely to achieve advantageous results under the BSWAT than intellectually disabled workers.<sup>229</sup>

In *Johnston v State of Queensland*,<sup>230</sup> an application was brought on behalf of Ms Johnston, a woman with physical and intellectual disabilities. Ms Johnston was in receipt of grants of funding from the State of Queensland to assist with the provision of support and care for her. The funding she received was enough to provide paid care for Ms Johnston for 'all but 27 hours of each week.'<sup>231</sup> The applicant sought an increase of funding to fund another 14 hours of care each week. That request was refused

225 [2011] FCA 1066. The case considered the provisions of the DDA as in force prior to the 2009 amendments.

226 Ibid at [81].

227 *Nojin v Commonwealth* (2012) 208 FCR 1 (Buchanan, Flick and Katzmann JJ).

228 Ibid at [121]-[124] (Buchanan J); [192]-[199] (Flick J); [232]-[244] (Katzmann J).

229 (Buchanan and Katzmann JJ, Flick J dissenting).

230 [2013] FCCA 175.

231 [2013] FCCA 175, [11].

by the respondent. Funding was provided in accordance with guidelines, and Ms Johnston was already receiving the ‘upper limit’ of available funding available in her circumstances.

The applicant argued that she would have been entitled to receive additional funding if she was ‘a risk of deliberate self-harm or possessed of violent tendencies such that she presents a risk of harm to members of the community.’ The applicant argued that this was a term or condition imposed on her for the purposes of section 6(1) of the DDA, that she did not comply with that term or condition, and the term or condition had the effect of disadvantaging her. Jarrett J accepted that the term or condition was imposed on Ms Johnston. However, he held that it could not be said that Ms Johnston did not comply, or was not able to comply, with the term or condition ‘because of her disability.’ Rather, Ms Johnston did not comply because she did *not* possess a *further* disability.<sup>232</sup> The claim was dismissed.

In *Abela v State of Victoria*,<sup>233</sup> the applicant argued the respondent had imposed a number of requirements or conditions on his son accessing education in a number of schools. Tracey J expressed the view that a ‘requirement or condition’ for the purposes of section 6 must be ‘of general application’ or ‘facially neutral.’ The applicant had not identified any such conditions or requirements:

On the contrary, each of the terms and conditions which he has formulated alleged deficiencies on the part of the Department. He complained that the Department failed to act in particular ways in response to his particular disability-related needs.<sup>234</sup>

**(i) Distinguishing the requirement from the inherent features of a service**

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 particular goods or services. In *Waters*, Mason CJ and Gaudron J explained this distinction as follows:

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 involves a requirement or condition that those availing themselves of that service have one or both of their hands.<sup>235</sup>

The distinction between a condition of a service and the service itself was raised at first instance in *Clarke v Catholic Education Office*<sup>236</sup> (*‘Clarke’*). The applicant contended that his son (‘the student’), who was deaf, was subjected to indirect discrimination by virtue of the failure of the respondent school to provide Australian Sign Language (‘Auslan’) interpreting assistance. Instead, the school had relied upon the use of note-taking as the primary communication tool to support the student in the classroom. The applicant alleged that this did not allow the student to adequately participate in classroom instruction.

Madgwick J referred to the principle set out in *Waters* that the DDA is beneficial legislation which is to be broadly construed, noting that:

it would defeat the purpose of the DDA if a narrow interpretation [of the expression ‘requirement or condition’] were to be taken.<sup>237</sup>

<sup>232</sup> [2013] FCCA 175, [40]-[43].

<sup>233</sup> [2013] FCA 832.

<sup>234</sup> [2013] FCA 832, [88]. See also [99], [104].

<sup>235</sup> (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).

<sup>236</sup> [2003] FCA 1085.

<sup>237</sup> [2003] FCA 1085, [44].

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'.<sup>238</sup> His Honour did not accept the argument by the respondent that it was an intrinsic feature of the respondent's 'education' or 'teaching' service that it be conducted 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 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...<sup>239</sup>

His Honour's decision was upheld on appeal.<sup>240</sup>

## **(ii) Imposition of the requirement or condition**

Prior to the 2009 amendments to the DDA,<sup>241</sup> an aggrieved person was required to demonstrate that a requirement or condition was actually imposed upon them: it did not apply to requirements or conditions with which a discriminator *proposed* to require an aggrieved person to comply.

The definition of indirect discrimination now applies to requirements or conditions with which the discriminator 'requires or proposes to require' an aggrieved person to comply.<sup>242</sup> This is consistent with the approach taken in the SDA,<sup>243</sup> *Age Discrimination Act 2004* (Cth) ('ADA')<sup>244</sup> and the definition of direct discrimination in section 5 of the DDA.

238 [2003] FCA 1085, [45]. Cf *Gluyas v Commonwealth* [2004] FMCA 224. In that matter, the applicant, who had Asperger's Syndrome complained that a requirement that he perform 'ad hoc tasks of a non-priority nature' was a requirement or condition of his employment with which he could not comply by reason of his disability. Without reference to authority on the issue, Phipps FM stated: 'It is impossible to see how the requirement to comply with a requirement or condition could be established from the way the applicant has put his case' ([19]). The application was summarily dismissed.

239 [2003] FCA 1085, [45].

240 (2004) 138 FCR 121.

241 *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth).

242 Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth) 9 [41-6].

243 See SDA, s 5(2).

244 See ADA, s 15(1)(a).

An applicant does not necessarily need to show that the relevant requirement or condition was imposed or is proposed to be imposed by way of a positive act or statement. In *Waters*,<sup>245</sup> for instance, Mason CJ and Gaudron J noted that:

compliance may be required even if the requirement or condition is not made explicit: it is sufficient if a requirement or condition is implicit in the conduct which is said to constitute discrimination.<sup>246</sup>

Similarly, McHugh J in that case stated:

In the context of providing goods and services, a person should be regarded as imposing a requirement or condition when that person intimates, expressly or inferentially, that some stipulation or set of circumstances must be obeyed or endured if those goods or services are to be acquired, used or enjoyed.<sup>247</sup>

The inaccessibility of premises or facilities may give rise to the imposition of a relevant requirement or condition for the purposes of establishing indirect discrimination.<sup>248</sup> For example, in *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*<sup>249</sup> ('Access For All Alliance') the applicant organisation complained that certain council facilities (a community centre, concrete picnic tables and public toilets) were inaccessible to members of the organisation who had disabilities. In relation to the community centre Baumann FM found the following requirements or conditions to have been imposed:

Persons are required to attend and enjoy entertainment held from the stage at the Centre viewed from the outside grassed area without:

- (a) an accessible path and platform; and
- (b) an accessible ramp and path from the grassed area to the toilets situated inside the Centre.<sup>250</sup>

In relation to the picnic tables, he identified the requirement or condition as follows:

Persons seeking to enjoy the amenity of the...foreshore are required to use tables which do not make provision for both wheelchair access to the tables and are not designed to accommodate the wheelchairs at the table.<sup>251</sup>

Finally, he identified the requirement or condition in relation to the public toilets as:

Members of the applicant seeking to enjoy the amenity of the... foreshore are required to use toilet facilities where wash basins are not concealed from the public view.<sup>252</sup>

Baumann FM went on to uphold the complaint in relation to the public toilets, but dismissed the complaint in relation to the community centre and picnic tables (see 5.2.3(f) below).

In *Devers v Kindilan Society*,<sup>253</sup> ('Devers') Marshall J held that an employer who was unaware of an employee's requirement for adjustments for her disability did not impose a requirement or condition upon that employee that they work without such adjustment.

The applicant (who has profound deafness) worked as a disability support worker in a residential care facility operated by the respondent. The applicant claimed, amongst other things, that the respondent had imposed a requirement or condition upon her that she work without a telephone typewriter (TTY – a

<sup>245</sup> (1991) 173 CLR 349.

<sup>246</sup> (1991) 173 CLR 349, 360.

<sup>247</sup> (1991) 173 CLR 349, 407.

<sup>248</sup> It is likely that the 2009 amendments to the definition of indirect discrimination that expressly make unlawful the failure to make reasonable adjustments will further support these kinds of claims (see further discussion at 5.2.4 below).

<sup>249</sup> [2004] FMCA 915.

<sup>250</sup> [2004] FMCA 915, [20].

<sup>251</sup> [2004] FMCA 915, [21].

<sup>252</sup> [2004] FMCA 915, [22].

<sup>253</sup> [2009] FCA 1392. Note that this case was not brought under the 'reasonable adjustment' provisions of s 6(2) of the DDA which had not commenced at the time of the events the subject of the case.

device that can be used by deaf people to communicate over the telephone) and without flashing lights to alert her that someone was at the door of the facility.

Marshall J held that the respondent could not be said to have imposed a requirement or condition upon the applicant that she access her employment without those things when the respondent was unaware that the applicant required them.<sup>254</sup>

The applicant in *Devers* also complained that she was required to attend training sessions without the use of a qualified Auslan interpreter. Marshall J held that such a requirement or condition was imposed by the respondent, except on the occasions when the applicant chose to attend training sessions without a qualified interpreter.<sup>255</sup> The exception arose from a training session for which a qualified interpreter was not available. The respondent had suggested that the applicant attend a later repeat session for which an interpreter would be booked, but the applicant chose to attend the earlier session without a qualified interpreter. In relation to that event, his Honour concluded that no requirement or condition to attend without a qualified interpreter had been imposed.<sup>256</sup>

### **(iii) Requirement 'imposed' by employers**

Where the alleged discriminatory requirement or condition arises from the failure of an employee to follow the proper procedures of his or her employer, the employer will not ordinarily be regarded as having imposed that requirement or condition. The employer may, however, be held vicariously liable for the conduct of the employee, although this involves a different test than that required under section 6 (see further 5.4.1 below).

The above distinction arose for consideration in *Vance v State Rail Authority*.<sup>257</sup> The applicant, a woman with a visual disability, complained of indirect disability discrimination in the provision of services by the respondent. The applicant had been unable to board a train because the guard had not allowed sufficient time for her to do so, by closing the doors without warning while the applicant was attempting to board.

The primary argument pursued under the DDA was that the respondent required the applicant to comply with a requirement or condition defined as follows:

That in order to travel on the 11.50am train on 8 August 2002 operated by the Respondent any intending passenger at Leumeah Station had to enter the train doors promptly which may close without warning.<sup>258</sup>

Raphael FM found that the guard on the train simply did not notice the applicant attempting to board the train and closed the doors after a period of between 10 and 15 seconds believing that no-one was getting on.<sup>259</sup> It did not follow, however, that the respondent Authority (the individual guard was not named as a party) imposed a requirement or condition consistent with that conduct.

The evidence before the court established that the respondent had detailed procedures for guards to ensure that all passengers were on board prior to doors of the train closing. In these circumstances, Raphael FM asked:

Can it be said that this requirement was imposed by virtue of what the applicant alleged occurred on this day? In other words does the alleged action of the guard constitute a requirement imposed by his employer. This could only be the case if the employer was vicariously liable for the acts of the employee. Such vicarious liability is provided for in the DDA under s 123.

<sup>254</sup> See [2009] FCA 1392, [42] (re TTY); [51] (re flashing lights).

<sup>255</sup> [2009] FCA 1392, [69].

<sup>256</sup> [2009] FCA 1392, [67]–[68]. The findings of Marshall J were not disturbed on appeal: *Devers v Kindilan Society* [2010] FCAFC 72.

<sup>257</sup> [2004] FMCA 240.

<sup>258</sup> [2004] FMCA 240, [2].

<sup>259</sup> [2004] FMCA 240, [45], [47].

His Honour considered that the respondent was not vicariously liable under section 123 for the conduct of its employees on the basis that the respondent had taken reasonable precautions and exercised due diligence to avoid the employee's conduct. Raphael FM concluded:

If the respondent has no liability under s 123(2), which I have found it does not, and if all the evidence is that the respondent itself did not impose the alleged requirement or condition, then I cannot see how there can be any liability upon it.<sup>260</sup>

Raphael FM accordingly dismissed the application under the DDA.<sup>261</sup>

In *Sluggett v Commonwealth of Australia*<sup>262</sup> the applicant alleged that she had been discriminated against on the basis of her disability, post-polio syndrome, by her employer, the Commonwealth Public Service. The applicant alleged that she was the subject of systematic discrimination in the form of direct and indirect discrimination as well as harassment within the terms of the DDA. In relation to indirect discrimination, the applicant argued that she had been unreasonably required by her employer to comply with various conditions as to how she performed her duties and the setup of her workstation, with which she could not comply because of her disability.

Brown FM was of the view that the evidence indicated that the applicant decided what she would and would not do whilst employed by the respondent. Management of the employer accepted that some duties were not appropriate and did not allocate them to her. However, the applicant declined to perform many of the duties that were allocated. Over time she was released from those duties also. Management of the respondent went to some lengths to modify the duties remaining by enlisting qualified experts to provide advice as to her duties and workstation and making the recommended modifications. Brown FM held that the applicant 'was not compelled to perform duties ... which she judged were beyond her capacity. She did not do them and she was not subject to a compulsion to do them'<sup>263</sup>. The complaint was dismissed. A subsequent appeal to the Federal Court was also dismissed.<sup>264</sup>

#### **(d) Inability to comply with a requirement or condition**

Following the 2009 changes to the DDA, the definition of indirect discrimination in section 6(1) requires an aggrieved person to show that 'because of the disability, the aggrieved person does not or would not, is not able to or would not be able to comply' with the relevant requirement or condition.<sup>265</sup>

This is a change from the previous definition of the DDA which did not require an aggrieved person to show that their inability to comply with the requirement or condition was 'because of their disability'.<sup>266</sup>

In considering whether an aggrieved person is 'able to comply' with a requirement or condition, courts have emphasised the need to take a broad and liberal approach.<sup>267</sup> The relevant question would appear to be *not* whether the complainant can technically or physically comply with the relevant requirement or condition, but whether he or she would suffer 'serious disadvantage' in complying with the requirement or condition.<sup>268</sup>

<sup>260</sup> [2004] FMCA 240, [54].

<sup>261</sup> [2004] FMCA 240, [61]. His Honour did, however, find liability for negligence under the court's accrued jurisdiction, applying the different test for vicarious liability at common law ([64]). He awarded compensation of \$5,000 ([71]).

<sup>262</sup> [2011] FMCA 609. Note that the 2009 amendments to the DDA did not apply in this case.

<sup>263</sup> *Ibid* at [738].

<sup>264</sup> *Sluggett v Commonwealth of Australia* [2012] FCA 963 (Lander J).

<sup>265</sup> DDA, s 6(1)(b) as amended by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), Sch 2, item 17.

<sup>266</sup> See the former s 6(1)(c).

<sup>267</sup> See, for example, *Travers v New South Wales* [2000] FCA 1565, [17], where the court held that a 'reasonably liberal' approach was required in assessing whether the complainant was able to comply with the relevant condition.

<sup>268</sup> *Clarke* [2003] FCA 1085, [49], upheld on appeal *CEO v Clarke* (2004) 138 FCR 121. See also *Hurst v Queensland* (2006) FCR 562, 580 [106], 585 [134].

The need for a complainant to establish that they were not able to comply with a requirement or condition is a further reason that the claimed requirement or condition must be identified with some precision. For instance, in *Mulligan v Virgin Australia Airlines Pty Ltd*, the Full Court of the Federal Court stated:

In circumstances where the alleged requirement or condition has not been appropriately identified, it is not possible to determine whether [the applicant's] non-compliance or inability to meet a hypothetical requirement or condition is also established.<sup>269</sup>

### (i) *Serious disadvantage*

In *Clarke*, Madgwick J held that 'compliance' with a requirement or condition 'must not be at the cost of being thereby put in any substantial disadvantage in relation to the comparable base group'.<sup>270</sup> 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 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.<sup>271</sup>

The 'serious disadvantage' approach was also adopted by the Full Court of the Federal Court in *Hurst and Devlin v State of Queensland* ('*Hurst*').<sup>272</sup> In that case, the respondent was found to have imposed a requirement or condition upon the applicants that they receive their education in English without the assistance of an Auslan teacher or interpreter. At first instance,<sup>273</sup> Lander J stated that whether the applicant had complied, or could comply, with the requirement or condition was a 'matter of fact'.<sup>274</sup> In relation to the application by Devlin, his Honour held that the evidence that he had fallen behind his hearing peers academically established that he could not comply with the requirement or condition imposed on him by the respondent, even though the respondent's conduct was not the only reason he had fallen behind.<sup>275</sup>

However, Lander J held that Hurst had not established that she could not comply with the requirement or condition that she be instructed in English. This was because there was no evidence that she had fallen behind her hearing peers academically as a result of receiving her education in English.<sup>276</sup> While his Honour accepted that that may be as a result of the 'attention which she receives from her mother and the instruction which she no doubt receives from her mother in Auslan',<sup>277</sup> he stated that it was 'a matter on which the experts have not discriminated'.<sup>278</sup>

269 (2015) 234 FCR 207, 248 [154] (Flick, Reeves and Griffiths JJ).

270 [2003] FCA 1085, [49].

271 [2003] FCA 1085, [49] (upheld on appeal: *CEO v Clarke* (2004) 138 FCR 121) (emphasis added).

272 (2006) 151 FCR 562.

273 [2005] FCA 405.

274 [2005] FCA 405, [69].

275 [2005] FCA 405, [805]-[806].

276 [2005] FCA 405, [819].

277 [2005] FCA 405, [819].

278 [2005] FCA 405, [820]. For a critique of this finding, see B Fogarty, 'The Silence is Deafening: Access to education for deaf children', (2005) 43(5) *Law Society Journal* 78.



The finding of Lander J that Hurst was able to comply with the respondent's condition as she could 'cope' without the assistance of Auslan was reversed on appeal.<sup>279</sup> The Full Court of the Federal Court unanimously held that Lander J had incorrectly focused on the comparison between the academic performance of Hurst and that of her peers.<sup>280</sup> Rather, the court held that the critical issue was:

whether, by reason of the requirement or condition that she be taught in English without Auslan assistance, she suffered serious disadvantage.<sup>281</sup>

The Full Court of the Federal Court further held that a child may be seriously disadvantaged if 'deprived of the opportunity to reach his or her full potential and, perhaps, to excel'.<sup>282</sup> In summary, the court held:

In our view, it is sufficient to satisfy that component of s 6(c) (inability to comply) that a disabled person will suffer serious disadvantage in complying with a requirement or condition of the relevant kind, irrespective of whether that person can 'cope' with the requirement or condition. A disabled person's inability to achieve his or her full potential, in educational terms, can amount to serious disadvantage. In Tiahna's case, the evidence established that it had done so.<sup>283</sup>

By contrast to the above decisions, an arguably narrower approach was taken in *Hinchliffe v University of Sydney* ('*Hinchliffe*').<sup>284</sup> In *Hinchliffe*, Driver FM held that the applicant and those assisting her were able to reformat the university course materials and, accordingly, she was able to comply with the university's condition that she use the course materials provided to her. Whilst there was a limited amount of material which could not be reformatted in an accessible format, which imposed a condition with which the applicant could not comply, his Honour had accepted that this condition was 'reasonable' in all of the circumstances of the case.<sup>285</sup> Accordingly, the applicant's case failed.

In *Devers*, the applicant (who has profound deafness) worked as a disability support worker in a residential care facility operated by the respondent. The applicant complained, amongst other things, that she was not provided with flashing lights to alert her that someone was at the door and that she was required to attend training sessions and staff meetings without the use of a qualified Auslan interpreter.

Marshall J found that the requirement or condition that the applicant access her employment without flashing lights was imposed by the respondent once it was aware that the applicant required their installation.<sup>286</sup> Applying the test in *Hurst*, his Honour concluded that the applicant had not shown that she suffered any serious disadvantage from her inability to answer the door. Relevantly, the applicant had been provided with a pager so that staff were able to attract her attention. Marshall J concluded: 'Her work consisted of caring for the clients at the [community residential unit] and she has not shown that her inability to answer the door led to any serious disadvantage.'<sup>287</sup>

279 *Hurst v Queensland* (2006) 151 FCR 562. For a discussion of this case, see Natasha Case, 'Clarifying indirect disability discrimination', (2006) 44(9) *Law Society Journal* 42.

280 (2006) 151 FCR 562, 580, [106].

281 (2006) 151 FCR 562, 580 [106].

282 (2006) 151 FCR 562, 584 [125].

283 (2006) 151 FCR 562, 585 [134].

284 [2004] FMCA 85.

285 *Hinchliffe v University of Sydney* [2004] FMCA 85, [115]–[116]. Arguably, his Honour did not take the 'reasonably liberal approach' suggested in *Travers* when considering the applicant's ability to comply with the requirement or condition. While the applicant's evidence was that she was able to reformat material, such process was 'time consuming and left her with no time to study' (381 [8]). In such circumstances it is arguable that the applicant could not meaningfully comply with the requirement or condition. Similarly, in *Ball v Silver Top Taxi Service Ltd* [2004] FMCA 967, Walters FM held that although it would cause 'significant inconvenience' to the applicant to comply with the requirement or condition imposed by the respondent, she could have complied with it ([70]). These decisions should perhaps be viewed with some caution in light of the 'serious disadvantage' approach confirmed by the Full Court of the Federal Court in *Hurst v Queensland* (2006) 151 FCR 562.

286 [2009] FCA 1392, [52].

287 [2009] FCA 1392, [54].

On the issue of interpreters, Marshall J held that this was a requirement with which the applicant could not comply. Although staff assisted with interpreting and the applicant's disadvantage was ameliorated by the provision of information in other forms such as workbooks and minutes of meetings, she was at a disadvantage in completing training, receiving information and participating in meetings and accordingly could not comply with the requirement.<sup>288</sup>

The test in *Clarke and Hurst* was applied in *Nojin v Commonwealth*<sup>289</sup>. In that case, the wages of persons with intellectual disabilities were assessed using the Business Services Wage Assessment Tool (BSWAT) (see above, 5.2.3(c)). The court held that the BSWAT disadvantaged disabled people with intellectual disabilities, when compared with disabled people without intellectual disabilities. While persons with intellectual disabilities could submit to an assessment which used the BSWAT, the use of that test would result in each of them being 'deprived of the opportunity to reach his ... full potential.'<sup>290</sup>

In *Agius v St Vincent's Health*,<sup>291</sup> the applicant was deaf. The respondent operated a hospital. On three occasions in 2008, the applicant attended the emergency department of that hospital. No Auslan interpreter was available. She claimed that the hospital had imposed a condition or requirement that she 'access and/or receive medical treatment without the assistance of an Auslan interpreter.' The court held that on each occasion she attended at the hospital, she had received appropriate medical care. She had communicated with relevant medical staff in writing and through a friend who accompanied her. The court noted that the applicant did not claim that she was humiliated or 'particularly distressed' after each hospital attendance. In these circumstances, Turner FM held that the applicant had not demonstrated that she had suffered any 'serious disadvantage.'<sup>292</sup>

## **(ii) Practicality and dignity**

In considering whether a complainant is able to comply with the relevant requirement or condition, it is also relevant to consider whether he or she can comply reasonably, practically and with dignity. In *Access for All Alliance*, Baumann FM cited with apparent approval a submission by the Acting Disability Discrimination Commissioner, appearing in the matter as amicus curiae, that:

in determining whether or not an applicant can 'comply' with a requirement or condition for the purposes of s 6(c), the Court should look beyond 'technical' compliance to consider matters of practicality and reasonableness.<sup>293</sup>

His Honour found that the relevant condition was that members of the applicant use toilet facilities where wash basins were not concealed from view. He accepted that this condition could not be complied with by people with disabilities who were 'required to undertake a careful toileting regime ... which reasonably requires use of wash basins out of public view and in private'.<sup>294</sup>

Similarly, in *Travers v New South Wales*<sup>295</sup> ('Travers'), (see 5.2.3(f) below), the applicant was a 12-year-old girl with spina bifida and resultant bowel and bladder incontinence. She claimed that she was denied access to an accessible toilet which was near her classroom. It was argued by the

288 [2009] FCA 1392, [73] (re training), [101] (re staff meetings). The applicant's claim was, however, unsuccessful as she was unable to establish that the requirement was not reasonable: [104]-[105]. The findings of Marshall J were not disturbed on appeal: *Devers v Kindilan Society* [2010] FCAFC 72.

289 (2012) 208 FCR 1.

290 (2012) 208 FCR 1, [130] (Buchanan J, Katzmann J agreeing, Flick J not deciding).

291 [2012] FMCA 840. Note the case was decided according to the DDA as in force in 2008.

292 [2012] FMCA 840, [39], [45], [47].

293 [2004] FMCA 915, [9]. The submissions of the Acting Disability Discrimination Commissioner are available at <[http://www.humanrights.gov.au/legal/submissions\\_court/amicus/hervey.html](http://www.humanrights.gov.au/legal/submissions_court/amicus/hervey.html)>.

294 [2004] FMCA 915, [81]. See further 5.2.3(c) above.

295 [2001] FMCA 18.

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 a toileting accident.<sup>296</sup> In considering an application for summary dismissal, Leane 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.<sup>297</sup>

### **(e) The effect of disadvantaging persons with the disability**

Prior to 5 August 2009, section 6(a) of the DDA required an aggrieved person to prove that a substantially higher proportion of people without the disability of the aggrieved person complied or were able to comply with the relevant requirement or condition.<sup>298</sup>

Section 6(1)(c) now requires an aggrieved person to prove that the condition or requirement ‘has or is likely to have the effect of disadvantaging persons with the disability’.

The term ‘disadvantaging’ is not defined in the DDA. The Explanatory Memorandum states that ‘in order for there to be discrimination, there must be a differential impact’.<sup>299</sup>

Two particular issues would seem likely to arise under the new section 6(1)(c):

- defining the group of people with the disability of the aggrieved person; and
- the evidence required to establish the group is disadvantaged by the condition or requirement.

### **(i) Defining the group of people with the disability of the aggrieved person**

The need to identify the relevant ‘disability’ with some precision has been discussed above.<sup>300</sup>

It is likely to be particularly important in this context as a broad definition of a person’s disability (for example ‘visual impairment’) may make proof of this element more difficult: it may require an aggrieved person to show that persons with a similar but less acute disability are also disadvantaged by the relevant requirement or condition. Such an approach would seem to be inconsistent with the protective purpose of the DDA.

### **(ii) Evidence of disadvantage**

The nature of the evidence that an aggrieved person will need to adduce to prove that a requirement or condition ‘has, or is likely to have, the effect of disadvantaging people with the disability’ is likely to vary from case to case.

In the context of the SDA, it has been successfully argued that a requirement to work full-time is a condition, requirement or practice that has the effect of disadvantaging women. The courts

<sup>296</sup> In support of this interpretation of compliance, Leane J referred to a line of cases including *Mandla v Dowell 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 & Trade* [1988] EOC 92-239, 77,238.

<sup>297</sup> [2000] FCA 1565, [17].

<sup>298</sup> Accordingly, for claims concerning actions prior to 5 August 2009, an applicant will need to identify a pool of persons without the disability with whom the aggrieved person can be compared. For information about the approach to indirect discrimination for incidents occurring prior to 5 August 2009, please refer to the archived version of *Federal Discrimination Law* at <<http://www.humanrights.gov.au/legal/FDL/archive.html>>.

<sup>299</sup> Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth), 9 [41-3].

<sup>300</sup> See *Qantas Airways Ltd v Gama* (2008) 167 FCR 537 and the discussion at 5.2.1(a).

have accepted, sometimes as a matter of judicial notice without any specific evidence, that this disadvantage stems from the fact that women are more likely to require part-time work to meet their family responsibilities.<sup>301</sup>

A similar approach was taken in relation to proof of the elements of the pre-2009 indirect discrimination provisions of the DDA. For example, in *Penhall-Jones v State of NSW*,<sup>302</sup> the applicant alleged that she had been indirectly discriminated against because her employer required her to attend formal and stressful interviews. Under the former indirect discrimination provisions, the applicant was required to show that a substantially higher proportion of people without her disability (which was adjustment disorder) could comply. Raphael FM rejected Ms Penhall-Jones' claim because she had not led any evidence of how other persons with her disability would have responded to such an interview, nor how persons without her disability would have responded. In reaching this conclusion his Honour did, however, note that he accepted:

that there are occasions where one can take the evidence of one complainant as being typical of all members of the group. One person in a wheelchair who complained that she was unable to climb the stairs to the Opera House might be accepted as speaking for all persons in her position, but the very nature of the complaints made by Ms Penhall-Jones cries out for more particularisation of the group to which it is said she belongs. In the absence of such particularisation Ms Penhall-Jones cannot proceed with a claim of indirect discrimination.<sup>303</sup>

In *Rawcliffe v Northern Sydney Central Coast Area Health Service*,<sup>304</sup> Smith FM noted that the authorities on the former section 6(a) of the DDA (requiring a comparison with people without the disability) 'allow considerable flexibility'<sup>305</sup> on the identification of the relevant groups for comparison, including the application of 'commonsense'<sup>306</sup> or 'ordinary human experience of which I can take judicial notice',<sup>307</sup> rather than necessarily requiring statistical or other such evidence.<sup>308</sup>

## (f) Reasonableness

Section 6(3) of the DDA provides a defence to a claim of indirect discrimination, where the condition or requirement is shown to be reasonable in the circumstances of the case. Section 6(4) of the DDA shifts the burden of proving 'reasonableness' onto the person who requires or proposes to require, the person with the disability to comply with the requirement or condition.

This is a change from the position prior to the 2009 amendments to the DDA<sup>309</sup> – previously an applicant needed to prove that the requirement or condition was *not* reasonable.

Placing the burden of proving reasonableness on the respondent is consistent with the approach taken in the SDA<sup>310</sup> and the ADA.<sup>311</sup>

301 See *Hickie v Hunt & Hunt* [1998] HREOCA 8, [6.17.10] (extract at (1998) EOC 92-910); *Escobar v Rainbow Printing (No 2)* [2002] FMCA 122, [33]; *Mayer v Australian Nuclear Science & Technology Organisation* [2003] FMCA 209, [70].

302 [2008] FMCA 832, [69].

303 [2008] FMCA 832, [69].

304 [2007] FMCA 931.

305 [2007] FMCA 931, [84].

306 [2007] FMCA 931, [87].

307 [2007] FMCA 931, [86].

308 Approving *Jordan v North Coast Area Health Service (No 2)* [2005] NSWADT 258.

309 *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth).

310 SDA, s 7B.

311 ADA, s 15(2).

However, unlike the SDA,<sup>312</sup> the DDA does not provide guidance on the matters to be taken into account in deciding whether the relevant requirement or condition is reasonable in the circumstances.<sup>313</sup> The DDA simply requires that reasonableness be assessed 'having regard to the circumstances of the case'. It is clear that this requires all relevant circumstances, including the circumstances of the respondent, to be taken into account.<sup>314</sup>

In *Waters*, the Victorian Equal Opportunity Board at first instance had held that the question of whether the respondent's scratch ticketing system was reasonable was to be assessed by having regard solely to the circumstances of the complainants.<sup>315</sup> In balancing the relevant considerations, the Board had therefore disregarded the financial and economic considerations advanced by the respondent. On appeal, Phillips J rejected this approach, holding that 'reasonableness' was to be assessed by reference to all relevant factors, including the circumstances of the respondent. The majority of the High Court agreed with that approach.<sup>316</sup> For example, McHugh J held:

In a legal instrument, subject to a contrary intention, the term 'reasonable' is taken to mean reasonable in all the circumstances of the case. Nothing in the context of s 17(5)(c) indicates that the term should not be given its ordinary meaning.<sup>317</sup>

And further:

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].<sup>318</sup>

Whilst the decision in *Waters* involved a provision in the *Equal Opportunity Act 1984* (Vic), the broad approach taken to the issue of 'reasonableness' has also been applied in relation to the DDA.<sup>319</sup>

A comprehensive summary of the relevant principles in relation to the assessment of reasonableness in the context of former section 6(b) was provided in *CEO v Clarke*.<sup>320</sup> Relevant to the current terms of section 6, the court held:

- (ii) The test of reasonableness 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 condition or requirement, on the other: *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251, at 263, per Bowen CJ and Gummow J; *Waters v Public Transport Corporation*, at 395-396, per Dawson and Toohey JJ; at 383, per Deane J. Since the test is objective, the subjective preferences of the aggrieved person are not determinative, but may be relevant in assessing whether the requirement or condition is unreasonable: *Commonwealth v Human Rights and Equal Opportunity Commission* (1995) 63 FCR 74, at 82-83, per Lockhart J.

312 See s 7B of the SDA.

313 See discussion of 'reasonableness' under the SDA at 4.3.3 above.

314 *Waters v Public Transport Corporation* (1991) 173 CLR 349, 378-380.

315 Earlier decisions of the Human Rights and Equal Opportunity Commission had also held that evidence adduced by a respondent in relation to financial hardship should not be considered relevant to determining the reasonableness or otherwise of a requirement or condition as such factors should be considered in the context of the defence of 'unjustifiable hardship': see, for example, *Scott v Telstra Corporation Ltd* (1995) EOC 92-917, 78,400; *Francey v Hilton Hotels of Australia Pty Ltd* (1997) EOC 92-903, 77,450-51.

316 (1991) 173 CLR 349, 365 (Mason CJ and Gaudron J), 383 (Deane J), 396-397 (Dawson and Toohey JJ), 408-411 (McHugh J).

317 (1991) 173 CLR 349, 410.

318 (1991) 173 CLR 349, 411.

319 See, for example, *Sluggett v Human Rights and Equal Opportunity Commission* (2002) 123 FCR 561, 574 [46].

320 (2004) 138 FCR 121.

- (iii) The test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience: *Styles*, at 263. It follows that the question is not whether the decision to impose the requirement or condition was correct, but whether it has been shown not to be objectively reasonable having regard to the circumstances of the case: *Australian Medical Council v Wilson* (1996) 68 FCR 46, at 61-62, per Heerey J; *Commonwealth Bank v HREOC*, at 112-113, per Sackville J.
- (iv) The Court must weigh all relevant factors. While these may differ according to the circumstances of each case, they will usually include the reasons advanced in favour of the requirement or condition, the nature and effect of the requirement or condition, the financial burden on the alleged discrimination [sic] of accommodating the needs of the aggrieved person and the availability of alternative methods of achieving the alleged discriminator's objectives without recourse to the requirement condition: *Waters v Public Transport Corporation*, at 395, per Dawson and Toohey JJ (with whom Deane J agreed on this point, at 383-384). However, the fact that there is a reasonable alternative that might accommodate the interests of the aggrieved person does not of itself establish that a requirement or condition is unreasonable: *Commonwealth Bank v HREOC*, at 88, per Beaumont J; *State of Victoria v Schou* (2004) 8 VR 120, at [26], per Phillips JA.<sup>321</sup>

In *Sklavos v Australasian College of Dermatologists*,<sup>322</sup> Jagot J accepted that these principles continue to be relevant, despite the 2009 amendments to section 6.<sup>323</sup>

## (i) Education cases

The issue of 'reasonableness' has frequently arisen in the educational context.<sup>324</sup> For example, in *Hurst and Devlin v Education Queensland*,<sup>325</sup> the applicants alleged that the respondent imposed a requirement or condition that they receive their education in English (including in Signed English<sup>326</sup>) without the assistance of an Auslan<sup>327</sup> teacher or interpreter. In determining whether that requirement or condition was 'reasonable', Lander J followed the approach of Madgwick J in *Clarke* and stated that the 'question of reasonableness will always be considered in light of the objects of the Act'.<sup>328</sup> His Honour held that it was reasonable for Education Queensland not to have adopted a bilingual-bicultural program<sup>329</sup> in relation to the education of deaf students prior to 30 May 2002,<sup>330</sup> stating:

I am satisfied on the evidence...that Education Queensland has progressed cautiously but appropriately, towards the introduction of a bilingual-bicultural program and the use of Auslan as a method of communication for those programs.

It must be accepted that an education system cannot change its method of education without first inquiring into the benefits of the suggested changes and the manner in which those changes might be implemented.

It must be first satisfied that there are benefits in the suggested changes. It must be satisfied that it can implement those changes without disruption to those whom it is delivering its service.

321 (2004) 138 FCR 121, 145-146 [115] (Sackville and Stone JJ, with whom Tamberlin J agreed).

322 [2016] FCA 179, [168].

323 Jagot J went on to cite *Commonwealth Bank v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78, 110-113 (Sackville J).

324 See further 5.2.6(b) (Education Standards) below.

325 [2005] FCA 405. For a discussion of the decision of Lander J, see Ben Fogarty, 'The Silence is Deafening: Access to education for deaf children', (2005) 43(5) *Law Society Journal* 78-81.

326 Signed English is the reproduction of English language into signs. It has the same syntax and grammar as English and as such, is not a language separate from English: [2005] FCA 405, [127]-[128]. Signing in English, however, refers to the use of Auslan signs in English word order: [2005] FCA 405, [129].

327 Auslan is the native language of the deaf community in Australia. It is a visual-spatial language with its own complex grammatical and semantic system and does not have an oral or written component: [2005] FCA 405, [125]-[126].

328 [2005] FCA 405, [74]-[75].

329 A bilingual-bicultural approach to the education of the deaf recognises Auslan and Signed English as distinct languages and students are instructed in Auslan as a first language and learn Signed English as a second language: [2005] FCA 405, [466].

330 [2005] FCA 405, [790].



It was appropriate, in my opinion, for Education Queensland to take the time that it did in considering the benefits which would be associated with bilingual-bicultural program and the use of Auslan.

I accept the respondent's argument that changes, as fundamental as those proposed in the bilingual-bicultural program, should be evolutionary rather than revolutionary. It is too dangerous to jettison a system of education and adopt a different system without being first sure that the adopted system is likely to offer increased benefits to the persons to whom the education is directed.<sup>331</sup>

However, Lander J found that 'Auslan will still be of assistance to those who are profoundly deaf even if delivered on a one-on-one basis';<sup>332</sup> though the Total Communication Policy adopted by the respondent did not allow for Auslan as a method of communication.<sup>333</sup> Consequently, (without making any findings about the reasonableness of the Total Communication Policy), his Honour held that it was unreasonable for the respondent not to have assessed the applicants' needs prior to 30 May 2002 to determine whether they should be instructed in English or in Auslan. Furthermore, his Honour held that if such an assessment had been undertaken, it would have established that 'it would have been of benefit to both of [the applicants] to have been instructed in Auslan rather than in English'.<sup>334</sup>

The first applicant (Hurst) successfully appealed the decision of Lander J to the Full Court of the Federal Court.<sup>335</sup> However, that appeal was only in relation to Lander J's finding that Hurst, unlike Devlin, was able to comply with the condition of being taught without the assistance of Auslan (discussed at 5.2.3(d)). The court did not disturb or discuss Lander J's findings on the issue of reasonableness.

In *Hinchliffe v University of Sydney*<sup>336</sup> ('Hinchliffe'), Driver FM held that, with the exception of certain course material, the applicant could comply with the university's condition that she use the course materials provided to her. In relation to the occasional material which was not accessible, his Honour held that the availability of a disability services officer to deal with such occasional problems in reformatting course materials was sufficient and adequate and, accordingly, rendered the university's requirement reasonable.<sup>337</sup>

In *Travers* (see 5.2.3(d) above) Raphael FM considered a requirement or condition that students in a particular class utilise the toilet in another building, rather than a toilet outside the classroom. This was a requirement with which the applicant, a student with a disability that caused incontinence, could not comply.<sup>338</sup> Raphael FM found the requirement or condition to be unreasonable, having considered the perspective of the applicant, the school and other students.

In *Minns*, the applicant complained about the application of a school's disciplinary policy to him (see 5.2.2(b) above). 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.<sup>339</sup>

331 [2005] FCA 405, [781]-[785].

332 [2005] FCA 405, [793].

333 [2005] FCA 405, [794].

334 [2005] FCA 405, [795]-[797].

335 *Hurst v Queensland* (2006) 151 FCR 562. The then Human Rights and Equal Opportunity Commission was granted leave to intervene in these proceedings. The submissions are available at <[http://www.humanrights.gov.au/legal/submissions\\_court/intervention/hurst.html](http://www.humanrights.gov.au/legal/submissions_court/intervention/hurst.html)>.

336 [2004] FMCA 85.

337 [2004] FMCA 85, [122].

338 See [5.2.3(d)] on the issue of the inability to comply with a requirement or condition.

339 [2001] FMCA 18, [263].



In *Sklavos v Australasian College of Dermatologists*,<sup>340</sup> the applicant was a doctor who was training to become a dermatologist. To become a fully qualified dermatologist, it was necessary to become a fellow of the Australasian College of Dermatologists ('the College'). Fellowship was granted following the successful completion of the College's final examinations. The applicant had developed a disability – being a specific phobia of the College's examinations – which prevented him from completing those examinations. It was agreed that the College was both a 'qualifying body' for the purposes of section 19 of the DDA and an 'education provider' for the purposes of section 22 of the DDA.

The applicant claimed that the College discriminated against him for the purposes of both sections 5(2) and 6(2) of the DDA by failing to make reasonable adjustments. Those elements of his complaint were rejected (see 5.2.4 below). In the alternative, the applicant claimed that the College had discriminated against him for the purposes of section 6(1) of the DDA.

The court agreed that the College had imposed a requirement or condition on the applicant – namely that he successfully complete its final examinations. That requirement was facially neutral, the applicant could not comply with it because of his disability, and the requirement disadvantaged the applicant because of his disability. However, Jagot J held that the requirement or condition was reasonable. The purpose of the examinations was to ensure that those who became entitled to practice as dermatologists were competent to do so. It was not disputed that it was reasonable for the College to ensure the competence of those admitted to fellowship. However, the applicant submitted that an alternative, non-discriminatory method could have been chosen by the College to achieve that objective.

Jagot J held that the examinations were a significant factor in the accreditation of the College's training program by the Australian Medical Council (AMC). They had been designed and refined over many years as a result of a very large amount of work. The College would have had to persuade the AMC that any alternative to the examinations would perform the same function. The examinations were devised and conducted by fellows of the College on a voluntary basis. Any alternative to the examinations would have required a great deal of work on the part of those volunteers. While the imposition of the condition or requirement may have disadvantaged the applicant, it was not established that the applicant would have satisfied any alternative test of competence that the College might have devised. While it may have been possible to devise an alternative method of assessing the applicant's competence, in all the circumstances it was reasonable for the College to impose the requirement or condition that the applicant pass the final examination.<sup>341</sup>

## **(ii) Employment cases**

The potentially broad scope of the considerations that are relevant to the question of 'reasonableness' has also been confirmed in the employment context. In *Daghlian*, the respondent's 'no chair' policy, which prohibited employees from using stools behind the retail counter, was found to impose a 'requirement or condition' that the applicant not be seated at the retail counter during her work hours.<sup>342</sup> The applicant had physical disabilities which limited her ability to stand for long periods.

In finding that the requirement or condition was not reasonable, Conti J considered a wide 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);

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340 [2016] FCA 179.

341 [2016] FCA 179.

342 [2003] FCA 759, [110]-[111].

- 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.<sup>343</sup>

In *Trindall*, Driver FM accepted that the imposition of certain requirements were reasonable in light of the applicant's sickle cell trait, including the imposition of 'flexible and informal restrictions' and the requirement that the applicant provide a medical report to justify the lifting of certain work restrictions. However, his Honour held that it was unreasonable for the respondent to require a *further* medical opinion before it would lift the relevant restrictions.<sup>344</sup>

In *Devers*, Marshall J found that the applicant had not proven<sup>345</sup> that it was unreasonable to require her to work without certain workplace adjustments. The applicant (who has profound deafness) worked as a disability support worker in a residential care facility operated by the respondent. The applicant complained, amongst other things, that she was not provided with flashing lights to alert her that someone was at the door and that she was required to attend training sessions and staff meetings without the use of a qualified Auslan interpreter.

In relation to the flashing lights, Marshall J took into account that the applicant was working approximately 15 hours per fortnight, that answering the door was incidental to the performance of her duties and that the respondent's policy was not to have staff members work alone at any time.<sup>346</sup>

In relation to the failure to provide interpreters for training sessions, Marshall J took into account the cost, that Ms Devers was a casual employee, that the respondent sought to ensure that information was conveyed to the applicant in other ways and that '[a]s a not for profit, charitable organisation, its primary obligation was the care of its clients, within its budget'.<sup>347</sup> In relation to the failure to provide interpreters for staff meetings, Marshall J also took into account the discrepancy between the applicant's income and the cost of interpreters and that her inability to comply with the requirement or condition did not cause her 'significant adverse consequences'.<sup>348</sup>

On appeal Ms Devers contended, amongst other things, that Marshall J erred by considering the amount of time that she was in the workplace as a factor relevant to assessing whether the requirement that she work without the adjustments in question was reasonable. The Full Court of the Federal Court agreed with Marshall J that this factor was relevant and stated:

It would be inappropriate to disregard completely the fact that the appellant was, in a relative sense, only an occasional presence in the workplace rather than a permanent employee. That factor would not justify discrimination but it is a factor which may be taken into account in assessing both the arguments the appellant advanced as to what she needed to perform her tasks and, as importantly, the reasonable balance which has to be struck when that issue is raised.<sup>349</sup>

343 [2003] FCA 759, [111].

344 [2005] FMCA 2, [179]-[182].

345 Note that since this decision, the onus of proof in relation to the reasonableness of a requirement or condition has shifted to the respondent: see DDA, s 6(4). The DDA also now contains an explicit recognition of the need to make reasonable adjustments: ss 5(2), 6(2).

346 [2009] FCA 1392, [55].

347 [2009] FCA 1392, [80]-[83].

348 [2009] FCA 1392, [104]-[105].

349 *Devers v Kindilan Society* [2010] FCAFC 72, [87] (Ryan, Mansfield and McKerracher JJ).

In *Nojin v Commonwealth*,<sup>350</sup> the respondents had assessed the wages to be paid to two workers with disabilities using the 'Business Services Wage Assessment Tool' ('BSWAT') (see above, 5.2.3(c)). The Full Court of the Federal Court held that the use of the BSWAT in the case of the applicants amounted to imposing a requirement or condition on the applicants, which disadvantaged them and with which they could not comply because of their disabilities.<sup>351</sup> A majority of the Full Court of the Federal Court held that assessing the wages of the applicants using the BSWAT was not reasonable. That was despite the fact that the BSWAT enjoyed widespread support. The applicants were paid under an award which fixed their wage as a percentage of a Grade 1 worker under that award. The percentage was determined by the use of the BSWAT. The BSWAT assessed both productivity and 'competencies.' Assessment of those competencies was not necessary for other Grade 1 workers (ie Grade 1 workers without disabilities). Further, the competencies which were assessed under the BSWAT were not shown to be related to the tasks the applicants were required to perform in the workplace. For these and related reasons, Buchanan and Katzmann JJ held that the use of the BSWAT was not reasonable.<sup>352</sup> Katzmann J held:

In particular, it strikes me as manifestly unreasonable that the appellants' wages be determined (even in part) by their ability to undertake tasks they would never be called upon to perform, by a method of assessment that imposes real disadvantages on them because of their intellectual disabilities and which, as Buchanan J puts it, understates the value of their actual work contributions, and when they also have to fulfil criteria that non-disabled employees against whose wages their wages are to be measured need not fulfil.<sup>353</sup>

### (iii) *Access to premises*

The reasonableness of implicit requirements or conditions associated with the accessibility of public premises and facilities arose for consideration in *Access for All Alliance* (see 5.2.3(c) above). In that case, members of the applicant organisation alleged that certain public premises were inaccessible to people with disabilities. Bauman FM found that the conditions for access to the community centre and picnic tables were reasonable in all the circumstances.<sup>354</sup> However, his Honour found that the requirement or condition relating to the public toilets, namely that the wash basins were outside the toilet and not concealed from public view, was not reasonable, on the basis that:

some persons with disabilities have personal hygiene difficulties and some are required to undertake a careful toileting regime...which reasonably requires use of wash basins out of public view and in private.<sup>355</sup>

His Honour went on to find that justifications for the placement of the basins outside the toilets advanced by the respondent were 'offset by the community expectation that persons with a disability should be entitled to complete a toileting regime in private'.<sup>356</sup> Suggested alternatives to being able to use the wash basins as part of a toileting regime (such as carrying 'Wet Ones', sponges, clean clothes and paper towels) were rejected by his Honour as 'inadequate'.<sup>357</sup>

Baumann FM also considered the relevance of the Building Code of Australia ('BCA') and the Australian Standards. His Honour accepted the submission of the Acting Disability Discrimination Commissioner, appearing as amicus curiae, that 'as standards developed by technical experts in building, design and

350 (2012) 208 FCR 1. The case was decided under the DDA as in force prior to the 2009 Amendments. It was therefore necessary for the applicants to establish that the requirement or condition was not reasonable.

351 (Buchanan and Katzmann JJ, Flick J not deciding).

352 (2012) 208 FCR 1, [134]-[140] (Buchanan J); [245]-[267] (Katzmann J; Flick J dissenting).

353 (2012) 208 FCR 1, [265] (Katzmann J).

354 [2004] FMCA 915, [76]-[78] (in relation to the community centre), [79]-80] (in relation to the picnic tables).

355 [2004] FMCA 915, [81].

356 [2004] FMCA 915, [81].

357 [2004] FMCA 915, [81].

construction, the BCA and the Australian Standards are relevant and persuasive in determining ... whether or not a requirement or condition is “reasonable”.<sup>358</sup> His Honour accepted that the Australian Standards and the BCA were ‘a minimum requirement which may not be enough, depending on the context of the case, to meet the legislative intent and objects of the DDA’.<sup>359</sup> In relation to the toilet facilities, Baumann FM found that the lack of any requirement under the Australian Standards or the BCA to provide an internal wash basin did not alter his finding as to unreasonableness.<sup>360</sup>

#### (iv) *Goods and services*

The issue of reasonableness in relation to goods and services (as well as access to premises) arose in *Forest v Queensland Health*.<sup>361</sup> The respondent in that case argued that it was reasonable to prohibit assistance animals, other than guide and hearing dogs and other animals approved in advance, from the relevant medical premises (a hospital and a dental clinic) on the grounds of health and safety and infection control.<sup>362</sup> At first instance, Collier J rejected this argument, noting the beneficial objects of the DDA and the fact that section 9 does not distinguish between guide and hearing dogs and other types of assistance animals. Her Honour further held that the respondent’s policy on admission of animals was vague, lacking in objective criteria and effectively gave complete discretion to the respondent to determine whether the relevant animal was an assistance animal for the purposes of the DDA.<sup>363</sup>

On appeal,<sup>364</sup> however, the Full Court of the Federal Court disagreed. Spender and Emmett JJ noted that there was no suggestion that the policy relating to admission of animals would be exercised in a capricious or arbitrary fashion.<sup>365</sup> Their Honours concluded:

The fact that a judgment was required is not of itself unreasonable. There was nothing unreasonable, in the circumstances of this case, in requiring the approval of the management of the hospital or the health centre, as the case may be, before a dog was permitted entry into the relevant facility.<sup>366</sup>

Similarly, Black CJ observed in obiter that:

it is not per se unreasonable for a health authority to administer objective criteria to protect those to whom it has a duty of care.<sup>367</sup>

For a discussion of the provisions of the DDA relating to assistance animals, see 5.2.5(c) below.

In *Agius v St Vincent’s Health*,<sup>368</sup> the applicant claimed that the respondent’s failure to provide an Auslan interpreter in the emergency department (‘ED’) of a hospital it operated amounted to indirect discrimination on the ground of her disability (see 5.2.3(d)(i) above). Turner FM held that it would not have been reasonable for the respondent to provide an Auslan interpreter in circumstances where the ED operated 24 hours a day, the applicant attended the ED only occasionally, very few patients who attended the ED were deaf (and therefore required an Auslan interpreter – in 2008-2009, 57 out of 38,956 attendances were by deaf people), the cost of providing a full-time Auslan interpreter would

358 [2004] FMCA 915, [13]-[14]. The submissions of the Acting Disability Discrimination Commissioner are available at <[http://www.humanrights.gov.au/legal/submissions\\_court/amicus/hervey.html](http://www.humanrights.gov.au/legal/submissions_court/amicus/hervey.html)>.

359 [2004] FMCA 915, [13]-[14].

360 [2004] FMCA 915, [81].

361 (2007) 161 FCR 152, reversed on appeal in *Queensland (Queensland Health) v Forest* (2008) 168 FCR 532.

362 (2007) 161 FCR 152, 171, [72].

363 (2007) 161 FCR 152, 172-174, [74]-[84].

364 *Queensland (Queensland Health) v Forest* (2008) 168 FCR 532.

365 (2008) 168 FCR 532, 557 [125].

366 (2008) 168 FCR 532, 557 [126].

367 (2008) 168 FCR 532, 535 [10].

368 [2012] FMCA 840. Note the case was decided according to the DDA as in force in 2008.

have been \$40,000 per annum for a 40 hour week, it was difficult to obtain Auslan interpreters, and there were reasonable alternatives to the provision of an interpreter available to the hospital.<sup>369</sup>

## 5.2.4 Reasonable adjustments

From 5 August 2009, the DDA creates an explicit duty to make reasonable adjustments for people with disability.

The duty is embedded into the definitions of both direct (section 5(2)) and indirect (section 6(2)) discrimination. The Explanatory Memorandum to the amending legislation states:

Until relatively recently, the general view, including in the case law, was that the Disability Discrimination Act impliedly imposes such a duty if such adjustments are necessary to avoid unlawful discrimination – subject to the defence of unjustifiable hardship. This view was supported by the Explanatory Memorandum of the Disability Discrimination Act and Second Reading Speech delivered when the Disability Discrimination Act was first enacted.<sup>370</sup>

The introduction of a duty to make reasonable adjustment is also consistent with the requirement to make ‘reasonable accommodation’ in the Disabilities Convention.<sup>371</sup>

In the educational context, the *Disability Standards for Education 2005* (‘Education Standards’) also impose a positive obligation on education providers to make ‘reasonable adjustments’ to accommodate the needs of students with disabilities (see discussion under 5.2.6(b)).

### (a) ‘Reasonable adjustments’

‘Reasonable adjustment’ is defined in subsection 4(1) as follows:

[a]n adjustment to be made by a person is a **reasonable adjustment** unless making the adjustment would impose an unjustifiable hardship on the person.

Accordingly, ‘reasonable adjustments’ are all adjustments that do not impose an unjustifiable hardship on the person making the adjustments.<sup>372</sup>

### (b) Direct discrimination under section 5(2)

Section 5(2) provides:

- 5(2) For the purposes of this Act, a person (the **discriminator**) also **discriminates** against another person (the **aggrieved person**) on the ground of a disability of the aggrieved person if:
- (a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and
  - (b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.

The Explanatory Memorandum states that:

New subsection 5(2) provides that a person is discriminating against another person if he or she fails to make, or proposes not to make, reasonable adjustments for the person with disability, where the failure

369 [2012] FMCA 840, [51].

370 Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 8 [38].

371 See Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 9 [41–7].

372 Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 8 [36].

to make such adjustments has, or would have, the effect that the person with disability is treated less favourably than a person without disability in circumstances that are not materially different.<sup>373</sup>

As discussed above, section 5(3) now provides that, circumstances are not *materially different* merely because of the fact that the person with the disability requires adjustments to be made.

Section 5(2) was considered in detail in *Watts v Australian Postal Corporation*.<sup>374</sup> The applicant was an employee of the respondent who developed a psychological condition which constituted a disability for the purposes of the DDA. She was for a time seconded to a different role with varied working conditions. She was later required to take leave for an extended period, including her paid sick leave and annual leave entitlements, and, when those entitlements were exhausted, unpaid leave.

Mortimer J held that the word ‘adjustment’ bears its ordinary meaning of an ‘alteration or modification.’<sup>375</sup> She further held:

- The concept of ‘reasonable adjustments’ is drawn from the concept of ‘reasonable accommodation’ in the Disabilities Convention. An interpretation of section 5(2) consistent with the Disabilities Convention should, where possible, be preferred.
- An adjustment is ‘facultative’ and made ‘for’ a person. Adjustments may be very specific to a particular person and their disability.
- A broad range of modifications or alterations may constitute ‘adjustments.’ What adjustments are required by the DDA may change with changing technology.
- What adjustments should be made for a person with a disability may change over time, with their changing circumstances. They may involve use or provision of technology, or human interaction.
- A person may require more than one adjustment.<sup>376</sup>

Citing *Purvis*, Mortimer J held that section 5(1) of the DDA is concerned with ‘formal’ equality, or equality of treatment. Section 5(2), on the other hand, is concerned with ‘substantive’ equality or equality of outcomes. For that reason, the comparison required by section 5(2)(b) directs attention to the *effect* of a failure to make, or to propose to make, adjustments. For a failure to make reasonable adjustments under section 5(2)(a) to constitute discrimination, it must have the result that the affected person is treated less favourably than a person without the disability.<sup>377</sup>

In the applicant’s case, Mortimer J held that the respondent had failed to make reasonable adjustments for an extended period. That failure to make adjustments had had the effect that the applicant was treated less favourably than a hypothetical comparator because of her disability for a part, but not for the whole, of that period. That is because, some time after the applicant had been required to take indefinite leave, the applicant had refused a request by the respondent to see a medical practitioner. From that time forwards, the applicant was not ‘kept away from work’ by the respondent’s failure to make reasonable adjustments. Rather, she was kept away from work by her ‘lack of cooperation with her employer.’<sup>378</sup> This was a finding of fact, made in circumstances where the applicant eventually did agree to an assessment by the relevant medical practitioner, and that assessment led quickly to the making of reasonable adjustments and a return to work for the applicant.

373 Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 8.

374 (2014) 222 FCR 220

375 (2014) 222 FCR 220, 228, [22]. Cited with approval by the Full Court of the Federal Court in *Mulligan v Virgin Australia Airlines Pty Ltd* (2015) 234 FCR 207, 247, [146] (Flick, Reeves and Griffiths JJ).

376 (2014) 222 FCR 220, 227 [18]-26].

377 (2014) 222 FCR 220, 277 [241]-[246].

378 (2014) 222 FCR 220, 281 [265].

While made in the context of section 5(2) of the DDA, a number of Mortimer J's remarks about the nature of adjustments are likely to apply equally to section 6(2).

In *Haraksin v Murrays Australia Ltd (No. 2)*,<sup>379</sup> the respondent operated a fixed route coach service between Sydney and Canberra. Ms Haraksin sought to book a return journey between those cities. As a result of her disability, she required a wheelchair. At the time she tried to book her journey, she told the respondent that she required a wheelchair accessible seat. The respondent did not have any wheelchair accessible buses or coaches in its fleet, and therefore told the applicant it could not offer her an accessible seat. Nicholas J found that an adjustment the respondent could have made, but did not, would have been to 'arrange for a vehicle that was equipped with wheelchair access to be deployed on its Sydney-Canberra service so as to allow the applicant to undertake her journey at or around the time she needed to travel.'<sup>380</sup> The respondent did not submit that this would not have been reasonable. There was no evidence that an accessible bus could not have been deployed. In those circumstances, Nicholas J held that the adjustment would have been a reasonable adjustment. He therefore found that the respondent had discriminated against Ms Haraksin within the meaning of section 5(2) of the DDA.<sup>381</sup>

In *Sklavos v Australasian College of Dermatologists*,<sup>382</sup> the applicant had a disability which prevented him from successfully completing the final examinations of the Australasian College of Dermatologists (see 5.2.3(f)(i) above). Passing those examinations was necessary to become a fellow of the College and to practice as a fully qualified dermatologist. The applicant claimed the College could have, but did not, make a number of adjustments. One of these was that the applicant:

could have been assessed by a method that did not involve the use of examinations conducted by the College.<sup>383</sup>

Another was that the College could have modified its examinations.

Jagot J doubted that the first of these was truly an 'adjustment.' The College required all Australian trainees to pass its examinations. The proposal made by the applicant was that that requirement 'be bypassed or abandoned altogether.'<sup>384</sup>

The application failed for a number of other reasons, including that the adjustments were not reasonable.

With respect to identifying what adjustments are required under the DDA, Jagot J expressed the view that for section 5(2) of the DDA to be engaged, there must be a 'failure' to make an adjustment. It appears that that does not necessarily require that a person with a disability request that an adjustment be made. However, 'there must exist some circumstance calling for action by the putative discriminator.'<sup>385</sup>

In *Hudson v Australian Broadcasting Corporation*,<sup>386</sup> an interlocutory decision capping costs in the principal proceeding, Manousaridis J made a number of remarks about the operation of section 5(2), and appeared to take a different approach to the construction of the provision than that taken in *Sklavos*. Manousaridis J stated:

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379 (2013) 211 FCR 1.

380 (2013) 211 FCR 1, 12, [46].

381 (2013) 211 FCR 1, 12- 13, [46]-[48].

382 [2016] FCA 179.

383 [2016] FCA 179, [84].

384 [2016] FCA 179, [125].

385 [2016] FCA 179, [154]. Cf the discussion of *Huntley v State of NSW, Department of Police and Justice (Corrective Services NSW)* [2015] FCCA 1827, at 5.3.1(d)(ii) below.

386 [2016] FCCA 917.



[Section] 5(2)(b) of the DDA provides that the adjustments must be of a character that, if not made, have or would have a particular effect. The required effect is that the PWD, because of his or her disability, is treated less favourably than a person without the disability would be treated in circumstances that are not materially different. Paragraph (b) of s.5(2) of the DDA, therefore, contemplates that a PWD is “treated less favourably” because of his or her disability; but an adjustment is available which, if the discriminator makes it, will eliminate the PWD’s being treated less favourably, or, perhaps, will reduce the extent to which the PWD will be treated less favourably, because of the PWD’s disability.

The expression “treated less favourably” as it appears in s.5(2)(b) of the DDA requires additional comment. It does not have the same meaning as the expression in s.5(1) of the DDA. In s.5(1), “treated less favourably” means the less favourable treatment the PWD experiences when the discriminator, because the PWD has a disability, treats the PWD differently than he or she would treat a person who does not have the disability in circumstances that are not materially different. In s.5(2), on the other hand, “treated less favourably” means the disadvantages the PWD experiences because of his or her disability, not because the discriminator has treated the PWD differently than he or she would treat a person without a disability in circumstances that are not materially different. Subsection 5(2) defines as discrimination a person’s treating a PWD no differently than he or she would treat a person who does not have a disability in circumstances where an adjustment could reasonably be made that would overcome or perhaps ameliorate the disadvantages the PWD has because of the disability when compared with persons who do not have the disability in circumstances not materially different.<sup>387</sup>

### (c) Indirect discrimination under section 6(2)

Section 6(2) of the DDA now provides:

- 6(2) For the purposes of this Act, a person (the **discriminator**) also **discriminates** against another person (the **aggrieved person**) on the ground of a disability of the aggrieved person if:
- (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
  - (b) because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and
  - (c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.

The Explanatory Memorandum to the amending legislation states that

a person does not discriminate if the person makes all reasonable adjustments to eliminate the disadvantage or minimise it to the greatest extent possible.

...the question of whether the person has made ‘all reasonable adjustments’ takes into account the circumstances of the parties involved, including what is or is not possible *for the person making the adjustments*. On the other hand, the question of what adjustments can be made to ‘minimise as much as possible the disadvantageous effect of the requirement or condition’ requires a consideration to be made of what adjustments are possible to be made *generally* – not what is possible *for that particular person*.<sup>388</sup>

In *Innes v Rail Corporation of New South Wales (No. 2)*,<sup>389</sup> Raphael FM found that the respondent railway operator failed to make any, or any audible, audio announcements to inform passengers of their whereabouts during a number of journeys on its trains. This had occurred on 36 out of 315 journeys taken by the applicant, who was blind. Raphael FM found that in failing to make audible

387 [2016] FCCA 917, [29]-[30].

388 Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 9 [41-8] - 10 [41-9] (emphasis in original).

389 [2013] FMCA 36.

announcements, the respondent had imposed a requirement or condition that the applicant 'made himself aware of where he was by utilising his sight'.<sup>390</sup> Raphael FM further found that the applicant could not satisfy this requirement or condition, that it disadvantaged the applicant and was not reasonable. The respondent's conduct therefore amounted to indirect discrimination for the purposes of section 6(1) of the DDA.<sup>391</sup>

Raphael FM also found that the respondent had imposed a requirement or condition on the applicant that 'the applicant know his whereabouts from the information provided by the respondent.' The applicant could not comply with that requirement or condition without the respondent making reasonable adjustments – namely the making of 'clear audible next stop announcements' on its trains. In failing to provide such announcements on 18-20 percent of the applicant's journeys over the relevant period, the respondent had failed to make reasonable adjustments for the purposes of section 6(2). Raphael FM found that the applicant was disadvantaged by the respondent's failure to make reasonable adjustments, and that he was not satisfied that the requirement or condition imposed was reasonable.<sup>392</sup>

A claim of a failure to make reasonable adjustments for the purposes of section 6(2) was also made, and rejected, in *Sklavos v Australasian College of Dermatologists*.<sup>393</sup>

## 5.2.5 Associates, carers, disability aids and assistance animals

### (a) Associates

The DDA protects the associates of people with disability from discrimination. Section 7 of the DDA extends all of the DDA's provisions to people who have an associate with a disability.<sup>394</sup> It provides:

- (1) This Act applies in relation to a person who has an associate with a disability in the same way as it applies in relation to a person with the disability

Example: It is unlawful, under section 15, for an employer to discriminate against an employee on the ground of a disability of any of the employee's associates.

- (2) For the purposes of subsection (1), but not without limiting that subsection, this Act has effect in relation to a person who has an associate with a disability as if:
  - (a) each reference to something being done or needed because of a disability were a reference to the thing being done or needed because of the fact that the person has an associate with the disability; and
  - (b) each other reference to a disability were a reference to the disability of the associate.
- (3) This section does not apply to section 53 or 54 (combat duties) and peacekeeping services) or subsection 54A(2) or (3) (assistance animals).<sup>[395]</sup>

Note: The combined effect of sections 7 and 8 is that this Act applies in relation to a person who has an associate who has a carer, assistant, assistance animal or disability aid in the same way as it applies in relation to a person with a disability.

In *Burns v Media Options Group Pty Ltd and Ors*,<sup>396</sup> Mr Burns' partner Ms Mezzomo became ill with cancer which required intensive medical treatment over a relatively short period of time. Mr Burns

390 [2013] FMCA 36, [47].

391 [2013] FMCA 36, [142].

392 [2013] FMCA 36, [147]. Cf the remark of Jagot J in *Sklavos v Australasian College of Dermatologists* that s 6(1) and (2) of the DDA are 'mutually exclusive': [2016] FCA 179, [164].

393 [2016] FCA 179.

394 Section 7 was inserted by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), Sch 2, item 17. Prior to the commencement of these amendments on 5 August 2009, individual sections of the DDA expressly protected against discrimination on the ground of the disability of a person's associates.

395 Sections 54A(2) and (3) are provisions relating to the control of assistance animals.

396 [2013] FCCA 79.

claimed that his employer provided no flexibility to him in meeting Ms Mezzomo's care needs. Mr Burns claimed discrimination in employment as an 'associate' of a person with a disability under section 15 of the DDA, and also discrimination in employment on the ground of family responsibilities under sections 7A and 14 of the SDA. Nicholls J found that the respondents engaged in a range of discriminatory conduct including telling him not to stay home to care for Ms Mezzomo, pressuring him to come to work and not to leave until he had finished the tasks allocated to him, and imposing a requirement that he could only take leave at times determined by his employer.<sup>397</sup> His Honour concluded that Mr Burns was dismissed from his employment at least in part because he had an associate with a disability.<sup>398</sup>

### **(b) Disability aids, carers, assistants and assistance animals**

The DDA also prohibits discrimination against people who have a carer, assistant, assistance animal or disability aid.<sup>399</sup>

The DDA was amended in 2009<sup>400</sup> to clarify the law following the decision of the Full Court of the Federal Court in *Queensland v Forest*<sup>401</sup> ('*Forest*'). In that case, Spender and Emmett JJ held that former sections 7 to 9 of the DDA were concerned only with defining certain circumstances of discrimination, but an applicant must still establish that such discrimination was on the ground of their disability. Accordingly, for acts of alleged discrimination occurring prior to 5 August 2009 (the date of commencement for the 2009 amendments), before a finding of unlawful conduct under Part 2 of the DDA can be made by reason of one person discriminating against another within sections 7, 8 or 9, it is also necessary to make a finding that the discrimination occurs on the ground of disability.<sup>402</sup>

Section 8 now provides:

- (1) This Act applies in relation to having a carer, assistant, assistance animal or disability aid in the same way as it applies in relation to having a disability

Example: For the purposes of section 5 (direct discrimination), circumstances are not materially different because of the fact that a person with a disability require adjustments for the person's carer, assistant, assistance animal or disability aid (see subsection 5(3)).

- (2) For the purposes of subsection (1), but without limiting that subsection, this Act has effect in relation to a person with a disability who has a carer, assistant, assistance animal or disability aid as if:
  - (a) each reference to something being done or needed because of a disability were a reference to the thing being done or needed because of the fact that the person has the carer, assistant animal or aid; and
  - (b) each other reference to a disability were a reference to the carer, assistant, animal or aid.
- (3) This section does not apply to section 48 (infectious diseases) or section 54A (exemptions in relation to assistance animals)

Note: The combined effect of sections 7 and 8 is that this Act applies in relation to a person who has an associate who has a carer, assistant, assistance animal or disability aid in the same way as it applies in relation to a person with a disability.

<sup>397</sup> [2013] FCCA 79, [1721].

<sup>398</sup> [2013] FCCA 79, [1726] and [1723]-[1726].

<sup>399</sup> See s 9 of the DDA for the definition of these different terms.

<sup>400</sup> *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), sch 2, item 17.

<sup>401</sup> (2008) 168 FCR 532; Explanatory Memorandum, *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008* [45]-[46].

<sup>402</sup> For analysis of the law prior to 5 August 2009 see: <[www.humanrights.gov.au/legal/FDL/archive.html](http://www.humanrights.gov.au/legal/FDL/archive.html)>.

New section 8 clarifies that the discrimination provisions in Part 2 of the DDA apply equally to having an aid, assistant, or assistance animal by providing that the types of discrimination in section 7 and section 8 are discrimination on the ground of disability.<sup>403</sup> Therefore, for acts of alleged discrimination occurring after 5 August 2009, it will not be necessary to make the additional finding that the discrimination under new section 8 occurs on the ground of disability.

As noted at 5.2.2(b)(v) above, in *Mulligan v Virgin Australia Airlines Pty Ltd*,<sup>404</sup> the Full Court of the Federal Court held that the effect of section 8 of the DDA is that a person's assistance animal is, for the purposes of sections 5 and 6, taken to be 'a part of' their disability.<sup>405</sup>

### **(c) Special provisions about assistance animals**

The DDA includes special provisions about the rights and responsibilities of both service providers and people who have assistance animals. The 2009 amendments to the DDA significantly changed the operation of the DDA in relation to assistance animals.<sup>406</sup>

#### **(i) What is an 'assistance animal'?**

Section 9 (2) defines an assistance animal as a dog or other animal:

- (a) accredited under a law of a State or Territory that provides for the accreditation of animals trained to assist a person with a disability to alleviate the effect of the disability; or
- (b) accredited by an animal training organisation prescribed by the regulations for the purposes of this paragraph; or
- (c) trained:
  - (i) to assist a person with a disability to alleviate the effect of the disability; and
  - (ii) to meet standards of hygiene and behaviour that are appropriate for an animal in a public place.

Note: For exemptions from Part 2 for discrimination in relation to assistance animals, see section 54A.

The Explanatory Memorandum to the 2009 amendments to the DDA states:

The purpose of this amendment is to provide greater certainty to both service providers and people with assistance animals. The third limb of the definition (paragraph 9(2)(c)) is designed to ensure that people with disability who may not live in a State or Territory that has a relevant accreditation scheme, or who may not have access to a recognised assistance animal trainer continue to be protected under the Disability Discrimination Act (if they are able to demonstrate the requirements of the relevant sections).<sup>407</sup>

At the time of writing, some, but not all, state and territories had laws providing for the accreditation of animals trained for the purposes of section 9(2)(a).<sup>408</sup> No organisations have been prescribed pursuant to section 9(2)(b).

#### **(ii) Guide and hearing dogs**

Early cases decided by the then Human Rights and Equal Opportunity Commission in relation to assistance animals involved persons with visual or hearing disabilities and their officially trained guide or hearing dogs. For example, in *Jennings v Lee*,<sup>409</sup> the respondent was found to have discriminated

403 Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 11, [46].

404 *Mulligan v Virgin Australia Airlines Pty Ltd*, (2015) 234 FCR 207.

405 *Mulligan v Virgin Australia Airlines Pty Ltd*, (2015) 234 FCR 207, 247 [149].

406 *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), Sch 2, items 17, 76.

407 Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 11 [50].

408 Eg *Guide, Hearing and Assistance Dogs Act 2009* (Qld); *Dog and Cat Management Act 1995* (SA).

409 [1996] HREOCA 29.

against the applicant, who has a visual impairment, by refusing to permit her to be accompanied by her guide dog when she 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 dog<sup>410</sup> and the refusal to allow an applicant with a visual impairment to enter a store because she was accompanied by her guide dog.<sup>411</sup>

### **(iii) Other types of assistance animals**

Section 9(2) makes explicit that an assistance animal can be either a dog or ‘other animal’. This confirms the observation of Collier J about former section 9(1)(f) in *Forest* that ‘there is no pre-requisite as to the type of animals that can be assistance animals’.<sup>412</sup> The section also arguably confirms the obiter comments of Spender and Emmett JJ in that case on appeal:

The question is not whether the dogs do in fact assist Mr Forest to alleviate the effects of a disability but whether they were trained with that purpose or object in mind.<sup>413</sup>

In *Mulligan v Virgin Australia Airlines Pty Ltd*, the Full Court of the Federal Court confirmed that section 9(2)(c) does not require that an animal receive training from an accredited body. The court held that the word ‘trained’ in that section should be given its ordinary meaning.<sup>414</sup> Earlier in its judgment, the court referred to the following definition of ‘trained’:

“to discipline and instruct (an animal) to perform specified actions”.<sup>415</sup>

The decision in *Mulligan* also confirms that an assistance animal for the purposes of section 9(2) may be trained to assist with any disability (ie it is not limited to dogs or other animals trained to assist with vision or hearing impairments). In that case, Mr Mulligan had a dog trained to assist him with his cerebral palsy and vision impairment. The training had not been provided by an ‘accredited’ trainer.

In *Ondrich v Kookaburra Park Eco Village*,<sup>416</sup> Burnett FM concluded that the evidence did not demonstrate that there was any relationship between the training of the dog, the skills acquired from that training and the alleviation of the effects of the applicant’s disability. Burnett FM concluded the applicant did not possess an animal trained to assist her to alleviate the effects of her disability as required under former section 9(1)(f).

### **(iv) Identifying the comparator in cases involving assistance animals**

As with other claims of unlawful discrimination on the ground of disability, care must be taken in identifying the appropriate comparator in cases where the discrimination is alleged to have occurred because a person has an assistant animal. The comparator identified by the Full Court of the Federal Court in *Mulligan v Virgin Australia Airlines Pty Ltd* is discussed above at 5.2.2(b)(v).

<sup>410</sup> *Brown v Birss Nominees Pty Ltd* [1997] HREOCA 54.

<sup>411</sup> *Grovenor v Eldridge* [1999] HREOCA 3 (extract at (1999) EOC 92-993).

<sup>412</sup> (2007) 161 FCR 152, 175, [94].

<sup>413</sup> (2008) 168 FCR 532, 553 [106].

<sup>414</sup> (2015) 234 FCR 207, 241 [127].

<sup>415</sup> The Court referred to the submissions the AHRC made in the matter, appearing as intervener. Those submissions are available at <<http://www.humanrights.gov.au/our-work/legal/submissions/submission-court-intervener-and-amicus-curiae>>.

<sup>416</sup> [2009] FMCA 260, [111]-[125].

In *Forest v Sydney Airport Corporation Ltd*,<sup>417</sup> the applicant, who had an assistance dog, needed to pass through a security screening point at an airport. The screening point had walk-through metal detectors ('WTMDs'). The applicant removed metal items from his dog. However, he was not allowed to pass through the WTMD. The respondent had implemented a policy under which persons identified as having 'special needs' were directed to pass to the side of the WTMDs and accompany security staff to a 'discreet area' for a manual, or 'pat down' screening. The respondent led evidence that this policy was implemented because animals were likely to set off the WTMDs, or bump the WTMDs while passing through which could temporarily disable them causing delays. The court held that the correct comparator was not a person without a dog approaching the security screeners, but 'a person approaching the security screeners with something in their hands or under their control from which they cannot be separated and which is reasonably perceived by the security screeners as being likely to trigger the WTMDs'.<sup>418</sup> Burnett J held that such a person would have been treated in the same way as the applicant, and summarily dismissed the application. The disposition of the case therefore depended on the particular factual findings made by Burnett J.

#### **(v) Assistance animal exemptions**

The DDA provides for specific exemptions relating to assistance animals. The Explanatory Memorandum to the 2009 amendments to the DDA states that new section 54A provides 'certainty for both people with assistance animals and service providers by clarifying the entitlements and obligations of both parties'.<sup>419</sup>

New section 54A provides that it is not unlawful:

- to request or require that an assistance animal remain under the control of the person with the disability or another person on behalf of the person with the disability (section 54A(2)).
- for a person to discriminate against a person with a disability on the ground of the disability if:
  - they reasonably suspect that the assistance animal has an infectious disease; and
  - the discrimination is reasonably necessary to protect public health or the health of other animals (section 54A(4)).
- for a person to request the person with the disability to produce evidence that an animal:
  - is an 'assistance animal'; or
  - is trained to meet standards of hygiene and behaviour that are appropriate for an animal in a public place (section 54A(5)).
- for a person to discriminate on the ground that a person has an assistance animal if the person with the assistance animal fails to produce evidence that the animal:
  - is an assistance animal; or
  - is trained to meet standards of hygiene and behaviour appropriate for an animal in a public place (section 54A(6)).

Section 54A(3) provides that for the purposes of subsection (2), an assistance animal may be under the control of a person even if it is not under the person's direct physical control.

There has been no detailed judicial consideration of the operation of sections 54A(5) and (6). In *Mulligan v Virgin Australia Airlines Pty Ltd*,<sup>420</sup> the Australian Human Rights Commission, intervening, submitted that what may constitute 'evidence' given in satisfaction of a request under section 54A(5) may depend

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417 [2014] FCCA 208.

418 [2014] FCCA 208, [45].

419 Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 19, [111].

420 (2015) 234 FCR 207

on the particular training an animal has received. The court referred to this submission in its reasons,<sup>421</sup> but as no request under section 54A(5) had in fact been made in that case, it did not need further to consider the question.

The provisions relating to assistance animals do not affect the liability of a person for damage to property caused by an assistance animal.<sup>422</sup>

### 5.2.6 Disability standards

Section 31(1) of the DDA provides that the Minister (the Attorney-General) may formulate 'disability standards' in relation to 'any area in which it is unlawful under [Part 2] for a person to discriminate against another person on the ground of a disability of the other person'.<sup>423</sup>

Section 31(2)(a) provides that, without limiting section 31(1), a disability standard may deal with:

- (i) reasonable adjustments;
- (ii) strategies and programs to prevent harassment or victimisation of persons with a disability;
- (iii) unjustifiable hardship;
- (iv) exemptions from the disability standard, including the power (if any) of the Commission to grant such exemptions.

Generally, the standards will prevail over State and Territory legislation,<sup>424</sup> however section 31(2)(b) also provides that a disability standard may provide 'that the disability standard, in whole or in part, is or is not intended to affect the operation of a law of a State or Territory'.

It is unlawful for a person to contravene a disability standard.<sup>425</sup> The exemption provisions (Part 2 Division 5) generally do not apply in relation to a disability standard.<sup>426</sup> However, if a person acts in accordance with a disability standard the unlawful discrimination provisions in Part 2 do not apply to the person's act.<sup>427</sup>

#### (a) Transport Standards

The *Disability Standards for Accessible Public Transport 2002* ('the Transport Standards') were formulated under section 31 of the DDA and came into effect on 23 October 2002. The Transport Standards apply to operators and providers of public transport services, and set out requirements for accessibility of the premises, conveyances and infrastructure that are used to provide those services.<sup>428</sup>

421 (2015) 234 FCR 207, [65]. The Commission's submissions are available at <<https://www.humanrights.gov.au/sites/default/files/AHRC%20Submissions%20-%20stamped.pdf>>.

422 See DDA, s 54A(7).

423 Note that this provides a more comprehensive power to make standards than previously existed under the DDA prior to the 2009 amendments (made by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), Sch 2, item 62). Prior to these changes, s 31 limited the power of the Minister to make standards with respect to specific areas such as employment and education.

424 See DDA, s 13(3A), which provides that s 13(3) does not apply in relation to Div 2A of Pt 2 (Disability standards). Section 13(3) provides that the DDA is not intended to exclude or limit the operation of a law of a state or territory that is capable of operating concurrently with the DDA.

425 DDA, s 32.

426 DDA, s 33.

427 DDA, s 34. Note, however, that a Disability Standard on one of the general topics on which standards can be made under the DDA - public transport, access to premises, education, employment, or administration of Commonwealth laws and programs - will not necessarily provide a complete code which displaces all application of the existing DDA provisions on that subject. How far it displaces the existing DDA provisions will depend on the terms of the particular standard.

428 See further: <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Australias-Anti-Discrimination-Law.aspx>> and the links therein.



On 1 May 2011, the *Disability (Access to Premises – Buildings) Standards 2010* ('the Premises Standards') commenced operation. The Premises Standards apply to certain premises designated 'public transport buildings'. The Transport Standards were also amended with effect from 1 May 2011. The Transport Standards no longer regulate certain premises to which the Premises Standards apply.<sup>429</sup>

The application and operation of the Transport Standards has not yet been the subject of extensive consideration by the courts.

Brief mention of the Transport Standards was made in *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*.<sup>430</sup> The applicant, a disability rights organisation, alleged that the respondent council had built or substantially upgraded a number of bus stops since the commencement of the Transport Standards which did not comply with those standards.

The application was summarily dismissed by Collier J on the basis that the applicant, as an incorporated association, was not itself 'aggrieved' by the alleged non-compliance with the Transport Standards and therefore lacked standing to commence the action.<sup>431</sup> However, her Honour did accept that individual members of the applicant organisation may have had standing to bring proceedings in relation to the same facts.<sup>432</sup>

The respondent Council had also sought to have the matter summarily dismissed on a separate ground relating to the 'equivalent access' provisions under the Transport Standards.<sup>433</sup> The Council claimed that no individual instance of discrimination had been alleged and therefore the applicant had not proven that the respondent had failed to provide equivalent access to an individual who could not negotiate the relevant bus stops by reason of the Council's failure to comply with the Transport Standards. Although it was unnecessary to decide this issue, Collier J made the following obiter comments:

I do not accept the submission of the respondent that the applicant's claim should be dismissed unless the applicant proves that the respondent has failed to provide equivalent access to an individual, who cannot negotiate the public transport infrastructure by reason of a failure of the respondent to comply with the Standards. In my view, as submitted by the applicant, the provisions in the Disability Standards as to equivalent access go to conduct which may be raised in defence of alleged failure of the respondent to comply with the Disability Standards.<sup>434</sup>

However, her Honour did not elaborate further on the application of the Transport Standards more generally.

In *Killeen v Combined Communications Network Pty Ltd*<sup>435</sup> the interpretation of 'allocated space' in sections 1.11, 9.1 and 9.3 of the Transport Standards was considered in regard to wheelchair accessible taxis. The applicant argued that these sections required an 'allocated space' be a three dimensional space for a single wheelchair without any intrusions, being 800mm by 1300mm horizontally and 1410mm high throughout. It was argued that the requirement in section 9.3 as to 'minimum headroom' of 1410mm required that the height must be maintained throughout the entire 'allocated space' so as to form a 'rectangular prism'.

Edmonds J did not agree. His Honour stated that whilst section 9.1 requires a clear floor space with a minimum measurement of 800mm by 1300mm, the reference to 'clear' is a reference to clear of objects

<sup>429</sup> See the definition of 'public transport building' in s 1.21 of the Transport Standards, and those standards generally.

<sup>430</sup> (2007) 162 FCR 313.

<sup>431</sup> (2007) 162 FCR 313, 331-335 [52]-[69]. See below discussion at 6.2.1.

<sup>432</sup> (2007) 162 FCR 313, 335 [69].

<sup>433</sup> Transport Standards ss 1.16, 33.3-33.5.

<sup>434</sup> (2007) 162 FCR 313, 335 [73].

<sup>435</sup> (2011) 192 FCR 98.

encroaching at ground level. Edmonds J held that the reference in section 9.3 to 'minimum headroom' refers to the height between floor and ceiling space in those parts of the vertical plane through which the head and shoulders of the wheelchair occupant will pass or stand when accessing the taxi. It does not require the height to be 'not less than' 1410mm in all parts of the vertical plane.

In *Innes v Rail Corporation of New South Wales*,<sup>436</sup> the respondent operated passenger trains in NSW. The applicant was blind. He claimed that on 36 of approximately 315 journeys he took on the respondent's trains between March and September 2011, the respondent did not provide any audio announcements, or any audible or comprehensible announcements, informing him which stations he had arrived at. Raphael FM held that these failures amounted to a contravention of section 27.4 of the Transport Standards, which requires that:

All passengers must be given the same level of access to information on their whereabouts during a public transport journey.

Raphael FM held that the 36 failures together constituted a single contravention of section 27.4.<sup>437</sup>

In *Haraksin v Murrays Australia Pty Ltd*,<sup>438</sup> the applicant claimed that the respondent had discriminated against her on the ground of disability by failing to allow her to book a wheelchair accessible seat on a coach service operated by the respondent. She claimed, inter alia, that this was in contravention of the Transport Standards. Nicholas J held that this claim was based on a 'misconception as to the scope of section 46P and section 46PO(1), because 'non-compliance with the Standards does not of itself constitute unlawful discrimination.' In arriving at this view, his Honour did not refer to section 32 of the DDA, which provides that it is unlawful to contravene a disability standard, or to the definition of 'unlawful discrimination' in section 3 of the AHRC Act, which includes 'acts, omissions or practices that are unlawful under ... Part 2 of the [DDA]'.<sup>439</sup>

The court in *Haraksin* also considered the scope of the definition of a 'public transport service' in section 1.23 of the Transport Standards. Nicholas J held:

It is the persons conveyed who must be members of the public for the definition in s 1.23 to apply. Not everyone is a member of the public for the purposes of the definition. In determining whether the persons conveyed in the respondent's vehicles are members of the public it is necessary to consider what it is about those persons that led to them being conveyed. They will only be members of the public for the purpose of the definition if they are conveyed in the respondent's vehicles as members of the public.

If a bus is chartered to a sporting club so that the members of the club might be conveyed to a sporting event, then the members of the club will be conveyed not as members of the public but as members of the club. It is their membership of the club which entitles them to ride in the bus. Of course, the position would be different if members of the public were also permitted to ride in the bus. In that situation the respondent would be conveying members of the public for the purposes of the Standards.

But it does not follow that every charter arrangement entered into by the respondent will be for the conveyance of persons who are not members of the public for the purposes of the Standards. If a provider of transport services to the public chartered a bus from the respondent to convey members of the public due to the provider's lack of capacity then there is no reason to think that the respondent would not be conveying members of the public merely because it did so pursuant to a charter arrangement.<sup>439</sup>

Section 34.1 of the Transport Standards provides that the Standards are to be reviewed every five years. The Final Report of the 2012 review was released on 10 July 2015.<sup>440</sup>

436 [2013] FMCA 36.

437 [2013] FMCA 36, [156].

438 (2013) 211 FCR 1.

439 (2013) 211 FCR 1, 23-24, [97]-[99].

440 The report and the government response can be viewed at <<https://infrastructure.gov.au/transport/disabilities/review/2012.aspx>>.

## (b) Education Standards

The *Disability Standards for Education 2005* ('Education Standards'), also formulated under section 31 of the DDA, came into effect on 18 August 2005. The purpose of the Education Standards is to 'clarify, and make more explicit, the obligations of education and training service providers under the DDA and the rights of people with disabilities in relation education and training'.<sup>441</sup>

The Education Standards apply to 'education providers', defined to include:<sup>442</sup>

- educational institutions, meaning a school, college, university or other institution at which education or training is provided;
- educational authorities, meaning persons or bodies administering an educational institution; and
- organisations whose purpose is to develop or accredit curricula or training courses used by other education providers.

The above categories include Commonwealth, State and Territory governments and agencies, as well as private organisations and individuals.<sup>443</sup>

The Education Standards cover the following areas relevant to education:

- enrolment;
- participation;
- curriculum development, accreditation and delivery;
- student support services; and
- elimination of harassment and victimisation.

Education providers must take 'reasonable steps' to ensure that students with disabilities do not experience discrimination in these areas.<sup>444</sup> Perhaps the most significant feature of the Education Standards is the introduction of a positive obligation on education providers to make 'reasonable adjustments' to accommodate the needs of students with disabilities.<sup>445</sup> The Standards also impose an obligation on education providers to consult with affected students or their associates in relation to such adjustments.<sup>446</sup>

In relation to harassment and victimisation, for example, Part 8 of the Education Standards imposes a positive obligation on education providers to:

develop and implement strategies and programs to prevent harassment or victimisation of a student with a disability, or a student who has an associate with a disability, in relation to the disability.<sup>447</sup>

Education providers must also take 'reasonable steps' to ensure that its staff and students are informed about the prohibition against harassment and victimisation, as well as the appropriate action to be taken if it occurs and the complaint mechanisms available.<sup>448</sup> The Standards also provide guidance on the types of measures that education providers should implement in order to fulfil their obligations in relation to victimisation and harassment.<sup>449</sup>

441 *Disability Standards for Education 2005 – Guidance Notes*, p 1.

442 Education Standards, s 2.1. See also the definitions of 'educational institution' and 'educational authority' in s 4 of the DDA.

443 *Disability Standards for Education 2005 – Guidance Notes*, p 1. A detailed list of examples of the types of education providers subject to the Education Standards appears as Note 1 to s 1.5 of the Standards.

444 Education Standards, ss 4.2(1), 5.2(1), 6.2(1), 7.2(1).

445 See, generally, Education Standards, Part 3. The obligation to provide reasonable adjustments arises from ss 4.2(3)(c), 5.2(2)(c), 6.2(2)(c), 7.2(5)(c) and 7.2(6)(c).

446 See, generally, Education Standards, s 3.5.

447 Education Standards, s 8.3(1).

448 Education Standards, s 8.3(2).

449 Education Standards, s 8.5.

A number of exceptions to the Standards are provided in Part 10. Most importantly, education providers are not required to comply with the Standards to the extent that compliance would impose ‘unjustifiable hardship’.<sup>450</sup>

A number of recent cases have considered claims that education providers have failed to fulfil their obligations under the Education Standards to make reasonable adjustments, and to consult affected persons.

In *Abela v State of Victoria*,<sup>451</sup> the applicant argued that the respondent had failed to make reasonable adjustments in relation to his schooling. He claimed that that was in contravention of a number of standards in the Education Standards, including those said to be contained in Part 3 (which is titled ‘Making Reasonable Adjustments’). Tracey J observed that Part 3 of the Education Standards does not contain free-standing disability standards. Rather, it sets out how reasonable adjustments are to be identified for the purposes of other paragraphs of the Standards.<sup>452</sup>

In *Walker v State of Victoria*,<sup>453</sup> the applicant was a school student who claimed that the State had discriminated against him on the basis of a number of disabilities. Among other things, he claimed that the State had failed to consult him or his associates in relation to making reasonable adjustments, as required by a number of standards in the Education Standards. Tracey J rejected that claim. He held that consultation had occurred, and observed that the relevant provisions of the Education Standards:

do not ... require that such consultation take any particular form or occur at any particular time. Those involved may meet formally or informally. Discussions can be instigated by either the school or the parents. Consultation may occur in face-to-face meetings, in the course of telephone conversations or in exchanges of correspondence. Once consultation has occurred it is for the school to determine whether any adjustment is necessary in order to ensure that the student is able, in a meaningful way, to participate in the programmes offered by the school. The school is not bound, in making these decisions, by the opinions or wishes of professional advisers or parents.<sup>454</sup>

This passage was approved on appeal by the Full Court of the Federal Court.<sup>455</sup>

The Federal Court has in several other cases considered and rejected arguments that education providers have failed to take ‘reasonable steps’ as required by various clauses of the Education Standards.<sup>456</sup>

### (c) Premises standards

The *Disability (Access to Premises – Buildings) Standards 2010* (‘Premises Standards’), made under section 31 of the DDA, came into effect on 1 May 2011.

<sup>450</sup> Education Standards, s 10.1, 10.2. The meaning of ‘unjustifiable hardship’, in the context of the DDA, is considered further at 5.5 below.

<sup>451</sup> [2013] FCA 832.

<sup>452</sup> [2013] FCA 832, [141].

<sup>453</sup> [2011] FCA 258.

<sup>454</sup> [2011] FCA 258, [284].

<sup>455</sup> *Walker v State of Victoria* [2012] FCAFC 38, [86]–[87] (Gray J); [145] (Flick J); [167] (Reeves J agreeing). See also *Sievwright v State of Victoria* [2012] FCA 118, [236] (Marshall J); *Abela v State of Victoria* [2013] FCA 832, [147] (Tracey J); *Kiefel v State of Victoria* [2013] FCA 1398, [243] (Tracey J).

<sup>456</sup> *Sievwright v State of Victoria* [2012] FCA 118 (Marshall J); *Abela v State of Victoria* [2013] FCA 832 (Tracey J); *Kiefel v State of Victoria* [2013] FCA 1398 (Tracey J); *Sklavos v Australasian College of Dermatologists* [2016] FCA 179 (Jagot J).

The Premises Standards apply to most classes of buildings (and parts of buildings) for which applications for building approvals are made after 1 May 2011.<sup>457</sup> They therefore apply to new buildings and new parts of buildings. They also apply to affected parts of existing buildings which are upgraded, where a building approval is required for that upgrade. They also apply to existing ‘public transport buildings’ still in use after specified target dates.<sup>458</sup>

The Premises Standards apply to the following persons:

- ‘building certifiers’<sup>459</sup>
- ‘building developers’<sup>460</sup>
- ‘building managers’.<sup>461</sup>

For the purposes of the Standards, a range of people may be considered certifiers, developers or managers, including building designers, property owners, lessees, and operational staff.<sup>462</sup>

The Commission has published a Guideline on the application of the Premises Standards, which is available on its website.<sup>463</sup>

At the time of publication, the operation of the Premises Standards had not received significant consideration by the courts.

The Premises Standards are subject to review every five years.<sup>464</sup>

## 5.2.7 Harassment

Division 3 of Part 2 of the DDA contains separate provisions that make it unlawful to ‘harass’ a person with a disability (or an associate of a person with a disability) in relation to that disability. For example, section 35(1) provides:

- (1) It is unlawful for a person to harass another person who:
  - (a) is an employee of that person; and
  - (b) has a disability;in relation to the disability.

The harassment provisions are limited to the following areas of public life:

- employment;<sup>465</sup>
- education;<sup>466</sup> and
- the provision of goods, services and facilities.<sup>467</sup>

‘Harass’ is not defined in the DDA. In *McCormack v Commonwealth*,<sup>468</sup> (‘*McCormack*’) Mowbray FM adopted the following definition from the Macquarie Dictionary:

457 Premises Standards, s 2.1(a) and (b).

458 Premises Standards, s 2.1(c).

459 Premises Standards, s 2.2(1)(a).

460 Premises Standards, s 2.2(1)(b).

461 Premises Standards, s 2.2(1)(c).

462 See the examples in s 2.2 of the Premises Standards.

463 Available at <<https://www.humanrights.gov.au/guidelines-application-premises-standards>>.

464 Premises Standards, s 6.1. Information about the 2015 review of the Premises Standards can be found at <<http://www.industry.gov.au/industry/IndustrySectors/buildingmetalsandconstruction/Pages/PremisesStandardsReview.aspx>>.

465 DDA, s 35.

466 DDA, s 37.

467 DDA, s 39.

468 [2007] FMCA 1245.

**Harass** 1. to trouble by repeated attacks, incursions, etc., as in war or hostilities; harry; raid. 2. to disturb persistently; torment, as with troubles, cares, etc.<sup>469</sup>

In *Penhall-Jones v State of NSW*,<sup>470</sup> Raphael FM concluded that the little authority that there is on what constitutes 'harassment' under section 35(1) identifies it as something which is repetitious or occurs on more than one occasion.<sup>471</sup>

In *McCormack*, in relation to the meaning of the phrase 'in relation to the disability', Mowbray FM applied the following statement of McHugh J in *O'Grady v The Northern Queensland Company Ltd*:

The prepositional phrase 'in relation to' is indefinite. But, subject to any contrary indication derived from its context or drafting history, it requires no more than a relationship, whether direct or indirect, between two subject matters.<sup>472</sup>

On the basis of these authorities, Simpson FM in *Orlowski v Sunrise Co-operative Housing Inc*<sup>473</sup> concluded that for a finding of harassment to be made out, an applicant must not only prove on the balance of probabilities that disparaging or other comments have been made about him/her, but also that the disparaging comments were made in relation to the applicant's disability and to the applicant personally.<sup>474</sup>

In *King v Gosewisch*,<sup>475</sup> the applicants alleged that they were subjected to disability harassment by several attendees of a public meeting when they advocated for disability rights. The alleged harassment was also said to be linked to the delay in the starting time of the meeting due to the need to transfer the meeting to the ground floor to accommodate the applicants who used wheelchairs.

The court accepted that the applicants were probably subjected to hostile remarks as alleged.<sup>476</sup> However, the court did not accept that the remarks were based on the applicants' disability or even the fact that the meeting had been transferred to the ground floor to accommodate them.<sup>477</sup> Rather, the harassing comments were held to have been motivated by other factors, such as the behaviour of the applicants during the meeting and a perception that the meeting was intended for local residents and the applicants had dominated the meeting for their own purposes.<sup>478</sup> For example, the court observed:

Rightly or wrongly, some of the members and the public regarded the behaviour and intervention in the meeting of the Applicants as disruptive. Political type public gatherings often engender robust sharing of views and comments with asides that can be, either directly or indirectly, focused on personalities rather than issues.

As the Applicants during the meeting continued to advocate for an exchange of views with candidates about their case of interest, namely access issues for the disabled across the city, some of the public became heated and disrespectful. However, those remarks were, in my view, in relation to the perceived behaviour of the Applicants in the meeting, not 'in relation to the disability.' In those circumstances, the remarks do not, in my view, constitute harassment within the meaning of ss 39 and 40.<sup>479</sup>

469 [2007] FMCA 1245, [75].

470 [2008] FMCA 832.

471 [2008] FMCA 832, [39].

472 [2007] FMCA 1245, [73], quoting *O'Grady v The Northern Queensland Company Ltd* (1990) 169 CLR 356, 376 (McHugh J).

473 [2009] FMCA 31.

474 *Orlowski v Sunrise Co-operative Housing Inc* [2009] FMCA 31, [21].

475 [2008] FMCA 1221.

476 [2008] FMCA 1221, [97].

477 [2008] FMCA 1221, [98].

478 [2008] FMCA 1221, [98].

479 [2008] FMCA 1221, [105]. Section 40 of the DDA, together with ss 36 and 38, were repealed by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), sch 2, item 65. These sections dealt with harassment of associates. Section 7 of the DDA now extends the operation of ss 35, 37 and 39 to associates of persons with disabilities.

The relationship between harassment and discrimination is yet to have received much judicial consideration. There is certainly considerable overlap between these two concepts, given that harassment of a person with a disability in relation to that disability will typically also constitute less favourable treatment because of that disability for the purposes of establishing direct discrimination. Indeed, the sub-heading of Division 3 of Part 2 is entitled 'Discrimination involving harassment', which suggests that harassment is to be regarded as a discrete kind of discrimination, albeit with separate statutory force.

However, there may also be circumstances in which the discrimination and harassment provisions operate independently. In *McDonald v Hospital Superannuation Board*,<sup>480</sup> for example, Commissioner Johnston accepted that one employee had made disparaging comments to another employee in relation to the applicant's disability. The Commissioner held that the relevant comments could not amount to harassment, as they had not been made to the applicant. However, he held that the comments amounted to discrimination, on the basis that:

To address a derogatory comment to a fellow worker about aspects of another worker by reference to a disability of the latter, and thereby to lower the dignity and regard of other persons toward that worker is to treat the latter differentially.<sup>481</sup>

Commissioner Johnston went on to accept that certain other disparaging comments, which had been made in the presence of the applicant, did amount to harassment.<sup>482</sup>

## 5.3 Areas of Discrimination

### 5.3.1 Employment (section 15)

Section 15 of the DDA deals with discrimination in employment, as follows:

#### 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:
  - (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:
  - (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.

This section considers the following issues:

- (a) the meaning of 'employment';
- (b) the meaning of 'arrangements made for the purposes of determining who should be offered employment';

480 [1999] HREOCA 13 (extract at (1999) EOC 93-025).

481 [1999] HREOCA 13 (extract at (1999) EOC 93-025).

482 [1999] HREOCA 13 (extract at (1999) EOC 93-025).



- (c) the meaning of ‘benefits associated with employment’ and ‘any other detriment’; and
- (d) the ‘inherent requirements’ defence (section 21A).

### (a) Meaning of ‘employment’

The issue of whether a priest was in the ‘employment’ of a church for the purposes of section 15 was considered in *Ryan v Presbytery of Wide Bay Sunshine Coast*.<sup>483</sup> 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 the pastoral tie’ with, or ‘demissioning’, the applicant.

Baumann FM considered an application to allow an extension of time for the commencement of proceedings pursuant to section 46PO(2) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (now the AHRC 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 section 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’.<sup>484</sup>

In *Zoltaszek v Downer EDI Engineering Pty Ltd (No.2)*<sup>485</sup> Mr Zoltaszek argued that he was an employee of Downer within the meaning of section 15 of the DDA. Mr Zoltaszek was the sole director and shareholder of Impowest Pty Ltd. Mr Zoltaszek worked for Downer under an agreement between Impowest and Downer. Mr Zoltaszek contended that his activity was ‘entirely controlled’ by Downer and that from the beginning of his engagement he was always ‘treated as [a] person’ in documents in relation to work issued by Downer and that Impowest was ‘not seriously treated as a company’.<sup>486</sup>

Barnes FM considered the tests set out in *Stevens v Brodribb Sawmilling Company Proprietary Limited*<sup>487</sup> and *Hollis v Vabu Pty Limited*<sup>488</sup> for assessing the distinction between an independent contractor and an employee. Barnes FM concluded that Mr Zoltaszek was an employee of Impowest and Impowest was an independent contractor providing the services of Mr Zoltaszek as a contract worker to Downer.<sup>489</sup> On this basis, Barnes FM held that section 15 of the DDA had no application to the proceedings. However, Barnes FM did consider Mr Zoltaszek to be a contract worker under section 17 of the DDA. These findings were upheld by the Federal Court on appeal.<sup>490</sup>

In *Pop v Taylor*,<sup>491</sup> Ms Pop had been employed to work as a book-keeper in an accounting practice. She had signed a contract of employment with a company called ‘Fractal Portico Pty Ltd’ which operated as a labour hire company. However, she performed work for an accountancy practice

483 [2001] FMCA 12.

484 [2001] FMCA 12, [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.

485 [2010] FMCA 938.

486 Ibid at [42].

487 (1986) 160 CLR 16.

488 (2001) 207 CLR 21.

489 [2010] FMCA 938, [85].

490 *Zoltaszek v Downer EDI Engineering Pty Ltd* [2011] FCA 744.

491 [2015] FCCA 1720.

operated by a company called 'Chatfield Price Pty Ltd.' Her employment was terminated when she suffered a shoulder injury. Shortly afterwards, both companies went into liquidation. The respondent, Mr Taylor, was not a director of either company. He was employed by Fractal Portico to work as the administration manager of Chatfield Price. His wife, Katerina Taylor, was an accountant and the director of Chatfield Price, and worked in the practice. It was Mr Taylor who informed Ms Pop that her employment was terminated.

On the basis of the evidence before him, Brown J held that Mr Taylor had been part of the decision-making process leading to the termination of Ms Pop. Further, Mr Taylor had also dealt with Ms Pop's initial application for employment. In these circumstances, Brown J held that Mr Taylor was a person 'acting or purporting to act on behalf of an employer,' and consequently liable for the discriminatory termination of her employment under section 15(2).<sup>492</sup> Brown J did not consider the potential operation of section 17 of the DDA.

### **(b) 'Arrangements made for the purposes of determining who should be offered employment'**

Section 15(1)(a) prohibits discrimination 'in the arrangements made for the purposes of determining who should be offered employment'.

In *Y v Human Rights and Equal Opportunity Commission*,<sup>493</sup> the applicant complained of disability discrimination after having been unsuccessful in his application for a job. The applicant sought to characterise the discrimination as being discrimination 'in the arrangements made for the purpose of determining who should be offered employment', contrary to section 15(1)(a) of the DDA. Finkelstein J rejected the applicant's argument, finding that the section:

seeks to outlaw the established ground under which persons with a disability will not even be considered for employment. It is not apt to cover the situation where a particular individual is refused employment, or an interview for employment, because of that person's particular disability.<sup>494</sup>

A similar issue arose in *Vickers v The Ambulance Service of NSW*<sup>495</sup> ('*Vickers*'). The applicant applied for a position as an ambulance officer and passed the initial stages of the respondent's job application process, including interview. He was then referred for an independent medical assessment. During that assessment, the applicant disclosed that he suffered from Type 1, insulin-dependent diabetes. Despite the applicant providing a letter supporting his application from his treating endocrinologist, his application was refused. The applicant claimed that the respondent had discriminated against him pursuant to section 15(1)(a) 'in the arrangements made for determining who should be offered employment' on the basis that it had effectively applied a blanket policy of excluding all persons with diabetes without taking into account their individual characteristics.<sup>496</sup>

Raphael FM found that there was insufficient evidence to infer that either the respondent or the organisation that had carried out the medical assessment had applied a blanket policy of all excluding applicants with diabetes.<sup>497</sup> His Honour also held that the respondent's process of selection, including

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492 [2015] FCCA 1720, [218]-[233].

493 [2004] FCA 184.

494 [2004] FCA 184, [34]. Note that such a situation is covered by s 15(1)(b) which makes it unlawful to discriminate 'in determining who should be offered employment'. Section 15(4) makes a defence of 'inherent requirements' available in such cases. See further 5.3.1(d) below.

495 [2006] FMCA 1232. For discussion of this case, see Brook Hely, 'Judge me by what I can do – not by what you think I can't', (2006) 44(11) *Law Society Journal* 48.

496 The applicant relied in particular upon the decision of the NSW Administrative Decisions Tribunal in *Holdaway v Qantas Airways* (1992) EOC 92-395.

497 [2006] FMCA 1232, [39].

the medical assessment stage, was the same for the applicant as for others.<sup>498</sup> Accordingly, he rejected the applicant's claim under section 15(1)(a).

However, his Honour ultimately found in favour of the applicant on the basis that the respondent had breached section 15(1)(b) (discrimination in determining who should be offered employment) and had failed to make out either the inherent requirements or unjustifiable hardship defences. (See further 5.3.1(d) below).

### (c) 'Benefits associated with employment' and 'any other detriment'

The meaning of the expressions 'benefits associated with employment' and 'any other detriment' was considered in *McBride v Victoria (No 1)*.<sup>499</sup> The applicant, a prison officer, 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?'<sup>500</sup>

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 section 15(2)(b) of the DDA.<sup>501</sup> He further held that the conduct was sufficient to constitute 'any other detriment' under section 15(2)(d).

In *Ware v OAMPS Insurance Brokers Ltd*,<sup>502</sup> the applicant, who suffered from Attention Deficit Disorder and depression, claimed that the respondent had directly discriminated against him in breach of section 15(2)(d) by virtue of the following measures:

- unilaterally changing his duties;
- removing his assistant;
- placing restrictions on his performance of duties;
- setting new performance criteria without providing him with any opportunity to fulfil those criteria or any realistic or fair timeframe for doing so; and
- demoting him.<sup>503</sup>

In relation to the first measure, Driver FM found that, on the evidence, whilst the applicant's duties were unilaterally altered by the respondent, this did not constitute a detriment as the applicant had not objected to the changes. On the contrary, the applicant had expressed satisfaction with the changes and they had been a measure to 'better fit [the applicant's] duties with his capacity'.<sup>504</sup>

However his Honour held that the remaining measures did constitute 'detriments' within the meaning of section 15(2)(d).<sup>505</sup>

In *Penhall-Jones v State of NSW*,<sup>506</sup> Raphael FM held that the making of a sarcastic remark by one employee to another employee because of the other person's disability constituted disability discrimination. His Honour did not specifically identify the section of the DDA that the conduct breached, however, given the context of the claim it seems that it is likely to have been one of the subsections of section 15 and most likely section 15(2)(d).

498 [2006] FMCA 1232, [40]-[42].

499 [2003] FMCA 285.

500 [2003] FMCA 285, [48].

501 [2003] FMCA 285, [55], [61]. The applicant relied upon *R v Equal Opportunity Board; Ex parte Burns* [1985] VR 317.

502 [2005] FMCA 664.

503 [2005] FMCA 664, [102].

504 [2005] FMCA 664, [102].

505 [2005] FMCA 664, [103]-[104].

506 [2008] FMCA 832, [65].

The meaning of ‘benefits associated with employment’ and ‘any other detriment’ were considered by Mortimer J in *Watts v Australian Postal Corporation*.<sup>507</sup> She held that the phrase ‘benefits associated with employment’ should be interpreted broadly, and could include benefits identified by the applicant, including:

attending for work, performing work and exercising skills, using accrued entitlements at a time and for a purpose of the employee’s choosing (as would usually be the case with entitlements, within reasonable limits) and earning ordinary income. A similar approach in a different statutory context was taken in *Quinn v Overland* (2010) 199 IR 40; [2010] FCA 799 at [110] per Bromberg J. In another context, see also *Blackadder v Ramsey Butchering Services Pty Ltd* (2005) 221 CLR 539; 215 ALR 87; [2005] HCA 22 at [80] where Callinan and Heydon JJ stated:

[80] ... It may be that in modern times, a desire for what has been called “job satisfaction”, and a need for employees of various kinds, to keep and to be seen to have kept their hands in by actual work have a role to play in determining whether work in fact should be provided.<sup>508</sup>

Mortimer J went on to hold that section 15(2)(d) is not merely a ‘negative mirror’ of section 15(2)(b). Rather, section 15(2)(d) is intended to ‘pick up’ matters not otherwise covered in section 15(2). She stated:

Aside from a nexus between the identified “detriment” and the employment of the person concerned, the context otherwise suggests no particular limits on the meaning which should be given to that word. For example, it may be a loss or disadvantage which is temporary but real (such as moving an employee away from her established workplace and colleagues); it may be a prejudice to the earning of additional income (such as a facially neutral requirement about eligibility for overtime which disproportionately affects employees with a particular disability); or it may be damage done by the tolerance (or encouragement) of teasing or harassment of a disabled employee in a workplace. Essentially (and perhaps obviously), a “detriment” within para (d) will have an immediate negative connotation: a “benefit” within para (b) will have an immediate positive connotation. A “detriment” should not be identified solely by the negative expression of what is in reality a benefit.<sup>509</sup>

#### (d) Inherent requirements

From 5 August 2009, section 21A(1) of the DDA provides a defence to a claim of unlawful discrimination in work where:

- the discrimination relates to particular work (including promotion or transfer to particular work); and
- a person is, because of their disability, ‘unable to carry out the inherent requirements of the particular work even if the relevant employer, principal or partnership made reasonable adjustments for the aggrieved person.’<sup>510</sup>

This defence was previously contained in section 15(4). That section has been repealed.<sup>511</sup>

This defence applies equally to employees, contract workers, commission agents, partnerships and qualifying bodies.<sup>512</sup> It also applies in a broad range of work situations:

- in the arrangements made for the purpose of determining who should be offered employment (section 15(1)(a));

507 (2014) 222 FCR 220.

508 (2014) 222 FCR 220, 239-240 [66].

509 (2014) 222 FCR 220, 239- 240 [66].

510 These changes were introduced by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), Sch 1, item 41.

511 *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), Sch 1, item 25.

512 DDA, s 21A(3).

- in the terms and conditions on which employment is offered (section 15(1)(c));
- when offering employment, promotion or transfers (section 15(1)(d));
- in the terms and conditions of employment (section 15(2)(a)); and
- dismissing the employee (section 15(2)(c)).

However, the defence does **not** apply to:

- denying a person with disability access to opportunities for promotion, transfer or training;
- denying a person with disability access to any other benefits associated with employment;
- subjecting the person with disability to any other detriment; or
- discrimination in section 20 (registered organisations under the *Fair Work (Registered Organisations) Act 2009*).<sup>513</sup>

The Explanatory Memorandum to the 2009 amendments to the DDA states:

The purpose of the first exclusion is to ensure people with disability retain an entitlement to have the opportunity to seek a promotion or transfer on an equal basis with others. Thus an employer could not, by denying access to the opportunity for promotion or transfer, deny an employee with disability the opportunity to demonstrate that he or she can in fact carry out the inherent requirements of the job sought.

The second and third area exclusions relate to instances of discrimination by an employer against a person who is already employed. In those instances, the employee is already carrying out the inherent requirements of the job, the defence of inherent requirements would bear no meaning. That is, if the employee is carrying out the inherent requirements of the job, but is then denied access to a benefit or is subjected to a detriment by his or her employer (other than dismissal or a change in terms and conditions), it cannot be a defence to claim that the reason for the discrimination was that the employee was unable to carry out the inherent requirements of the job.

However, if an existing employee became unable to meet the inherent requirements of the job, the defence of inherent requirements would remain available to the employer, should he or she decide to dismiss the employee or to change the terms and conditions of the employment on that basis.<sup>514</sup>

The onus of proving the elements of the defence is on the respondent.<sup>515</sup>

Section 21A(2) lists the factors the court must take into account in determining whether the aggrieved person would be able to carry out the inherent requirements of the work as:

- (a) the aggrieved person's past training, qualifications and experience relevant to the particular work;
- (b) the aggrieved person's performance in working for discriminator if the aggrieved person already works for the discriminator;
- (c) any other factor that is reasonable to take into account.

### **(i) Meaning of 'inherent requirements'**

The meaning of 'inherent requirements', albeit in a different statutory context, was considered by the High Court in *Qantas Airways Ltd v Christie*.<sup>516</sup> The applicant in that case had complained that he was terminated from his employment as a pilot by reason of his age (60 years) contrary to section 170DF(1) of the *Industrial Relations Act 1988* (Cth). Section 170DF(2) of that Act provided a defence if the reason

<sup>513</sup> DDA, ss 15, 21A(4).

<sup>514</sup> Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 14 [75]-[77].

<sup>515</sup> *Commonwealth v Human Rights and Equal Opportunity Commission* (1996) 70 FCR 76, 87-88; *Power v Aboriginal Hostels Ltd* (2003) 133 FCR 254, [19] (Selway J); *Williams v Commonwealth* [2002] FMCA 89, [144].

<sup>516</sup> (1998) 193 CLR 280.

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.<sup>517</sup>

Gaudron J held that an ‘inherent requirement’ was something ‘essential to the position’<sup>518</sup> and suggested that:

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.<sup>519</sup>

The High Court subsequently considered the meaning of ‘inherent requirements’ in the context of section 15(4) in *X v Commonwealth*.<sup>520</sup> 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.

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.<sup>521</sup> 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’.<sup>522</sup>

McHugh J also noted that the concept of ‘inherent requirements’ must be understood in the context of the defence of ‘unjustifiable hardship’ (see 5.5.1 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.<sup>523</sup> This would now appear to have been codified in section 21A(1)(b) (discussed further below).

In *Williams v Commonwealth*,<sup>524</sup> it was held that the ‘inherent requirements’ of a position did not include ‘theoretical’ or ‘potential’ requirements of the position. The applicant was discharged from the RAAF on the ground of his insulin dependent diabetes. 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 applicant was engaged as Communications Information Systems Controller and his work was generally performed in comfortable air-conditioned centres unless he was on exercises.

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517 (1998) 193 CLR 280, 284 [1].

518 (1998) 193 CLR 280, 294 [34].

519 (1998) 193 CLR 280, 295 [36].

520 (1999) 200 CLR 177.

521 (1999) 200 CLR 177, 189-190 [37]. See also Gummow and Hayne JJ (with whom Gleeson CJ and Callinan J agreed) who noted 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]).

522 (1999) 200 CLR 177, 189 [37].

523 (1999) 200 CLR 177, 190 [39]. Gummow and Hayne JJ (with whom Gleeson CJ and Callinan J agreed) noted their agreement with McHugh J on this point, 208-209 [104].

524 [2002] FMCA 89.

The Commonwealth argued that the inherent requirements of the position included the ability to be deployed to 'Bare Base' facilities and the applicant was unable to carry out these 'inherent requirements' by virtue of his diabetes. This was due to problems with ensuring a regular supply of insulin, potential complications relating to diabetes 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.

At first instance, McInnis FM applied *X v Commonwealth*<sup>525</sup> and upheld the application, finding that deployment of the type suggested by the Commonwealth was not 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.<sup>526</sup>

The decision of McInnis FM was overturned by the Full Court of the Federal Court in *Commonwealth v Williams*<sup>527</sup> on the basis of the exemption in section 53 of the DDA (considered below in 5.5.2(b)). His Honour's findings in relation to inherent requirements were not considered.

The relevance of pre-employment training or induction periods in applying the inherent requirements defence was considered by Heerey J in *Gordon v Commonwealth*.<sup>528</sup> In that case, the applicant had been offered employment as a field officer with the Australian Tax Office (ATO), a position which required a significant amount of driving. His offer of employment was subsequently withdrawn whilst he was completing induction, based on medical assessments revealing that he had very high blood pressure which was said to affect his ability to drive.

Heerey J noted that the applicant would not have been required to drive during the 16 week induction program, during which time his blood pressure could have been satisfactorily brought under control with medication. Accordingly, by the completion of the induction program, he would have been able to comply with the requirement of the position to be able to drive.<sup>529</sup>

In *Pop v Taylor*,<sup>530</sup> the applicant sustained a shoulder injury. Her medical practitioner advised that she should work reduced hours, initially for one week. As a result, she was dismissed from employment. The respondent argued that it was an inherent requirement of the job that the applicant work full time. Brown J held that 'sickness and temporary incapacity are common exigencies of the workplace',<sup>531</sup> and that it could not be said that it was an inherent requirement of Ms Pop's job that she work full time for the short period specified by her medical practitioner.<sup>532</sup> (Brown J further

525 (1999) 200 CLR 177.

526 [2002] FMCA 89, [146].

527 (2002) 125 FCR 229.

528 [2008] FCA 603.

529 [2008] FCA 603, [77]-[82]. See further the discussion of this case at 5.3.1(d)(iv).

530 [2015] FCCA 1720.

531 [2015] FCCA 1720, [258].

532 [2015] FCCA 1720, [259].



held that shortening the applicant's hours of work for that period would have been a reasonable adjustment.)<sup>533</sup>

*X v Commonwealth* was applied in *Kubat v Northern Health*<sup>534</sup> in the context of an adverse action claim under section 351 of the *Fair Work Act 2009* (Cth) ('FWA'). That section contained a general prohibition on employers taking adverse action against employees, but contained an exception for an action 'taken because of the inherent requirements of the particular position concerned.'<sup>535</sup> Ms Kubat was working as an interpreter in a hospital when she was diagnosed with depression. She took time off work as a result. She received medical advice that she could return to work initially working half a day per week, if she avoided stressful situations. Brown J accepted the respondent's evidence that it was not possible given the applicant's job to avoid stressful situations or to guarantee that her shifts would not run overtime. He therefore held that she could not at that time fulfil the inherent requirements of her role.<sup>536</sup>

**(ii) *Extent to which an employer must assist an aggrieved person to be able to carry out inherent requirements***

Section 21A(1)(b) requires a discriminator to show that a person would be unable to carry out the inherent requirements of the particular work, even if the relevant employer, principal or partnership made reasonable adjustments. As discussed above 'reasonable adjustments' are all adjustments that do not impose an unjustifiable hardship on the person making the adjustments.<sup>537</sup>

It is likely that the cases determining to what extent an employer must assist an aggrieved person carry out the inherent requirements of the job under former section 15(4) of the DDA will remain relevant despite the slightly different wording of section 21A.

Section 15(4) provided that it was a defence for an employer to discriminate against an employee where the employee, 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.

In *X v Commonwealth*, the High Court made it clear that section 15(4) did not require an employer to modify the nature of a particular employment, or its inherent requirements, to accommodate a person with a disability. Gummow and Hayne JJ (with whom Gleeson CJ and Callinan J agreed) observed:

the requirements that are to be considered are 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.<sup>538</sup>

This point was central to the decision in *Cosma v Qantas Airways Ltd*<sup>539</sup> ('*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

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533 [2015] FCCA 1720, [261]-[262].

534 [2015] FCCA 3050.

535 FWA, s 351(2)(b).

536 [2015] FCCA 3050, [78]-[81].

537 DDA, s 4(1).

538 (1999) 200 CLR 177, 208 [102].

539 [2002] FCA 640.

or facilities which might have been provided by the employer pursuant to former section 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.<sup>540</sup>

The decision in *Cosma* was distinguished in the case of *Barghouthi v Transfield Pty Ltd*,<sup>541</sup> 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.<sup>542</sup>

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.

In *Huntley v State of NSW, Department of Police and Justice (Corrective Services NSW)*,<sup>543</sup> a judge of the Federal Circuit Court held that the respondent had discriminated against Ms Huntley, inter alia, by not allowing her to return to her role as a probation and parole officer, and not allowing her to remain on secondment in another role, following her diagnosis with Crohn's disease, and, later, idiopathic hypersomnolence. The respondent claimed that the applicant had been unable to perform the inherent requirements of her role as a result of her disabilities. Nicholls J held that the respondent had failed to establish what the inherent requirements of the role were. It therefore failed to make out the defence. Further, the respondent had failed to provide, 'or attempt to provide',<sup>544</sup> reasonable adjustments. The judgment seems to suggest that there may be an onus on a respondent to investigate what reasonable adjustments might be made to allow an employee to perform the inherent requirements of a job.<sup>545</sup> As Nicholls J held that Ms Huntley had in fact requested an adjustment, the question did not strictly arise.

### (iii) 'Unable to carry out'

Another issue relevant to the 'inherent requirements' defence is the extent to which an aggrieved person must be unable to carry out the relevant inherent requirements.

In *X v Commonwealth*, it was held at first instance by the then Human Rights and Equal Opportunity Commission<sup>546</sup> that the ability to carry out the inherent requirements of the employment should be

540 [2002] FCA 640, [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 at [54]-[55]. The decision of Heerey J was upheld on appeal: *Cosma v Qantas Airways Ltd* (2002) 124 FCR 504.

541 (2002) 122 FCR 19.

542 (2002) 122 FCR 19, 27 [24].

543 [2015] FCCA 1827.

544 [2015] FCCA 1827, [261].

545 See eg ibid at [435]-[436] the finding that the respondent failed to make, and failed to consider making, various adjustments in circumstances where no findings were made about adjustments being requested by the applicant.

546 *X v Department of Defence* (1995) EOC 92-715.

understood as referring to the employee's physical ability to perform the characteristic tasks or skills of the particular employment. Given that the employee was able to perform the requisite tasks, 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.

This reasoning of the Commission was rejected by the majority of the High Court. 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.<sup>547</sup>

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 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.<sup>548</sup>

A similar issue arose in *Vickers*, where the applicant was refused a position as an ambulance officer because of his Type 1, insulin-dependent diabetes. The respondent argued that the applicant's diabetes posed a grave risk to the safety of himself, his patients and the community at large due to the risk of him suffering a hypoglycaemic event whilst driving an ambulance at a high speed or whilst treating a patient. Accordingly, it argued, he was unable to *safely* carry out the inherent requirements of the employment.

Raphael FM applied *X v Commonwealth* and held that mere technical ability to comply with the inherent requirements of a position was not sufficient; the aggrieved person must be able to do so *safely*.<sup>549</sup> However, his Honour held that the safety risk posed by a person's disability must be considered in light of that person's individual characteristics, rather than assumptions about that person's disability based on stereotypes. In addition, that risk must be balanced against other relevant factors, including the likelihood of that risk eventuating. His Honour held that there is no requirement on an employer to 'guarantee' the safety of a potential employee and others, as this would be 'far too exclusionary of persons with diabetes'.<sup>550</sup>

His Honour accepted the evidence that the applicant's diabetes was very well controlled and a hypoglycaemic event was therefore very unlikely.<sup>551</sup> His Honour further held that the chances were even more remote that the applicant would suffer a hypoglycaemic event whilst driving an ambulance or treating a patient in circumstances where a delay of 30 – 60 seconds to consume some glucose would be critical to the care of his patient or to the safety of co-workers or members of the public.<sup>552</sup>

In *Power v Aboriginal Hostels Ltd*<sup>553</sup> ('Power'), Brown FM referred to the distinction that needed to be drawn between 'inability' and 'difficulty' exhibited by the person concerned in the performance of

547 (1999) 200 CLR 177, 181-182 [11].

548 (1999) 200 CLR 177, 208 [103].

549 [2006] FMCA 1232, [47]. See also *Gordon v Commonwealth* [2008] FCA 603, [66].

550 [2006] FMCA 1232, [47].

551 [2006] FMCA 1232, [49]-[50].

552 [2006] FMCA 1232, [51]-[53].

553 [2004] FMCA 452.

the inherent requirements of the employment.<sup>554</sup> His Honour noted that whilst the applicant may have found it difficult to perform the tasks of the position of assistant manager of the hostel because of his psychiatric illness, 'difficulty' is not sufficient for the purposes of former section 15(4): 'Rather it must be shown that the person's disability renders him or her **incapable** of performing the tasks required of the position'.<sup>555</sup>

Applying *X v Commonwealth*, Brown FM noted that 'such inability must be assessed in a practical way'.<sup>556</sup> In his view the only practical way to make the assessment in this case was to examine the medical evidence.<sup>557</sup> Having made that assessment he accepted that the applicant was not incapable of performing the inherent requirements of his position of assistant manager, regardless of the workplace environment, and former section 15(4) therefore had no application.<sup>558</sup>

#### (iv) *Imputed disabilities*

Another issue which has arisen in the context of former section 15(4) is whether ability to carry out the inherent requirements of the position should be assessed by reference to the aggrieved person's actual disability or imputed disability.

This issue arose in *Power*. The applicant had been dismissed from his employment after the respondent imputed to him the disability of depression and determined that that disability rendered him unable to perform the inherent requirements of the position of assistant manager at one of its hostels. At first instance, Brown FM accepted that the defence under former section 15(4) was made out, because: '[i]n essence, the respondent was entitled to consider that Mr Power was not cut out for the particular job...'.<sup>559</sup>

On appeal, Selway J held that Brown FM 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.<sup>560</sup>

His Honour also considered the issue of whether the aggrieved person's actual or imputed disability was relevant when applying former section 15(4), observing:

The next question is whether the appellant is unable to perform those duties 'because of his disability'. That question was not addressed by the learned Federal Magistrate. In my view the failure to address that question was an appealable error. If the question had been addressed then there are two possibilities. The first is that the 'imputed disorder' of depression is the relevant disability. Alternatively, his actual condition of an adjustment disorder (from which he seems to have recovered) is the relevant disability.

The appellant's submissions assumed that the relevant disability was the actual condition of the appellant at the time of his termination. On that basis the appellant submitted that he could perform the inherent requirements of the position - indeed, he was doing so for the four weeks before his employment was terminated. Consequently, he argued, s 15(4) of the DDA had no application.

On the other hand the respondent's submissions assumed that the relevant disability was the imputed disorder of depression, notwithstanding that the appellant was not suffering from that disability. On this

<sup>554</sup> [2004] FMCA 452, [23].

<sup>555</sup> [2004] FMCA 452, [57] (emphasis added).

<sup>556</sup> [2004] FMCA 452, [58].

<sup>557</sup> [2004] FMCA 452, [58], [68].

<sup>558</sup> [2004] FMCA 452, [65], [68]-[69].

<sup>559</sup> [2004] FMCA 452, [119].

<sup>560</sup> (2003) 133 FCR 254, 262 [13].

basis the respondent argued that in light of the report of Dr Ducrou the appellant was unable to comply with the inherent duties of the position.

So far as my research reveals, there is no authority directly on point. The definition of 'disability' in s 4 of the DDA purports to be an exhaustive definition, 'unless the contrary intention appears'. There is no obvious contrary intention disclosed by s 15(4). Nor is there any obvious reason to imply one. The DDA is principally directed to the elimination as far as possible of 'discrimination against persons on the ground of disability' in relevant areas (s 3 DDA). It is not directed at achieving 'fair outcomes' as such. Consequently what is prohibited is discriminatory behaviour based upon disability. 'Imputed' disability is sufficient for this purpose. What the DDA prohibited in this case was not the dismissal of the appellant for a reason which was wrong, but the dismissal of the appellant who had a disability (albeit an imputed one) in circumstances where a person without a disability would not have been dismissed. When it is understood that the DDA is directed at the ground of discrimination (which includes imputed disability) and not 'fair outcomes' then there seems no reason to imply that 'disability' appearing in s 15(4) of the DDA does not include imputed disability.<sup>561</sup>

On remittal from the Federal Court,<sup>562</sup> Brown FM noted that the applicant had been dismissed on the basis of a disability (depression) that he did not have. The applicant did, however, have another disability (adjustment disorder) which had 'resolved' prior to his dismissal. Brown FM concluded that it was the aggrieved person's **actual** disability that was to be considered when applying former section 15(4), stating that 'it would be absurd if the exculpatory provisions of section 15(4) were to be implied to the imputed disability per se'<sup>563</sup> such that an employer could lawfully dismiss an employee on the basis that they were unable to carry out the inherent requirements of the position because of a disability that they did not have.

A similar result was reached, by different reasoning in *Gordon v Commonwealth*<sup>564</sup> ('Gordon'). In *Gordon*, the applicant had been offered a position as a field officer with the Australian Tax Office ('ATO'), which involved a significant amount of driving. The offer had been made subject to a satisfactory medical assessment during the induction phase of the position. The offer was subsequently withdrawn whilst the applicant was completing his induction on the basis of certain medical reports showing him to have very high blood pressure which was said to affect his ability to drive.

Heerey J held that the relevant medical reports did not paint an accurate picture of the applicant's blood pressure, as additional medical evidence demonstrated that he suffered from 'white coat syndrome' (anxiety when undergoing medical assessments), which temporarily raised his blood pressure when the readings were taken. Accordingly, the ATO had essentially withdrawn the offer based on an imputed disability (severe hypertension) that the applicant in fact did not have, or at least not to the extent believed by the ATO and its medical adviser.

In considering the application of former section 15(4), Heerey J cited the passage from Selway J's judgment in *Power* (quoted above), which his Honour regarded as authority for the proposition that, when applying former section 15(4), it is the applicant's **imputed** disability that must be considered.<sup>565</sup> His Honour does not appear to have been referred to the decision of Brown FM, on remittal in *Power*, taking the contrary view. His Honour added that the word 'disability' should logically be interpreted consistently throughout section 15, such that if the alleged discrimination under section 15(1) or (2) was based on an imputed disability, then the defence under former section 15(4) should also be applied by reference to that same imputed disability. His Honour concluded:

561 (2003) 133 FCR 254, 262-263 [15]-[18].

562 *Power v Aboriginal Hostels Ltd* [2004] FMCA 452.

563 [2004] FMCA 452, [65]. See also [17]-[22].

564 [2008] FCA 603.

565 [2008] FCA 603, [63].

Since s 15 as a whole is setting up a norm of conduct, it is to be read as addressed to employers as at the time they are contemplating potentially discriminatory conduct. Subsections (1) and (2) tell employers what they must not do. Subsections (3) and (4) tell them in what circumstances they may lawfully do what would otherwise amount to unlawful discrimination. This suggests that what subs (4) is concerned with are circumstances known to the employer at the time. However, consistently with the philosophy of anti-discrimination legislation (see [58] above), the criterion is an objective one – as is indicated by the reference to ‘all other factors that it is reasonable to take into account’. The relevant circumstances include the nature of the imputed disability in light of such medical investigation as may be reasonable and the availability of reasonable treatment.<sup>566</sup>

In the circumstances of the case, his Honour held that the respondent had failed to show that the applicant was unable to carry out the inherent requirements of the position ‘by reason of his imputed (or indeed actual) hypertension’.<sup>567</sup> This was on account of the fact that at the time of the alleged discrimination it was reasonably apparent that:

- the applicant may have been affected by ‘white coat syndrome’;
- ‘ambulatory testing’ (using a device to record blood pressure over a 24 hour period) would have likely revealed that his blood pressure was significantly lower than first thought; and
- in any event, even with elevated blood pressure, this could have been satisfactorily brought under control within the period of his induction, during which time the applicant would not have been required to drive a vehicle.<sup>568</sup>

Interestingly, his Honour’s reasoning appears to suggest that where medical investigations or treatment are reasonably available that would have revealed the person’s imputed disability to be less severe (or possibly even false) than was imputed, it is that disability rather than the imputed disability that is relevant when applying former section 15(4). In most cases, this would presumably equate with the person’s actual disability (or lack thereof).

Despite the repeal of section 15(4) and the insertion of the ‘inherent requirements’ defence into section 21A his Honour’s reasoning would still appear to be relevant to the defence.

### 5.3.2 Education

A number of significant cases under the DDA have related to disability discrimination in education.<sup>569</sup> Section 22 of the DDA provides:

#### 22 Education

- (1) It is unlawful for an educational authority to discriminate against a person on the ground of the person’s disability:
  - (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:
  - (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.

<sup>566</sup> [2008] FCA 603, [65].

<sup>567</sup> [2008] FCA 603, [82].

<sup>568</sup> [2008] FCA 603, [77]–[82].

<sup>569</sup> See, for example, *Purvis v New South Wales (Department of Education & Training)* (2003) 217 CLR 92; *Minns v New South Wales* [2002] FMCA 60; *Clarke v Catholic Education Office* [2003] FCA 1085; *Finney v Hills Grammar School* [1999] HREOCA 14 (extract at (1999) EOC 93-020); *Travers v New South Wales* [2001] FMCA 18; *AJ & J v A School (No 2)* (Unreported, Human Rights and Equal Opportunity Commission, Commissioner McEvoy, 10 October 2000).

- (2A) It is unlawful for an education provider to discriminate against a person on the ground of the person's disability:
- (a) by developing curricula or training courses having a content that will either exclude the person from participation, or subject the person to any other detriment; or
  - (b) by accrediting curricula or training courses having such a content.
- (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.

As discussed above at 5.2.6(b), since 18 August 2005 disability discrimination in education is subject to the *Disability Standards for Education 2005*. These Standards clarify the obligations and responsibilities of education providers in avoiding unlawful discrimination on the basis of disability in education.

### (a) 'Educational authority'

Another issue that has arisen in relation to section 22 is the scope of the expression 'educational authority.' In *Applicant N v Respondent C*,<sup>570</sup> the respondent argued that it was a child care centre, not an 'educational authority' and therefore not subject to section 22 of the DDA. McInnes FM held that the expression 'educational authority' should be interpreted broadly and would include a child care centre.<sup>571</sup> His Honour held:

On the evidence and the pleadings before this court, at the very least, in my view, the Respondent can be said to manage an institution which provides for education of children in **the development of mental or physical powers and/or the moulding of some aspects of character**.<sup>572</sup>

### (b) Education as a service?

One matter that remains unresolved in relation to section 22 is whether an education authority or institution is the provider of a 'service', so as to also trigger the application of section 24 (provision of goods, services and facilities).

In *Clarke v Catholic Education Office*,<sup>573</sup> 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 unlawful discrimination contrary to section 22(1)(b) or alternatively unlawful discrimination in the provision of educational services, contrary to section 24(1)(b). Madgwick J was prepared to permit this alternative claim to be included as part of the proceedings.<sup>574</sup> However, in upholding the applicant's claim, his Honour did not make it clear under which specific provision the discrimination was found to be unlawful.<sup>575</sup>

### (c) Availability of defence of unjustifiable hardship

As originally drafted, the DDA provisions relating to education only provided for a defence of unjustifiable hardship<sup>576</sup> for admission of students to educational institutions. The defence was not available in

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570 [2006] FMCA 1936.

571 [2006] FMCA 1936, [38]-[43].

572 [2006] FMCA 1936, [42] (emphasis added).

573 [2003] FCA 1085.

574 [2003] FCA 1085, [39]. Cf *Ferneley v The Boxing Authority of New South Wales* (2001) 115 FCR 306 in the context of the SDA.

575 [2003] FCA 1085, [82]. Note, however, that in *Rana v Human Rights and Equal Opportunity Commission* (1997) 74 FCR 451, O'Loughlin J held that s 24 had no operation in relation to a claim under s 27 based on the principle of statutory construction that an express reference to one matter indicates that other matters are to be excluded.

576 See 5.5 below for a discussion of unjustifiable hardship generally.



relation to the treatment of students once they had been admitted. This distinction was of some importance in the decision of the High Court in *Purvis v New South Wales (Department of Education and Training)*<sup>577</sup> (see 5.2.1 above). The case involved the expulsion of a child with behavioural problems from a school. The case was brought as one of direct discrimination, and due to the drafting of the DDA at the time, it was also not open to the respondent to argue that permitting the child to remain at the school would have imposed an unjustifiable hardship. Accordingly, the case fell to be decided on the question of whether the school's expulsion of the child was 'on the ground of' the student's disability for the purposes of establishing direct discrimination under section 5.

Section 22(4) of the DDA was subsequently amended in 2005 to, amongst other things, extend the unjustifiable hardship defence to the treatment of students post-admission.<sup>578</sup> From 5 August 2009,<sup>579</sup> there is a general defence of unjustifiable hardship and section 29A provides a defence of unjustifiable hardship in relation to all aspects of education.

### 5.3.3 Access to premises

Section 23 of the DDA deals with discrimination in relation to access to premises, as follows:

#### 23 Access to premises

It is unlawful for a person to discriminate against another person on the ground of the other person's disability:

- (a) by refusing to allow the other person access to, or the use of, any premises that the public or a section of the public is entitled or allowed to enter or use (whether for payment or not); or
- (b) in 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; or
- (c) in relation to the provision of means of access to such premises; or
- (d) by refusing to allow the other person the use of any facilities in such premises that the public or a section of the public is entitled or allowed to use (whether for payment or not); or
- (e) in the terms or conditions on which the first-mentioned person is prepared to allow the other person the use of any such facilities; or
- (f) by requiring the other person to leave such premises or cease to use such facilities.

Premises are defined by section 4 of the DDA as follows:

**premises** includes:

- (a) a structure, building, aircraft, vehicle or vessel; and
- (b) a place (whether enclosed or built on or not); and
- (c) a part of premises (including premises of a kind referred to in paragraph (a) or (b)).

The scope of the expression 'terms and conditions' for the purposes of section 23 was considered in *Haar v Maldon Nominees*.<sup>580</sup> 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

<sup>577</sup> (2003) 217 CLR 92.

<sup>578</sup> The changes to s 22 were introduced by the *Disability Discrimination Amendment (Education Standards) Act 2005* (Cth), which commenced operation on 1 March 2005 (although the amendments to s 22 did not commence until 10 August 2005). The Act also inserted into s 4(1) a new definition of 'education provider', which applies to the newly created s 22(2A).

<sup>579</sup> As a result of the amendments to the DDA in the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), see Sch 2, item 41, 60.

<sup>580</sup> [2000] FMCA 5.

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.<sup>581</sup>

Other examples of cases concerning access to premises include:<sup>582</sup>

- *Sheehan v Tin Can Bay Country Club*,<sup>583</sup> where Raphael FM decided that a man with an anxiety disorder that required him to have an assistance dog in social situations was discriminated against when his local club imposed the condition that his dog not be allowed into the club unless it was on a leash.<sup>584</sup> See 5.2.5(c).
- *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*,<sup>585</sup> where the applicant organisation complained that certain council facilities (a community centre, concrete picnic tables and public toilets) were inaccessible to members of the organisation who had disabilities. Baumann FM found that the three areas the subject of the application all fell within the definition of 'premises' for the purposes of section 4 of the DDA.<sup>586</sup> However, only the claim in relation to the toilet facilities (specifically, the fact that wash basins were located outside the toilet) was successful. See 5.2.3(c).
- *Haraksin v Murrays Australia (No. 2)*,<sup>587</sup> where the applicant wanted to book a wheelchair accessible seat on a coach service operated by the respondent. The respondent did not own any wheelchair accessible coaches. Nicholas J noted that section 4 of the DDA defines 'premises' to include a 'vehicle', and found that the respondent's failure to make reasonable adjustments to allow the applicant to travel on the relevant coach service amounted to discrimination in relation to the access to premises.<sup>588</sup>

### 5.3.4 Provision of goods, services and facilities

Section 24 of the DDA deals with discrimination in relation to the provision of goods, services and facilities, as follows:

#### 24 Goods, services and facilities

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:

- (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.

581 [2000] FMCA 5, [68].

582 See also, for example, *Webb v Child Support Agency* [2007] FMCA 1678; *Sluggett v Human Rights and Equal Opportunity Commission* (2002) 123 FCR 561; *Cooper v Human Rights and Equal Opportunity Commission* (1999) 93 FCR 481, 491-492 [29]-[31]; *Grovenor v Eldridge* [2000] FCA 1574.

583 [2002] FMCA 95.

584 [2002] FMCA 95, [24].

585 [2004] FMCA 915.

586 [2004] FMCA 915, [75].

587 (2013) 211 FCR 1.

588 (2013) 211 FCR 1, 13-14, [49]-[54].

**(a) Defining a ‘service’****(i) Council planning decisions**

In *IW v City of Perth*<sup>589</sup> (*‘IW’*), the High Court considered the meaning of ‘services’ in section 4(1) of the *Equal Opportunity Act 1984* (WA).<sup>590</sup> In that matter, People Living With Aids (WA) Inc (*‘PLWA’*) had applied to Perth City Council for approval to use premises in an area zoned for shopping as a day time drop-in centre for persons who were HIV positive. The respondent Council rejected the application and it was argued that this amounted to discrimination on the grounds of impairment.

A majority of the High Court dismissed the appeal (Toohey and Kirby JJ dissenting). However, of the majority, only Brennan and McHugh JJ based their reasoning on a conclusion that there was no service. Their Honours held that:

when a council is called on as a deliberative body to exercise a statutory power or to execute a statutory duty, it may be acting directly as an arm of government rather than a provider of services and its actions will be outside the scope of the Act.<sup>591</sup>

They stated further:

when a council is required to act in a quasi-judicial role in exercising a statutory power or duty it may be inappropriate to characterise the process as the provision of a service for the purpose of the Act even in cases when the product of the process is the provision of a benefit to an individual.<sup>592</sup>

In dissenting or obiter comments the other members of the court said that there was a ‘service’ being provided by the Council. Dawson and Gaudron JJ said that ‘services in its ordinary meaning, is apt to include the administration and enforcement by the City of Perth of the Planning Scheme’.<sup>593</sup> Similarly, Gummow J said that the Council was providing ‘services’ when it granted or refused a particular application for consent.<sup>594</sup> Toohey J said the ‘service’ in this case could be seen as the consideration and disposition of the application for planning approval.<sup>595</sup> Kirby J also said that ‘services’ read in its context includes the provision by a local government body of a planning decision to alter the permissible use of premises.<sup>596</sup>

**(ii) Prisons as a service**

The extent to which a prison may be regarded as the provider of a service arose in *Rainsford v Victoria (No 2)*.<sup>597</sup> The applicant, who suffered a back condition, was a prisoner at Port Philip Prison. He complained that prison transport arrangements which involved lengthy journeys in uncomfortable vehicles would leave him in pain and with limited movement. He also complained that he had been locked down in a Management Unit of Port Philip Prison for 23 hours a day for 9 days during which he was unable to access exercise facilities. The applicant alleged this treatment constituted unlawful discrimination contrary to the DDA.

<sup>589</sup> (1997) 191 CLR 1.

<sup>590</sup> Section 4(1) of the *Equal Opportunity Act 1984* (WA) at that time provided a definition of ‘services’ which is similar to that contained in s 4(1) of the DDA and included: ‘(e) services of the kind provided by a government, a government or public authority or a local government body’.

<sup>591</sup> (1997) 191 CLR 1, 15.

<sup>592</sup> (1997) 191 CLR 1, 15.

<sup>593</sup> (1997) 191 CLR 1, 23-24.

<sup>594</sup> (1997) 191 CLR 1, 44-45.

<sup>595</sup> (1997) 191 CLR 1, 28.

<sup>596</sup> (1997) 191 CLR 1, 72.

<sup>597</sup> [2004] FMCA 707.

Raphael FM concluded that the respondents had not provided a service.<sup>598</sup> His Honour stated:

In the case of these particular prison 'services' they cannot be separated from the duty of incarceration. A place must be provided for a prisoner to sleep and in order to move the prisoner from the place of trial to the place of incarceration transport must be used.<sup>599</sup>

His Honour referred to *IW*, authorities reviewed therein<sup>600</sup> and other Australian authorities<sup>601</sup> and stated:

If, in the case of services of the kind provided by a government one distinguishes the statutory duty element from the services element by assessing whether the alleged services element is intended to provide a benefit to the complainant then it can be seen that the decided cases are consistent.<sup>602</sup>

His Honour then proceeded to draw a distinction between a government authority acting under the authority of statute deciding whether or not to extend a service to an individual, compared with the case before him in which no discretionary element existed. He stated that 'incarceration is the result of the coercive power of the State following judicial determination, and is a decision imposed on both the prisoner *and* the provider of correctional services'.<sup>603</sup>

An appeal against Raphael FM's decision was successful on procedural grounds, namely that his Honour had incorrectly applied the separate question procedure under Part 17, rule 17 of the *Federal Magistrates Court Rules 2001* (Cth).<sup>604</sup> However, in obiter comments, Kenny J (with whom Hill and Finn JJ agreed), rejected the distinction sought to be drawn by Raphael FM between the provision of a service pursuant to a statutory discretion and the situation where no discretion existed. Her Honour held:

The Federal Magistrate erroneously relied on a distinction that he drew between the provision of services pursuant to a statutory discretion and 'the situation ... where no discretionary element exists'.

In addition to the management and security of prisons, the purposes of the *Corrections Act 1986* (Vic) include provision for the welfare of offenders. The custodial regime that governs prisoners under this Act is compatible with the provision of services to them: see, for example, s 47. Indeed this proposition is fortified by the provision of the Prison Services Agreement to which counsel for Mr Rainsford referred on the hearing of the appeal. In discharging their statutory duties and functions and exercising their powers with respect to the management and security of prisons, the respondents were also providing services to prisoners. The fact that prisoners were unable to provide for themselves because of their imprisonment meant that they were dependent in all aspects of their daily living on the provision of services by the respondents. Although the provision of transport and accommodation would ordinarily constitute the provision of services, whether the acts relied on by Mr Rainsford will constitute services for the DDA will depend upon the findings of fact, which are yet to be made and, in particular, the identification of the acts that are said to constitute such services.<sup>605</sup>

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598 [2004] FMCA 707, [26].

599 [2004] FMCA 707, [20].

600 [2004] FMCA 707, [11]-[15], [19]; *Attorney General (Canada) v Cumming* [1980] 2 FC 122, [131]-[132]; *Savjani v Inland Revenue Commissioners* (1981) QB 458; *R v Entry Clearance Officer; Ex parte Amin* (1983) 2 AC 818; *Farah v Commissioner of Police of the Metropolis* (1998) QB 65.

601 [2004] FMCA 707, [16]-[17]; *Secretary of the Department of Justice & Industrial Relations v Anti Discrimination Commissioner* 11 TASR 324; *Clarkson v The Governor of the Metropolitan Reception Prison* (1986) EOC 92-153; *Henderson v Victoria* (1984) EOC 92-027 and (1984) EOC 92-105; *Jolly v The Director General of Corrections* (1985) EOC 92-124; *A Complainant v Western Australia* (1994) EOC 92-610; *Hobby v Executive Director of the Department of Corrective Services* (1992) EOC 92-397; *Bandulla v Victoria* [2002] VCAT 91.

602 [2004] FMCA 707, [20].

603 [2004] FMCA 707, [24].

604 *Rainsford v Victoria* (2005) 144 FCR 279.

605 (2005) 144 FCR 279, 296 [54]-[55].

The Full Court remitted the matter back to Federal Magistrates Court, where it was subsequently transferred to the Federal Court for hearing before Sundberg J.<sup>606</sup>

Sundberg J confirmed that whether the particular services alleged by the applicant fell within the DDA was a question of fact. His Honour held that it was necessary to identify the alleged service with some precision and then ask whether that service was being provided to the applicant. In doing so, his Honour held, the guiding principle is whether the respondent's actions could be characterised as being helpful or beneficial to the applicant.<sup>607</sup>

On the facts, Sundberg J rejected the applicant's characterisation of the relevant service as 'prison management and control'. Rather, his Honour held that the identification of the services required greater specificity, namely the transportation of prisoners and the accommodation of prisoners in cells within the prison system.<sup>608</sup> When so identified, his Honour held, neither constituted a service within the meaning of the DDA. This was because both alleged services were simply inherent parts of incarceration and prison management. They did not confer any benefit or helpful activity on the prisoners in the relevant sense.<sup>609</sup>

Sundberg J also emphasised that, in considering whether the relevant acts constituted the provision of a service to the applicant, it was necessary to have regard to the wider obligations of the respondents in providing prison management:

Their obligations are not just to the welfare of prisoners but also to the general public and prison staff through providing adequate security measures, to other prisoners by ensuring that prisoners do not harm one another, and to the general good governance of the prison. To suggest that transport of prisoners or cell accommodation is a service to prisoners is to ignore the fact that they are functions performed in order to comply with the sometimes competing obligations of prison management to its prisoners, its staff, the public and the good governance of the prison.<sup>610</sup>

On further appeal,<sup>611</sup> the Full Court of the Federal Court concluded that none of the matters about which the appellant complained met the test for indirect discrimination under section 6. Accordingly, the court considered that it was unnecessary to reach a finding on the question of whether the respondent prison was the provider of a service within the meaning of section 24. However, their Honours did observe, *in obiter*, that

although the meaning of 'service' is not simple to resolve, and the matter was not argued in depth, we see some strength in the view that the provision of transport and accommodation, even in a prison, may amount to a service or facility.<sup>612</sup>

### **(iii) The detection and prevention of crime as a service**

In the context of a race discrimination complaint, the NSW Court of Appeal considered the meaning of 'services' under section 19 of the *Anti-Discrimination Act 1977* (NSW) in *Commissioner of Police v Mohamed*.<sup>613</sup>

606 *Rainsford v Victoria* (2007) 167 FCR 1. For discussion of this case, see Frances Simmons, 'When is performing a government function a service?' (2008) 46 *Law Society Journal* 40.

607 (2007) 167 FCR 1, 17-19 [73]-[76].

608 (2007) 167 FCR 1, 19 [76].

609 (2007) 167 FCR 1, 19 [77]-[78].

610 (2007) 167 FCR 1, 19-20 [79].

611 *Rainsford v Victoria* (2008) 167 FCR 26. See also Frances Simmons, 'When is performing a government function a service?' (2008) 46 *Law Society Journal* 40.

612 (2008) 167 FCR 26, 29 [9] (Tamberlin, North and Mansfield JJ).

613 [2009] NSWCA 432.

The respondent had called the police to investigate a complaint that her Caucasian Australian neighbours had thrown rocks at her house, smashed the glass on her front door and had subjected her to physical and verbal abuse.

The respondent subsequently lodged a complaint with the Anti-Discrimination Board in NSW, alleging that the conduct of the police officers who responded to her complaint was racially discriminatory.

Various questions of law were referred to the Supreme Court and then the Court of Appeal. On the issue of services, the majority of the Court of Appeal found:

- The detection and prevention of crime can constitute ‘services’ for the purposes of section 19 of the *Anti-Discrimination Act 1977* (NSW).<sup>614</sup>
- Conduct of police officers with respect to a request for assistance in relation to possible criminal activity, where protection of persons or property may be required, can involve the refusal or provision of ‘services’ for the purposes of section 19 of the *Anti-Discrimination Act 1977* (NSW).<sup>615</sup>
- The aggrieved person, as described in section 7(1) of the *Anti-Discrimination Act 1977* (NSW), will be the person or persons who are treated less favourably or required to comply with a requirement or condition, as described in section 7(1), in relation to the provision or refusal to provide the services and need not be limited to the person or persons reporting an event relating to an alleged criminal offence.<sup>616</sup>

The judgement contains a useful analysis of the Australian and UK case law on whether public authorities can be said to be providing ‘services’ to individuals in the context of interpreting anti-discrimination statutes.<sup>617</sup>

Not all police activities will constitute the provision of services. A question may also arise about *to whom* the police may be providing services when they perform certain functions. For instance, in *Robinson v Commissioner of Police, New South Wales Police Force*,<sup>618</sup> Yates J held that two police officers, in pursuing and arresting the applicant, and later in maintaining custody over him in an ambulance and in hospital, were not providing services to the applicant. Similarly, in considering the applicant’s application for police bail, the police were not providing any service to him.<sup>619</sup> These findings were upheld on appeal by the Full Court of the Federal Court.<sup>620</sup>

#### **(iv) Other disputed services**

The applicant in *Vintila v Federal Attorney General*<sup>621</sup> 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 preparation of the RIS involved the provision of a service and was therefore covered by the DDA.

In summarily dismissing the application, McInnis FM found that an RIS does not constitute the provision of a ‘service’. Without reference to other authorities, his Honour held:

614 [2009] NSWCA 432, [35] (Basten JA), [1] (Spigelman CJ agreeing), [91] (Handley AJA did not consider).

615 [2009] NSWCA 432, [49] (Basten JA), [1] (Spigelman CJ agreeing), [91] (Handley AJA).

616 [2009] NSWCA 432, [49] (Basten JA), [1] (Spigelman CJ agreeing), [91] Handley AJA considered that victims of alleged criminal offences who report the event to the police could be ‘persons aggrieved’ in relation to the conduct of the police officers responding to the report, at least in the initial stages of any such investigation.

617 [2009] NSWCA 432, [45]–[48] (Basten JA).

618 *Robinson v Commissioner of Police, NSW Police Force* [2012] FCA 770.

619 [2012] FCA 770, [86]–[98].

620 *Robinson v Commissioner of Police, NSW Police Force* [2013] FCAFC 64 (Siopis, Besanko and McKerracher JJ).

621 [2001] FMCA 110.

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.<sup>622</sup>

In *Ball v Morgan*,<sup>623</sup> McInnes FM held that a particular service would fall outside section 24 of the DDA if it was illegal or 'against good morals'.<sup>624</sup> The applicant had been at an illegal brothel in Victoria and alleged that 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 queried whether or not this fell within the scope of 'services' under the DDA:

The preliminary issue therefore which I need to consider is whether the provision of a service characterised as an illegal brothel is a service of a kind which would attract the attention of human rights legislation and in particular whether the provisions relied upon in the DDA can be applied for the benefit of the applicant in the present case even if I were to assume that discrimination has occurred.<sup>625</sup>

McInnis FM dismissed the application, finding:

It is difficult in circumstances of this kind to determine the extent to which the court should refuse to allow a claim to be pursued but in all the circumstances I am satisfied that to do so would be to allow the applicant to pursue a claim arising out of the provision of an illegal service and/or would allow a claim to be pursued in relation to an activity that I am satisfied would affront public conscience and even in this modern age would be regarded as against good morals.<sup>626</sup>

## (b) Identifying the service

The identification of the relevant service will be important in determining whether a service has been refused, or provided subject to discriminatory terms or conditions.

In *King v Jetstar Airways (No. 2)*,<sup>627</sup> the applicant sought to book a ticket on a flight operated by Jetstar. As a result of a disability, she used a wheelchair and required assistance to board and disembark from the plane. Jetstar refused to allow her to book travel on her chosen flight because Jetstar had a policy under which it only allowed two persons requiring wheelchair assistance to travel on any particular flight. The applicant claimed that Jetstar had refused to provide her with a service, for the purposes of section 24 of the DDA.

Jetstar submitted that the services it provided to persons requiring wheelchair assistance were different from those it supplied to other passengers. Robertson J rejected that argument. In identifying the relevant service, he held:

In my view, identification of the service should start from the perspective of a person wanting the putative service. The preferable analysis here is that the service was the major and dominant service Mrs King wanted, being flight JQ 769 from Adelaide to Brisbane on 23 September 2008. For the purposes of the Act, the assistance should be seen as ancillary to the service constituted by the particular flight. It was assistance to board and disembark the flight. Its provision does not negate the identification of the flight as the service.

622 [2001] FMCA 110, [22].

623 [2001] FMCA 127.

624 [2001] FMCA 127, [64].

625 [2001] FMCA 127, [60].

626 [2001] FMCA 127, [64].

627 [2012] FCA 8. See the discussion at 5.5.1(c) below.



While it is possible to identify two services in my opinion it would be artificial to do so. Although the assistance which Mrs King required in order to board or disembark the flight was substantial it was not sufficiently discrete or separate from the service of travel on the flight in question to constitute a different service for the purposes of the Act. In my view, the provision of substantial assistance to some passengers or indeed to all passengers to board or disembark from the aircraft does not change the identity of the service.<sup>628</sup>

### (c) 'Refusal' of a service

In *IW*, while finding that the respondent council was providing a service in the consideration of applications for planning approval, Dawson and Gaudron JJ rejected the argument that there had been a refusal to provide the service:

Once the service in issue is identified as the exercise of a discretion to grant or withhold planning approval, a case of refusal to provide that service is not established simply by showing that there was a refusal of planning approval. Rather it is necessary to show a refusal to consider whether or not approval should be granted.<sup>629</sup>

Similarly, Gummow J held that the Council did not refuse to provide services as it did not refuse to accept or deal with the application by PLWA.<sup>630</sup>

In *Tate v Rafin*,<sup>631</sup> the respondent argued that a person is not discriminated against by being refused access to goods, services or facilities in circumstances where they have access to goods, services or facilities from another source. Wilcox J rejected that argument, holding:

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.<sup>632</sup>

The mere fact that a service is not provided on a particular occasion does not necessarily establish that there has been a 'refusal' of that service. For example, in *Ball v Silver Top Taxi Service Ltd*<sup>633</sup> the applicant, who used an electric wheelchair for mobility, brought a complaint against the respondent in relation to its failure to meet her booking for a wheelchair accessible taxi. It was accepted that the services provided by the respondent were 'services relating to transport or travel' for the purposes of section 4(1).<sup>634</sup> The applicant argued that there had been a refusal to provide that service to people with disabilities. Walters FM held, however, that the respondent did not *refuse* to provide the applicant with its services: rather, it did all that it could to dispatch an appropriate taxi on the particular day.<sup>635</sup> His Honour concluded that the respondent dealt with the applicant's booking in the same way as it dealt with bookings for a standard taxi from persons without the applicant's disability.<sup>636</sup> The respondent in *Ball* was a 'taxi depot' that operated a 'taxi booking and dispatch service for taxi operators affiliated with the depot.' It did not itself operate any wheelchair accessible taxis. The situation in *Ball* may be contrasted, for example, with that in *King v Jetstar Airways Pty Ltd (No. 2)*,<sup>637</sup> where Jetstar was held to have refused to provide a service to the applicant (who required wheelchair assistance) when it refused to allow her to book a ticket to travel on her chosen flight.

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628 [2012] FCA 8, [128]-[129].

629 (1997) 191 CLR 1, 23-24.

630 (1997) 191 CLR 1, 44-45.

631 [2000] FCA 1582.

632 [2000] FCA 1582, [53].

633 [2004] FMCA 967.

634 [2004] FMCA 967, [27].

635 [2004] FMCA 967, [45].

636 [2004] FMCA 967, [38].

637 [2012] FCA 8, [184]-[185].

By contrast to *Ball*, in *Wood v Calvary Health Care*,<sup>638</sup> Moore J emphasised that the meaning of 'refusing' in section 24(1)(a) should be given a beneficial construction and the section 'does not cease to apply where a putative discriminator is for some reason temporarily unable to provide the goods or services'.<sup>639</sup> In that case the applicant had requested certain medical treatment at home through the 'Calvary at Home' scheme. Upon making that request, she was told that she would not be able to be treated at home because of her past intravenous drug use and past aggressive behaviour. However, at the time that the applicant requested to be treated at home, the home visits scheme was closed to new entrants because of staff shortages.

At first instance,<sup>640</sup> Brewster FM held that there must be a service available to be offered before that service can be said to have been refused. As the service was closed at the relevant time, there was no refusal of a service and section 24 did not apply.<sup>641</sup>

However, on appeal to the Federal Court,<sup>642</sup> Moore J disagreed with this approach as taking an unduly narrow reading of 'refusal'.<sup>643</sup> Nevertheless, Moore J rejected the appeal on the basis that the appellant was treated no differently to a person without a disability, as the program was closed to all patients:

The Federal Magistrate's finding that the home visits program was closed seems to lead, inevitably, to the conclusion that the appellant was treated no differently than a person without the disability would have been treated. Neither would have been provided with the service. It is therefore unnecessary to consider the construction of a comparator for the purpose of s 5. The Federal Magistrate was correct in reaching the conclusion that the hospital did not contravene s 5.<sup>644</sup>

#### **(d) Delay in providing a service or making a facility available**

The issue of whether discrimination can arise from delay in providing a service or making a facility available in order to accommodate the needs of a person with a disability arose for consideration in *King v Gosewisch*.<sup>645</sup> The Burrum Chamber of Commerce held an open meeting for the purpose of introducing local council candidates to the community. The meeting was held on the first floor of the local golf club which was inaccessible to two attendees who used wheelchairs. This gave rise to some heated commotion amongst various attendees and organisers. However, after a 40 minute delay, but prior to the meeting commencing, the meeting was transferred to the ground floor. A claim alleging discrimination in breach of section 24 of the DDA was brought against the organisers of the meeting by the two attendees who used wheelchairs as well as one of their associates.

Baumann FM held that there had been no 'refusal' to provide a service or to make the facilities available, as the time at which the service was provided was the time at which the meeting began, by which time the meeting had moved downstairs and the applicants were able to attend.<sup>646</sup>

Similarly, Baumann FM rejected the claim that the respondent had discriminated against the applicants in relation to the manner and/or terms on which the services or facilities were provided, such as having to ascend the stairs to the first floor or wait 40 minutes to attend the meeting on the ground floor. His Honour noted that the applicants were not required to ascend the stairs to attend the meeting as the

638 155 FCR 489.

639 155 FCR 489, 497 [28].

640 *Wood v Cavalry Hospital* [2005] FMCA 799.

641 [2005] FMCA 799, [23].

642 155 FCR 489.

643 155 FCR 489, 497 [28].

644 155 FCR 489, 497-8[31].

645 [2008] FMCA 1221.

646 [2008] FMCA 1221, [78]-[81], [88].

meeting did not commence until it had been transferred downstairs.<sup>647</sup> In relation to the delay of 40 minutes, his Honour held that this was reasonable in the circumstances and treated the applicants no differently to the other attendees.<sup>648</sup>

### (e) Ownership of facilities not necessary for liability

In *King v Gosewisch*,<sup>649</sup> the respondents argued that they could not be liable in respect of the inaccessibility of the meeting on the first floor of the golf clubhouse because they did not own the premises. Baumann FM rejected this argument, stating:

I find no merit in the argument of the Respondents that they can deny any responsibility for making available the premises at the Burrum Golf Club simply because they have no ownership of those facilities. Although it seems they clearly had the consent of the 'owner' or management of the Burrum Golf Club to hold their gatherings at the Clubhouse, the formal nature of their right or licence to do so is not the subject of evidence. They were not trespassers. They exercised some implied licence at least. I am satisfied, for the purposes of section 24 that the Respondents were making 'facilities available'.<sup>650</sup>

## 5.4 Ancillary Liability

### 5.4.1 Vicarious liability

Section 123(2) of the DDA sets out the circumstances in which a body corporate will be held vicariously liable for particular conduct, as follows:<sup>651</sup>

Any conduct engaged in on behalf of a body corporate by a director, employee or agent of the body corporate within the scope of his or her actual or apparent authority is taken, for the purposes of this Act, to have been engaged in also by the body corporate unless the body corporate establishes that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct.

The meaning of the above section was considered by Raphael FM in *Vance v State Rail Authority*.<sup>652</sup> His Honour noted that the section was similar in its operation to provisions in the SDA (section 106), RDA (section 18A) and State legislation, then stated:

Case law in this area emphasises the importance of implementing effective education programs to limit discriminatory conduct by employees and the necessity of such programs for employers to avoid being held vicariously liable for the acts of their employees. Cases such as *McKenna v State of Victoria* (1998) EOC 92-927; *Hopper v Mt Isa Mines* [1999] 2 Qd R 496; *Gray v State of Victoria and Pettiman* (1999) EOC 92-996; *Evans v Lee & Anor* [1996] HREOCA 8 indicate that the test to be applied is an objective one based upon evidence provided by the employer as to the steps it took to ensure its employees were made aware of what constituted discriminatory conduct, that it was not condoned and that effective procedures existed for ensuring that so far as possible it did not occur.<sup>653</sup>

Raphael FM also cited with approval the decision under the RDA in *Korczak v Commonwealth*,<sup>654</sup> to the effect that what is required is proactive and preventative steps to be taken. Perfection is not the requisite

647 [2008] FMCA 1221, [84], [88].

648 [2008] FMCA 1221, [86], [88].

649 [2008] FMCA 1221.

650 [2008] FMCA 1221, [75] (emphasis in original).

651 See also DDA, ss 123(1)-(9), which elaborate on the circumstances in which a body corporate will be held liable for particular conduct.

652 [2004] FMCA 240, [54]-[58].

653 [2004] FMCA 240, [56].

654 (2000) EOC 93-056.

level – only reasonableness.<sup>655</sup> In the circumstances of the case before him (see 5.2.3(c) above), his Honour found that the respondent had exercised due care and was not liable under section 123(2) for the actions of its employee.

In *Penhall-Jones v State of NSW*,<sup>656</sup> Raphael FM held that the Ministry of Transport was not vicariously liable for the discriminatory act of one of its employees, which consisted of that employee making a sarcastic comment to the applicant because of her disability. His Honour held that the policies of the Ministry of Transport dealing with disability discrimination ‘constituted “reasonable steps” bearing in mind their comprehensiveness and the action taken in support of them following the complaint’.<sup>657</sup>

## 5.4.2 Permitting an unlawful act

Section 122 of the DDA provides for liability of persons involved in unlawful acts otherwise than as the principal discriminator, as follows:

### 122 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, 2A 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*,<sup>658</sup> the applicant alleged that the Coffs Harbour City Council (‘the Council’) was in breach of the DDA by virtue of section 122, for having allowed the redevelopment of a cinema complex without requiring that wheelchair access be incorporated as part of the redevelopment.

The then Human Rights and Equal Opportunity Commission 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.<sup>659</sup> However, in a separate decision in relation to the Council, the Commission held that there was no liability under section 122.<sup>660</sup> The applicant sought review of this latter decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

Madgwick J upheld the application and remitted the matter to the Commission for determination according to law.<sup>661</sup> The following principles can be distilled from the decision of Madgwick J.

- The first step in establishing liability under section 122 is to establish whether or not there was an unlawful act of a principal under Division 1, 2 or 3 of Part 2.<sup>662</sup>
- To find that a person has permitted a particular act, it is necessary to show that they were able to prevent it.<sup>663</sup>
- The high standard of knowledge required to prove liability as an accessory in criminal cases is not required: section 122 has been drafted so as to be wider in its scope and the DDA was intended to have far-reaching consequences.<sup>664</sup>

655 [2004] FMCA 240, [56].

656 [2008] FMCA 832.

657 [2008] FMCA 832, [65].

658 (1999) 93 FCR 481.

659 *Cooper v Holiday Coast Cinema Centres Pty Ltd* [1997] HREOCA 32.

660 *Cooper v Coffs Harbour City Council* (1998) EOC 92-962.

661 (1999) 93 FCR 481, 496 [52].

662 (1999) 93 FCR 481, 490 [27]. The liability of the principal had been established in *Cooper v Holiday Coast Cinema Centres Pty Ltd* [1997] HREOCA 51 and was not an issue in the proceedings before Madgwick J.

663 (1999) 93 FCR 481, 494 [41], citing with approval *Adelaide City Corporation v Australasian Performing Rights Association Ltd* (1928) 40 CLR 481, 490-491 (Isaacs J). *Cooper v Human Rights and Equal Opportunity Commission* (1999) 93 FCR 481 was cited with approval in *Elliott v Nanda* (2001) 111 FCR 240, 289-292 [154]-[160]; followed in *Oberoi v Human Rights and Equal Opportunity Commission* [2001] FMCA 34, [27]-[29]; *Phillips v Australian Girls' Choir Pty Ltd* [2001] FMCA 109, [24].

664 (1999) 93 FCR 481, 493 [37]-[39].

- '[O]ne person permits another to do an unlawful discriminatory act if he or she permits that other to do an act which is in fact discriminatory'.<sup>665</sup> It is not necessary for an applicant to show that the 'permittor' had knowledge or belief that there was *no* defence or exemption (in the present case the defence of unjustifiable hardship) available to the principal.<sup>666</sup>
- It will be an exception to section 122 for a 'permittor' to show that an act was permitted based on an honest and reasonable mistake of fact.<sup>667</sup> In the present matter, the Council would have avoided liability if it acted on an honest and reasonable belief that there was 'unjustifiable hardship' such as would constitute a defence under the DDA.<sup>668</sup>

On remittal, the Council was found to be liable under section 122 for having approved the redevelopment without wheelchair access.<sup>669</sup> Commissioner Carter held:

Prima facie, in permitting the development to proceed without access for persons with disabilities, the Council was about to act unlawfully and in breach of the DDA. It could only avoid such a finding on the basis of an honest and reasonable belief that the operator could properly claim unjustifiable hardship if account were taken of 'all relevant circumstances of the particular case'... In short it had to convert a potentially unlawful situation to one which could withstand scrutiny.

In this the onus lay on the Council. Its fundamental obligation was to reasonably inform itself of the relevant facts upon which to found its belief.<sup>670</sup>

The Commissioner found that the Council had not made sufficient inquiry to have enabled it to have been reasonably satisfied as to unjustifiable hardship and was therefore liable under section 122. The Commissioner stated:

To convert a potential finding of unlawfulness to one that it had not acted unlawfully required much more than its mere acceptance of the content of the application, the assumptions which it made about the persons involved, the likely cost of the required access and its impact on the developer's financial position. In fact it made no significant or relevant inquiry. The circumstances of the case required it, if it was to be in a position of avoiding the serious finding of unlawfulness, to at least engage [the architect who wrote the development application] in substantial discussions about the project, what it involved, the costs of it, and the difficulties or otherwise in complying with the DDA requirements. An investigation by it of 'all the relevant circumstances of the case'... would have immediately revealed that the assumptions upon which it had initially proceeded were wrong or at least subject to significant doubt. Such a basic inquiry would have alerted the relevant Council officers that their assumptions made so far were probably not sound.

For there to have been an honest and reasonable basis for a belief that the operator could itself have avoided unlawfulness on the unjustifiable hardship ground further inquiry was essential.<sup>671</sup>

In *King v Gosewisch*<sup>672</sup> the applicants alleged that the organisers of a public meeting were liable under section 122 for causing, inducing, aiding or permitting certain hostile comments directed at the applicants in the course of the meeting, which were alleged to constitute disability harassment. The court rejected the claim that the various comments amounted to disability harassment on the basis

665 (1999) 93 FCR 481, 494 [41].

666 (1999) 93 FCR 481, 493-494 [40]-[41].

667 (1999) 93 FCR 481, 495-496 [46]-[49].

668 (1999) 93 FCR 481, 496 [51].

669 Unreported, Human Rights and Equal Opportunity Commission, Commissioner Carter QC, 12 May 2000 (extract at (2000) EOC 93-089).

670 Unreported, Human Rights and Equal Opportunity Commission, Commissioner Carter QC, 12 May 2000 (extract at (2000) EOC 93-089), 13.

671 Unreported, Human Rights and Equal Opportunity Commission, Commissioner Carter QC, 12 May 2000 (extract at (2000) EOC 93-089), 14.

672 [2008] FMCA 1221.

that the comments were not in relation to the applicants' disabilities.<sup>673</sup> The court held that it therefore followed that there could be no liability under section 122.<sup>674</sup> In any event, the court accepted that the respondents had not caused, induced, aided or permitted the relevant comments. These comments arose in the context of a heated political meeting in which the respondents generally handled the matter well and did their best to enforce proper meeting procedure whilst allowing the public to have their say.<sup>675</sup>

In *Pop v Taylor*,<sup>676</sup> the applicant had been employed by a labour hire company to work as a book-keeper in an accountancy practice (see 5.3.1(a)). At trial, there was a factual dispute about the role of Mr Taylor in the management of the practice. Mr Taylor was employed by the same labour hire company as Ms Pop and stated that he was only the 'administration manager' of the practice and had had no part in the decision to terminate Ms Pop's employment. Brown J found that Mr Taylor in fact had played an instrumental role in that decision. Brown J therefore held that Mr Taylor was directly liable for the termination of Ms Pop's employment under section 15(2) of the DDA. In the alternative, he found that Mr Taylor 'both permitted and aided any principal source of the discrimination against Ms Pop.'<sup>677</sup> However, Brown J did not expressly consider whether Mr Taylor had the power to prevent the decision to terminate Ms Pop's employment.

## 5.5 Unjustifiable Hardship and Other Exemptions

### 5.5.1 Unjustifiable hardship

It is a defence to a claim of discrimination in almost all areas specified in Divisions 1 and 2 of Part 2 of the DDA, that 'unjustifiable hardship' would be imposed upon a respondent in order for them to avoid discriminating against an aggrieved person.<sup>678</sup> The only area where the defence is not available is requests for information under section 30.

'Unjustifiable hardship' is defined by section 11 of the DDA as follows:

- (1) For the purposes of this Act, in determining whether a hardship that would be imposed on a person (the **first person**) would be an **unjustifiable hardship**, all relevant circumstances of the particular case must be taken into account, including the following:
  - (a) the nature of the benefit or detriment likely to accrue to, 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;
  - (d) the availability of financial and other assistance to the first person; and
  - (e) any relevant action plans given to the Commission under section 64.

Example: One of the circumstances covered by paragraph (1)(a) is the nature of the benefit or detriment likely to accrue to, or to be suffered by, the community.
- (2) For the purposes of this Act, the burden of proving that something would impose unjustifiable hardship lies on the person claiming unjustifiable hardship.

673 [2008] FMCA 1221, [98]-[105].

674 [2008] FMCA 1221, [106].

675 [2008] FMCA 1221, [106].

676 [2015] FCCA 1720.

677 [2015] FCCA 1720, [242].

678 See ss 21B and 29A of the DDA.

The 2009 changes to the DDA inserted the additional factor of the ‘availability of financial and other assistance’ in section 11(d).<sup>679</sup> The Explanatory Memorandum states that this is:

designed to allow for a more balanced assessment of the costs of making adjustments. For example, funding to assist in responding to the particular needs of people with disability is available in some circumstances.<sup>680</sup>

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.<sup>681</sup>

The onus is on the respondent to establish unjustifiable hardship by way of defence: the position under the case law<sup>682</sup> has now been codified in section 11(2).

### (a) ‘More than just hardship’

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 on 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...<sup>683</sup>

In *Francey v Hilton Hotels of Australia Pty Ltd*<sup>684</sup> (‘*Francey*’) Commissioner Innes held 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.<sup>685</sup>

This approach was cited with approval in *Access For All Alliance (Hervey Bay) v Hervey Bay City Council*<sup>686</sup> (‘*Access For All Alliance*’) in which Baumann FM held:

Whilst I accept the Council has many priorities, and is proactive in acquiring funding to meet and accommodate the needs of those who live within the local authority area, I am satisfied even at a cost of \$75,250 this Council can make the necessary adjustments to its budget to remedy the unlawful discrimination found by me.

His Honour ordered the respondent to undertake the necessary works to prevent the continued discrimination (see 5.2.3(c) above) within nine months.

679 *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), Sch 2, item 18.

680 Explanatory Memorandum, *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008*, 12 [57].

681 *Sluggett v Human Rights and Equal Opportunity Commission* (2002) 123 FCR 561, 568 [24]–[25]; *Daghlian v Australian Postal Corporation* [2003] FCA 759, [113]–[114].

682 *Cooper v Human Rights and Equal Opportunity Commission* (1999) 93 FCR 481, 492 [32]; cited with approval in *Sluggett v Human Rights and Equal Opportunity Commission* (2002) 123 FCR 561, 567–568 [23]–[24].

683 *Finney v Hills Grammar School* [1999] HREOCA 14 (extract at (1999) EOC 93–020). Affirmed on review in *Hills Grammar School v Human Rights and Equal Opportunity Commission* (2000) 100 FCR 306, 318 [48]. See also *Access For All Alliance (Hervey Bay) v Hervey Bay City Council* [2004] FMCA 915, [84].

684 (1997) EOC 92–903.

685 (1997) EOC 92–903, 77, 453.

686 [2004] FMCA 915, [85].



**(b) 'Any person concerned'**

It is clear that the expression 'any person concerned' in section 11 extends beyond the immediate complainant and respondent. The 2009 changes to the DDA inserted the example at the end of section 11 to clarify 'that the nature of the benefit or detriment likely to accrue or be suffered by the community is one of the factors to be taken into account under section 11(a)'.<sup>687</sup>

The example in section 11 reflects the decision of Baumann FM in *Access For All Alliance*, where he took into account the 'real and important' benefits that would flow from an adjustment to public toilets to make them accessible to people with disabilities. His Honour took into account not only the benefit to local residents, but also to visitors to the area.<sup>688</sup>

In *Francey*, 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.<sup>689</sup>

In *Cooper v Holiday Coast Cinema Centres Pty Ltd*,<sup>690</sup> 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 section 11(a) and stated as follows:

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.<sup>691</sup>

In *Scott v Telstra Corporation Ltd*,<sup>692</sup> 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 rejected by Sir Ronald Wilson:

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.<sup>693</sup>

<sup>687</sup> Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 12 [56].

<sup>688</sup> [2004] FMCA 915, [87], citing with approval *Scott v Telstra* (1995) EOC 92-117, 78, 401.

<sup>689</sup> (1997) EOC 92-903, 77,452.

<sup>690</sup> [1997] HREOCA 32.

<sup>691</sup> [1997] HREOCA 32.

<sup>692</sup> (1995) EOC 92-717, 78,402.

<sup>693</sup> (1995) EOC 92-717, 78,402. See also *Finney v Hills Grammar School* [1999] HREOCA 14 (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 [43]-[45].

In *Williams v Commonwealth*,<sup>694</sup> (see 5.3.1(d) above), the applicant had been discharged from the RAAF on the basis of disability, namely, his insulin dependent diabetes. 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. The Commonwealth argued that the applicant was unable to meet these 'inherent requirements' by virtue of his diabetes. It also sought to rely on the defence of unjustifiable hardship. McInnis FM 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, for example) would not have imposed an unjustifiable hardship on the Commonwealth.<sup>695</sup>

In *Sklavos v Australasian College of Dermatologists*,<sup>696</sup> the applicant developed a disability which prevented him from successfully completing the final examinations of the Australasian College of Dermatologists (see 5.2.3(f)(i) above). He argued that the College discriminated against him in requiring him to take the examinations, and in failing to make reasonable adjustments to its method of assessing his competence to practice as a dermatologist. He proposed three adjustments which he said the College could have made. Jagot J found that these adjustments were not reasonable, as making them would have imposed unjustifiable hardship on the College. In so finding, her Honour considered a number of factors, including:

- The effect of the adjustments on members of the College, who had devised the College's existing training program, and who undertook training and assessment of students enrolled in that program on a voluntary basis. Devising and providing an alternative method of training and assessment would have required them to undertake a very significant amount of work.<sup>697</sup>
- The effect of the adjustments on all potential patients of the applicant, including:
  - The effect on their safety if the applicant's competence were not properly assessed<sup>698</sup>
  - The resultant lack of information available to them about the applicant's qualifications and competence.<sup>699</sup>
- The effect of depriving the public of the services of the dermatologists whose time would be occupied in creating, implementing and overseeing an alternative form of assessment specifically for the applicant.<sup>700</sup>

In *Forest v HK and W Investments Pty Ltd*,<sup>701</sup> Burnett J considered the effects on the applicant, other persons with assistance animals, and other patients and staff of allowing the applicant to bring his assistance dog into a sterile area in a dentists' clinic. He concluded that it would impose an unjustifiable hardship on the respondent to so allow it.

### (c) Other factors

Section 11 provides that 'all relevant circumstances of the particular case must be taken into account' in determining unjustifiable hardship.

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694 [2002] FMCA 89.

695 [2002] FMCA 89, [149]. The decision of McInnis FM was overturned by the Full Court of the Federal Court in *Commonwealth v Williams* (2002) 125 FCR 229 on the basis of the exemption in s 53 of the DDA (considered below in 5.5.2(b)). The aspects of his Honour's decision relating to unjustifiable hardship were not considered.

696 [2016] FCA 179.

697 [2016] FCA 179, [191].

698 [2016] FCA 179, [124].

699 [2016] FCA 179, [124].

700 [2016] FCA 179, [191].

701 [2014] FCCA 209, [114]-[127].

In *Access For All Alliance*, Baumann FM accepted that the Australian Standards and the BCA were ‘relevant and persuasive’ in determining whether or not any hardship faced by the respondent in effecting an alteration to premises is ‘unjustifiable’.<sup>702</sup> In that case, the application concerned the placement of wash basins outside public toilets, rendering them inaccessible to people with disabilities which required them to use the basins as part of their toileting regime (see 5.2.3(f) above). Baumann FM found that this constituted indirect discrimination and that there was no unjustifiable hardship. His Honour stated:

It is clear that the Australian Standards or BCA do not proscribe the necessity for internal hand basins. The accessible cubicle conforms with all such standards. I do not regard the fact that the premises comply with the standards precludes me from finding either unlawful discrimination or that there is no ‘unjustifiable hardship’.<sup>703</sup>

Relevant to his Honour’s conclusion was the potential effect of the discrimination on people with disabilities who may need to use the toilets, and the benefits of alterations being made:

The evidence in my view overwhelmingly supports a finding that the benefits for those persons with a combination of mobility and toileting regime challenges... are real and important. Without the alterations, many persons may lose the benefit of this engaging in the foreshore experience and amenity. This, of course, not only extends to local residents but because of the renown attractions of this area to tourists, it also extends to visitors to the area (see *Scott v Telstra* (1995) EOC 92-117 per Wilson P at 78,401).

It is hard to imagine a more embarrassing or undignified experience than to be forced to endure a stream of Wet Ones, wash cloths and the like from the outside running water basin to the privacy of the accessible toilet if one had an ‘accident’. Those self-catheterising are also entitled to complete the usual regime with the basic support an internal wash basin would provide to them.<sup>704</sup>

In *King v Jetstar Airways Pty Ltd (No. 2)*,<sup>705</sup> the applicant, Ms King, had a disability which required the use of a wheelchair. She sought to book a ticket on a flight operated by Jetstar. As a result of her disability, the applicant required assistance to board and disembark from the plane. Jetstar did not accept her booking, but offered her a seat on another flight. Ms King refused and booked a flight on another airline at an additional cost of \$40. Jetstar’s reason for refusing to allow Ms King to travel on her chosen flight was that Jetstar had implemented a policy under which only two passengers requiring ‘wheelchair assistance’ were allowed to travel on any one flight. At the time Ms King wished to book, two other passengers requiring assistance had already booked to travel on the relevant flight. At trial, Jetstar led evidence to the effect that it operated on a particular business model as a ‘low-cost carrier’, that model required it to adhere to short ‘turnaround times’ for planes at airports, and that allowing more than two passengers requiring wheelchair assistance on its flights would not allow it to adhere to those turnaround times. Robertson J found that Jetstar had refused to provide a service to Ms King because of her disability. It had therefore discriminated on the ground of her disability for the purposes of sections 5 and 24(1)(a).<sup>706</sup> However, he held that requiring Jetstar not to limit the number of passengers requiring wheelchair assistance it carried on each flight would have imposed unjustifiable hardship on Jetstar. He considered a number of factors, including:

- The detriment suffered by Ms King. She had been required to book another flight at a cost of an extra \$40.
- There was no evidence that the policy had ever previously prevented Ms King from booking a ticket on her choice of flight, despite her having travelled with them on a number of occasions. Nor was there evidence of other persons who used wheelchairs being so prevented.

702 [2004] FMCA 915, [13]-[14].

703 [2004] FMCA 915, [86].

704 [2004] FMCA 915, [87]-[88].

705 [2012] FCA 8.

706 [2012] FCA 8, [185]-[186].

- The particular service offered by Jetstar. Jetstar operated a budget airline. The cost of abandoning its ‘two wheelchair’ policy would have imposed a substantial cost on Jetstar.
- Delays, or a reduction in the number of flights operated by Jetstar, would have negatively affected other passengers.<sup>707</sup>

The decision was upheld on appeal.<sup>708</sup> On the question of the relevance of Jetstar’s low cost business model, the Full Court of the Federal Court observed that a person may not avoid obligations under the DDA simply by creating a low cost service. What is relevant is the extent of any hardship in all the circumstances.<sup>709</sup>

## 5.5.2 Other exemptions to the DDA

Division 5 of Part 2 of the DDA contains a number of exemptions. Many of these exemptions have not been the subject of any detailed jurisprudence. The discussion below is limited to provisions which have been the subject of significant judicial consideration.

### (a) Annuities, insurance and superannuation

Section 46(1) of the DDA creates an exemption from the DDA in relation to annuities, insurance and superannuation, as follows:

- (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*,<sup>710</sup> it was not disputed that the applicant had been discriminated against on the basis of being HIV positive when his claim was declined under an insurance policy which excluded ‘all claims made on the basis of the condition of HIV/AIDS’.

Driver FM considered the meaning of the term ‘reasonable’ in the context of section 46(1)(f)(i). His Honour described as a ‘useful guide’,<sup>711</sup> the consideration of ‘reasonableness’ in the context of indirect discrimination (see 5.2.3(f) above) by the High Court in *Waters v Public Transport Corporation*<sup>712</sup> (*‘Waters’*) and the Federal Court in *Secretary, Department of Foreign Affairs & Trade v Styles*<sup>713</sup> (*‘Styles’*).

707 [2012] FCA 8, [242]–[264].

708 *King v Jetstar Airways Pty Ltd* [2012] FCAFC 115.

709 [2012] FCAFC 115, [44].

710 [2001] FMCA 15.

711 [2001] FMCA 15, [16].

712 (1991) 173 CLR 349.

713 (1989) 23 FCR 251.

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.<sup>714</sup>

The same approach to ‘reasonableness’ was taken by Raphael FM in *Bassanelli v QBE Insurance*.<sup>715</sup> In that matter, the applicant sought travel insurance for an overseas trip. She was denied the insurance on the basis of her disability, being 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 as 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 section 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.<sup>716</sup>

His Honour noted that the onus is on the respondent to establish ‘reasonableness’ in this context<sup>717</sup> and found that the decision by the respondent was not reasonable in all of the circumstances of the case.

His Honour’s decision was upheld on appeal by Mansfield J in *QBE Travel Insurance v Bassanelli*.<sup>718</sup> Mansfield J commented that the exemptions in sections 46(1)(f) and 46(1)(g) of the DDA are ‘not simply alternatives’<sup>719</sup> – only one can apply in any particular case. His Honour stated:

I consider that, on its proper construction, the exemption for which s 46(1)(g) provides is only available if there is no actuarial or statistical data available to, or reasonably obtainable by, the discriminator upon which the discriminator may reasonably form a judgment about whether to engage in the discriminatory conduct. If such data is available, then the exemption provided by s 46(1)(g) cannot be availed of. The decision made upon the basis of such data must run the gauntlet of s 46(1)(f)(ii), that is the discriminatory decision must be reasonable having regard to the matter of the data and other relevant factors. If the data (and other relevant factors) do not expose the discriminatory decision as reasonable, then there is no room for the insurer to move to s 46(1)(g) and thereby to ignore such data. If such data were not available to the insurer but were reasonably obtainable, so that its discriminatory decision might have been measured through the prism of s 46(1)(f), again there would be no room for the insurer to invoke the exemption under s 46(1)(g).

Hence, if the exemption pathway provided by s 46(1)(f) ought to have been followed by the insurer, whatever the outcome of its application, the exemption pathway provided by s 46(1)(g) would not also be available. It is only if there is no actuarial or statistical data available to, or reasonably obtainable by, the insurer upon which it is reasonable for the insurer to rely, that s 46(1)(g) becomes available. The legislative intention is that the reasonableness of the discriminatory conduct be determined by reference to such data, if available or reasonably obtainable, and other relevant factors. That conclusion is consistent with the Explanatory Memorandum to the Disability Discrimination Bill 1992 (Cth) concerning the superannuation and insurance exemption.<sup>720</sup>

714 [2001] FMCA 15, [16]-[18].

715 [2003] FMCA 412.

716 [2003] FMCA 412, [37].

717 [2003] FMCA 412, [52].

718 (2004) 137 FCR 88.

719 (2004) 137 FCR 88, 94 [28].

720 (2004) 137 FCR 88, 95-96 [33]-[34].

In the circumstances of the case, however, the parties conducted the application at first instance as if the exemption provided under section 46(1)(g) of the DDA was available to the appellant insurer and Mansfield J was of the view that Mr Bassanelli was bound by that conduct.<sup>721</sup>

Nevertheless, Mansfield J upheld the decision of Raphael FM at first instance, confirming that the onus of proof is on an insurer to qualify for an exemption under section 46 of the DDA.<sup>722</sup> He further held that the assessment of what is 'reasonable' is to be determined objectively in light of all relevant matters, citing the decisions in *Waters* and *Styles*.<sup>723</sup>

## **(b) Defence force**

Section 53(1) 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 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
  - (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 section 53(2) and section 132 of the DDA, 'combat duties' and 'combat-related duties' were defined in the *Disability Discrimination Regulations 1996* (Cth) (the 'Regulations'). 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*,<sup>724</sup> 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 ...<sup>725</sup>

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<sup>721</sup> (2004) 137 FCR 88, 96 [36].

<sup>722</sup> (2004) 137 FCR 88, 96 [37].

<sup>723</sup> (2004) 137 FCR 88, 99 [51]-[54]. *QBE Travel Insurance v Bassanelli* was applied by the Victorian Civil and Administrative Tribunal in *Ingram v QBE Insurance (Australia) Ltd (Human Rights)* [2015] VCAT 1936, finding in that case that the respondent had failed to establish 'reasonableness'.

<sup>724</sup> [2002] FMCA 89.

<sup>725</sup> [2002] FMCA 89, [154]. See 5.3.1(d) above for general discussion on the issue of inherent requirements.

This decision was overturned on appeal by the Full Court of the Federal Court in *Commonwealth v Williams*.<sup>726</sup> The Full Court held that section 53 of the DDA, when read in conjunction with the relevant definitions in 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 Mr Williams, 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 regulation 4(b). Therefore Mr Williams' alleged discrimination was not covered by the operation of the DDA due to section 53.<sup>727</sup>

The Full Court noted that this did not mean that all members of the Australian Defence Force were, for the purposes of matters connected with their employment, unable to invoke the DDA. The court stated that section 53 and the regulations require an element of directness and, accordingly, staff in a recruiting office or in public relations may not be excluded by the section.<sup>728</sup>

### (c) Compliance with a prescribed law

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'.<sup>729</sup>

In *McBride v Victoria (No 1)*,<sup>730</sup> McInnis FM considered issues surrounding the return to work in 1994 of an employee with a disability which resulted from a workplace injury. The applicant was employed in a prison. The respondent submitted that some of the conduct complained of was done in direct compliance with the *Corrections Act 1986* (Vic) so it could therefore not be unlawful by reason of section 47 of the DDA.<sup>731</sup> While finding that there was no unlawful discrimination arising out of the allegations relating to the applicant's return to work, his Honour indicated, in obiter remarks, that a narrow interpretation of the expression 'in direct compliance' as it appears in section 47(2) (and the now repealed section 47(3))<sup>732</sup> should be taken.<sup>733</sup> His Honour stated:

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 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.<sup>734</sup>

726 (2002) 125 FCR 229.

727 (2002) 125 FCR 229, 237 [32]–[33].

728 (2002) 125 FCR 229, 237–238 [34].

729 'Prescribed laws' are those for which regulations have been made by the Governor-General pursuant to s 132 of the DDA.

730 [2003] FMCA 285.

731 [2003] FMCA 285, [26]. Note, however, the *Corrections Act 1986* (Vic) is not a law that has been prescribed for the purposes of s 47(2). (Nor does s 47(3) have application as that section only applies for 3 years from the commencement of the section (1 March 1993)).

732 See *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), Sch 2, item 72.

733 [2003] FMCA 285, [46].

734 [2003] FMCA 285, [46].



On this view, it is not sufficient for a respondent to show that it was acting generally in pursuance of its statutory authority.

The exception in section 47(2) of the DDA applies only in relation to things done in compliance with a 'prescribed law'. In *Mulligan v Virgin Australia Airlines Pty Ltd ('Mulligan')*,<sup>735</sup> the Full Court of the Federal Court noted that a 'prescribed law' is a law prescribed by the DDA or by regulations made under the DDA.<sup>736</sup> Section 132(2) of the DDA refers to the power to prescribe laws for the purposes of section 47. A number of laws have been so prescribed in the *Disability Discrimination Regulations 1996*.<sup>737</sup>

In *Mulligan*, the respondent airline had refused to allow the applicant to travel accompanied by his assistance animal. At first instance, the Federal Circuit Court had held that the respondent had acted in accordance with the *Civil Aviation Regulations 1988* and instruments issued under those regulations by the Civil Aviation Safety Authority, and that those regulations and instruments were 'prescribed laws' for the purposes of section 47(2) of the DDA.<sup>738</sup> Those findings were overturned on appeal by the Full Court of the Federal Court, which noted that the relevant regulations and instruments did not meet the definition in section 47(2).<sup>739</sup>

#### (d) Special measures

Section 45 of the DDA provides an exemption in relation to 'special measures', as follows:

##### 45 Special measures

- (1) This Part does not render it unlawful to do an act that is reasonably intended to:
  - (a) ensure that persons who have a disability have equal opportunities with other persons in circumstances in relation to which a provision is made by this Act; or
  - (b) afford persons who have a disability or a particular disability, goods or access to facilities, services or opportunities to meet their special needs in relation to:
    - (i) employment, education, accommodation, clubs or sport; or
    - (ii) the provision of goods, services, facilities or land; or
    - (iii) the making available of facilities; or
    - (iv) the administration of Commonwealth laws and programs; or
    - (v) their capacity to live independently; or
  - (c) afford persons who have a disability or a particular disability, grants, benefits or programs, whether direct or indirect, to meet their special needs in relation to:
    - (i) employment, education, accommodation, clubs or sport; or
    - (ii) the provision of goods, services, facilities or land; or
    - (iii) the making available of facilities; or
    - (iv) the administration of Commonwealth laws and programs; or
    - (v) their capacity to live independently.
- (2) However, subsection (1) does not apply:
  - (a) in relation to discrimination in implementing a measure referred to in that subsection if the discrimination is not necessary for implementing the measure;
  - (b) in relation to the rates of salary or wages paid to persons with disabilities.

Note: For discrimination in relation to the rates of salary or wages paid to persons with disabilities, see paragraphs 47(1)(c) and (d).

<sup>735</sup> (2015) 234 FCR 207, (Flick, Reeves and Griffiths JJ).

<sup>736</sup> (2015) 234 FCR 207, 244 [62].

<sup>737</sup> Regulation 2A and Sch 1.

<sup>738</sup> [2015] FCCA 157, [8]-[14] (Street J).

<sup>739</sup> (2015) 234 FCR 207, 234, [101]. The AHRC was granted leave to intervene in the proceedings. The Commission's submissions are summarised in the judgment at [50]-[68], and are available at <<http://www.humanrights.gov.au/our-work/legal/submissions/submission-court-intervener-and-amicus-curiae>>.

The 2009 changes to the DDA inserted subsection 2, which limits the discrimination in the special measures exemption to discrimination ‘necessary’ to implement the measure for the benefit of the person with the disability.<sup>740</sup>

Former section 45 was examined in *Clarke v Catholic Education Office*.<sup>741</sup> The primary judge had found that the ‘model of learning support’ put forward by a school as part of the terms and conditions upon which an offer of admission was made to a deaf student indirectly discriminated against the student on the ground of his disability (see 5.2.3(c) above). Before the Full Court of the Federal Court,<sup>742</sup> the appellant challenged this finding, arguing that its acts were reasonably intended to afford the student, as a person with a particular disability, access to services to meet his special needs in relation to education. The court viewed this submission as seeking to rely on former section 45(b).<sup>743</sup>

The court stated that two points should be made about section 45. First, the section ‘should receive an interpretation consistent with the objectives of the legislation’.<sup>744</sup> The court noted, in this regard, Finkelstein J’s observation in *Richardson v ACT Health & Community Care Service*<sup>745</sup> that ‘an expansive interpretation of an exemption in anti-discrimination legislation may well threaten the underlying object of the legislation’. Secondly, section 45 ‘refers to an act that is “reasonably intended” to achieve certain objects’. The Court agreed with the observation of Kenny JA in *Colyer v Victoria*<sup>746</sup> that section 45 ‘incorporates an objective criterion, which requires the court to assess the suitability of the measure taken to achieve the specified objectives’.<sup>747</sup>

In rejecting the appellants’ submission, the court said that the ‘act’ rendered unlawful by the DDA was not the offer of a ‘model of support’ which provided benefits to the student, but rather the appellants’ offer of a place subject to a term or condition that the student participate in and receive classroom instruction without an interpreter. This could not be said to be ‘reasonably intended’ to meet the student’s special needs for the purposes of section 45.<sup>748</sup>

In any event, the test of whether or not something is ‘reasonably intended’ to achieve the purposes set out in section 45 is an objective one. Sackville and Stone JJ concluded:

[The primary judge] found that any adult should have known that the withdrawal of Auslan support would cause Jacob distress, confusion and frustration and that, in the absence of an Auslan interpreter, Jacob would not have received an effective education. Whatever the subjective intentions of the appellants’ officers, it could not be said that the particular act otherwise rendered unlawful satisfied the objective standard incorporated into s 45.<sup>749</sup>

After 5 August 2009, respondents will need to show that a special measure is both ‘reasonably intended’ to achieve one of the designated purposes and that its discriminatory effect is ‘necessary for implementing the measure’.

In *Nojin v Commonwealth of Australia*,<sup>750</sup> the applicants, who had intellectual disabilities, had been employed by Australian Disability Enterprises. Their wages had been assessed using the Business Services Wage Assessment Tool (BSWAT). The applicants claimed that the use of the BSWAT constituted

740 *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), Sch 2, item 71.

741 [2003] FCA 1085.

742 *Catholic Education Office v Clarke* (2004) 138 FCR 121.

743 (2004) 138 FCR 121, 148 [127].

744 (2004) 138 FCR 121, 149 [129].

745 (2000) 100 FCR 1, 5 [24].

746 [1998] 3 VR 759, 771.

747 (2004) 138 FCR 121, 149 [130].

748 (2004) 138 FCR 121, 149 [131] (Sackville and Stone JJ).

749 (2004) 138 FCR 121, 149 [132].

750 [2011] FCA 1066.

discrimination on the ground of disability (see the discussion at 5.2.3(c) above). The Commonwealth claimed, among other things, that the use of the BSWAT amounted to a special measure. (The facts considered by the court in *Nojin* occurred prior to the commencement of section 45(2) in 2009). At first instance, Gray J found that there had been no discrimination. It was therefore not necessary to consider the Commonwealth's argument based on section 45. However, Gray J expressed the view that it was unlikely that section 45 would apply to the use of the BSWAT with respect to the applicants. Section 45 applies to acts that are 'reasonably intended' to do the things specified in subsection 45(1) (a)-(c). There was no evidence 'that the decision to use the BSWAT was made in order to provide access to services or opportunities, or to benefits or programs.' In fact, the applicants were already employed at the time the BSWAT was introduced by their employers.<sup>751</sup>

On appeal, a majority of the Full Court of the Federal Court overturned the decision of Gray J.<sup>752</sup> The Full Court agreed with the reasoning of Gray J in holding that the use of BSWAT was not a special measure.<sup>753</sup>

See also the discussion of special measures under the RDA at 3.3.1 above and under the SDA at 4.4 above.

## 5.6 Victimisation

Section 42 of the DDA prohibits victimisation, as follows:

### 42 Victimisation

- (1) It is an offence for a person to commit an act of victimisation against another person.  
Penalty: Imprisonment for 6 months.
- (2) For the purposes of subsection (1), a person is taken to commit an act of victimisation against another person if the first-mentioned person subjects, or threatens to subject, the other person to any detriment on the ground that the other person:
  - (a) has made, or proposes to make, a complaint under this Act or the *Australian Human Rights Commission Act 1986*; or
  - (b) has brought, or proposes to bring, proceedings under this Act or the *Australian Human Rights Commission Act 1986* against any person; or
  - (c) has given, or proposes to give, any information, or has produced, or proposes to produce, any documents to a person exercising or performing any power or function under this Act or the *Australian Human Rights Commission Act 1986*; or
  - (d) has attended, or proposes to attend, a conference held under this Act or the *Australian Human Rights Commission Act 1986*; or
  - (e) has appeared, or proposes to appear, as a witness in a proceeding under this Act or the *Australian Human Rights Commission Act 1986*; or
  - (f) has reasonably asserted, or proposes to assert, any rights of the person or the rights of any other person under this Act or the *Australian Human Rights Commission Act 1986*; or
  - (g) has made an allegation that a person has done an act that is unlawful by reason of a provision of this Part;  
or on the ground that the first-mentioned person believes that the other person has done, or proposes to do, an act or thing referred to in any of paragraphs (a) to (g) (inclusive).

This section is in essentially identical terms to section 94 of the SDA, discussed at 4.8, and the cases relevant under one Act are therefore relevant in applying the other. See also section 27(2) of the RDA, discussed at 3.5, and section 51 of the ADA, discussed at 2.5.

<sup>751</sup> [2011] FCA 1066, [99]-[102].

<sup>752</sup> (2012) 208 FCR 1.

<sup>753</sup> (2012) 208 FCR 1, [151]-[157] (Buchanan J), [216] (Flick J), [269] (Katzmann J).

Cases brought before 2011 under both section 42 of the DDA and section 94 of the SDA have held that an aggrieved person may bring a civil action for a breach of section 42, notwithstanding that it also may give rise to a separate criminal prosecution.<sup>754</sup> This is because the definition of ‘unlawful discrimination’ in section 3 of the AHRC Act specifically includes conduct that is an offence under Division 4 of Part 2 of the DDA (which includes section 42). As discussed in Chapter 6, the jurisdiction of the Federal Court and FCC in respect of discrimination matters is conferred by section 46PO of the AHRC Act, which requires that the proceedings must relate to a complaint alleging ‘unlawful discrimination’ (as defined in section 3) which has been terminated by the President of the Australian Human Rights Commission.

In three cases since 2011 (arising under the DDA and the SDA), the Federal Court has cast doubt on whether either the Federal Circuit Court or the Federal Court has jurisdiction to hear an application under section 46PO of the AHRC Act if the alleged unlawful discrimination is an act of victimisation.<sup>755</sup> These cases are discussed in relation to victimisation under section 94 of the SDA in 4.8. As noted in that discussion, these three cases are contrary to an earlier decision of the Full Court of the Federal Court.<sup>756</sup> It may be that the Full Court is called upon to consider the matter again in a future case.

In cases prior to these recent decisions, the two main issues that have arisen in relation to section 42 include the following:

- (a) the test for causation as to whether certain conduct is ‘on the ground that’ the aggrieved person has done or proposes to do one of the matters contained in section 42(2)(a)-(g); and
- (b) the meaning of the phrase ‘threatens to subject ... to any detriment’ in section 42(2).

### (a) Test for causation

Pursuant to section 10 of the DDA, if an act is done for two or more reasons, and one of those reasons is the aggrieved person’s disability, then for the purposes of the DDA the act is taken to be done for that reason even if the person’s disability is not the dominant or a substantial reason.

However, in *Penhall-Jones v New South Wales* (*‘Penhall-Jones’*),<sup>757</sup> Buchanan J held that, when considering whether certain alleged acts of victimisation were done ‘on the ground that’ the aggrieved person had done or proposed to do one of the matters listed in section 42(2)(a)-(g), section 10 has no application:

Section 10 does not address the assessment of grounds or reasons which form part of an act of victimisation, but only acts of discrimination in an earlier part of the Act in which s 10 appears. Section 10, therefore, does not establish, in favour of Ms Penhall-Jones’ case, any proposition that existence of one of the conditions for the engagement of s 42 might be an insubstantial reason.<sup>758</sup>

<sup>754</sup> *Tadawan v South Australia* [2001] FMCA 25; *Aleksovski v AAA Pty Ltd* [2002] FMCA 81; *Font v Paspaley Pearls* [2002] FMCA 142; *O’Connor v Ross (No 1)* [2002] FMCA 210, [11]; *Hassan v Hume* [2004] FCA 886; *Damiano v Wilkinson* [2004] FMCA 891, [22]; *Drury v Andreco Hurl Refractory Services Pty Ltd (No 4)* [2005] FMCA 1226, [43]; *Lee v Smith* [2007] FMCA 59, [211]; *Obieta v NSW Department of Education & Training* [2007] FCA 86, [240] and [259]; *Penhall-Jones v New South Wales* [2007] FCA 925, [10]; *Huang v University of NSW* [2008] FMCA 11, [120]; *Poniatowska v Hickinbotham* [2009] FCA 680, [36]; *Dye v Commonwealth Securities Limited* [2010] FCA 720, [64]; *Reynolds v The Minister for Health* [2010] FMCA 843, [30]; *Dye v Commonwealth Securities Limited (No 2)* [2010] FCAFC 118, [70]-[71] (the Court). See also the later cases of *Noble v Baldwin* [2011] FMCA 283, [282]; *Plunkett v Silverbrook Research Pty Ltd* [2011] FMCA 1012, [152] and [165]-[173]; *Alexander v Cappello* [2013] FCCA 860 and *Forest v HK and W Investments Pty Ltd* [2014] FCCA 209, [111].

<sup>755</sup> *Walker v Cormack* (2011) 196 FCR 574, 585-586 [37]-[41] (Gray J); *Walker v State of Victoria* [2012] FCAFC 38, [98]-[100] (Gray J); *Chen v Monash University* [2016] FCAFC 66, [119]-[124] (Barker, Davies and Markovic JJ).

<sup>756</sup> *Dye v Commonwealth Securities Limited (No 2)* [2010] FCAFC 118, [71] (Marshall, Rares and Flick JJ).

<sup>757</sup> [2007] FCA 925.

<sup>758</sup> [2007] FCA 925, [69].

After reviewing a number of authorities,<sup>759</sup> Buchanan J concluded that the appropriate test for causation in relation to section 42 was as follows:

Accordingly the authorities are unified in their approach that the ground or reason relied upon to establish a breach of the relevant legal obligation need not be the sole factor but it must be a **substantial and operative factor**. At least one circumstance from the list in s 42(2) of the Act must be a reason for the alleged detriment or threatened detriment. It must afford a rational explanation, at least in part, ‘why’ an action was taken. The connection cannot be made by a mere temporal conjunction of events, by an incidental but non-causal relationship or by speculation. The establishment of the suggested ground is as much a matter for proper proof as any other factual circumstance.<sup>760</sup> (emphasis added)

### (b) Threatens to subject to any detriment

The meaning of the phrase ‘threatens to subject the other person to any detriment’ for the purposes of section 42(2) also arose for consideration in *Penhall-Jones*. The applicant alleged that she had been victimised by her employer, the NSW Ministry of Transport (‘the Ministry’), in response to her complaint of discrimination to the then Human Rights and Equal Opportunity Commission. Specifically, she pointed to the following conduct alleged to constitute victimisation:

- being ‘verbally abused’ by her supervisor after she failed to attend a scheduled meeting;
- a ‘programme of bullying’ by her supervisor;
- proposals made by the Ministry during a conciliation conference that she discontinue her claim and resign from her employment in return for a sum of money; and
- a letter from the Acting Director-General of the Ministry, Mr Duffy, indicating that a continuation of her conduct of making false and vexatious complaints against the Ministry might lead to the termination of her employment on the basis that such conduct was contrary to the duties of fidelity, trust and good faith owed by an employee to an employer.

At first instance,<sup>761</sup> in relation to the first claim, Driver FM held that verbal abuse in the workplace, particularly by a supervisor, can be a ‘detriment’ for the purposes of section 42 of the DDA.<sup>762</sup> However, his Honour held that the supervisor’s conduct was not linked to the applicant’s complaint to the Commission.<sup>763</sup>

In relation to the second claim, Driver FM held that, when viewed in the context of the prior animosity between the applicant and her supervisor, her supervisor’s attitude and behaviour towards the applicant was not victimisation but arose out of her ‘growing dislike’ for the applicant.<sup>764</sup>

Driver FM dismissed the applicant’s third claim as ‘ridiculous’,<sup>765</sup> stating:

It was reasonable for the respondent to seek to limit its liability to Ms Penhall-Jones by securing the cessation of her employment in return for adequate compensation. Ms Penhall-Jones did not regard the monetary offer as adequate but she did not have to accept it. The HREOC conciliation process is non binding and no one is forced to agree to anything. The attempt by Ms Penhall-Jones to use the private conciliation conference to support her claim of victimisation is most unfortunate. If such a tactic were to become common it would imperil the conciliation role of HREOC as respondents would be reluctant to participate in conciliation for fear of the process then being used against them.<sup>766</sup>

759 [2007] FCA 925, [68]-[84].

760 [2007] FCA 925, [85]. See also *Damiano v Wilkinson* [2004] FMCA 891.

761 *Penhall-Jones v New South Wales (No 2)* [2006] FMCA 927.

762 [2006] FMCA 927, [125].

763 [2006] FMCA 927, [126].

764 [2006] FMCA 927, [127].

765 [2006] FMCA 927, [129].

766 [2006] FMCA 927, [128]-[129].

Driver FM also dismissed the applicant's fourth claim, in relation to the letter from Mr Duffy, stating:

the threat, in my view, falls short of victimisation. That is because the threat was a consequence not of the fact of the complaint of unlawful discrimination made by Ms Penhall-Jones, or her participation in the conciliation conference on 28 September 2004. Rather, the threat was a consequence of the intemperate and continuing allegations by Ms Penhall-Jones which Mr Duffy, on advice, genuinely viewed as unfounded, false and vexatious, to the extent of probably constituting a breach of the duty of trust and confidence necessary to the continuation of the employment relationship.<sup>767</sup>

The above findings of Driver FM were upheld on appeal.<sup>768</sup> In relation to the fourth claim, Buchanan J even expressed doubt as to whether the relevant letter from Mr Duffy amounted to a 'threat' within the meaning of section 42(2):

I find it hard to see the letter as a 'threat' notwithstanding the view expressed by the Federal Magistrate. Some indication of the seriousness with which Ms Penhall-Jones' accusations were viewed and, in particular, that they were regarded as inappropriate was not only natural but necessary if, in response to a continuation of allegations of that kind, the [respondent] wished to take action as a result. ... A failure to indicate the seriousness with which the allegations were viewed would require explanation if disciplinary action followed. A lack of candour and a failure to provide an unvarnished statement of the implications for Ms Penhall-Jones' employment would not be justified simply by a desire to avoid what might later be construed as threatening behaviour. All warnings, which are often an integral and necessary part of fair treatment and proper notice, contain an element of explicit or implicit menace by their very nature.<sup>769</sup>

The meaning of 'threatens to subject ... to any detriment' was also considered by Baumann FM in *Damiano v Wilkinson*.<sup>770</sup> The applicants alleged that, after lodging a claim of disability discrimination on behalf of their son with the Commission, the principal of the school victimised them by:<sup>771</sup>

- failing to return three phone calls made by the parents;
- shouting at the parents during a phone conversation, including shouting that he would speak to the mother 'only when he was ready to do so'; and
- making statements to the local paper that:
  - the complaint was 'trivial, vexatious, misleading or lacking in substance';
  - the matter had been taken 'to the highest authority and thrown out'; and
  - the school 'is currently investigating what legal recourse we have in terms of taking action against people who are guilty of these sorts of complaints, because there is a high degree of harassment we want investigated'.

In relation to the meaning of 'detriment', his Honour held that, whilst the term is not defined in the DDA, it involves placing a complainant 'under a disadvantage as a matter of substance',<sup>772</sup> or results in a complainant suffering 'a material difference in treatment'<sup>773</sup> which is 'real and not trivial'.<sup>774</sup>

Baumann FM upheld the application for summary dismissal by the respondent on the basis that the allegations in relation to the phone calls were 'trivial' and lacking in particularity.<sup>775</sup> The claims relating

767 [2006] FMCA 927, [136].

768 [2007] FCA 925.

769 [2007] FCA 925, [63].

770 [2004] FMCA 891.

771 Note that other conduct alleged by the applicants was found not to have formed part of the complaint to the Commission and was excluded from consideration by virtue of s 46PO(3) of the then *Human Rights and Equal Opportunity Commission Act 1986* (Cth): [2004] FMCA 891, [39].

772 [2004] FMCA 891, [23], citing *Bogie v University of Western Sydney* (1990) EOC 92-313.

773 [2004] FMCA 891, [23], citing *Bailey v Australian National University* (1995) EOC 92-744.

774 [2004] FMCA 891, [23], citing *Sivanathan v Commissioner of Police (NSW)* (2001) NSWADT 44.

775 [2004] FMCA 891, [24].

to the comments made to the newspaper were also rejected as either accurate, understandable or not constituting a threat.<sup>776</sup>

In *Drury v Andreco Hurl Refractory Services Pty Ltd (No 4)*,<sup>777</sup> the respondent was found to have made a decision not to re-employ the applicant because of his previous complaint to the Commission and subsequent proceedings in the Federal Court and because he had threatened in correspondence to repeat that action were he not given employment. Raphael FM stated:

I can understand that the company might have been disturbed by [the applicant's] correspondence with them. But that correspondence when read in context and as a whole is no more than a firm assertion of [the applicant's] rights. The Act does not excuse the respondent to a victimisation claim because the proposal to make a complaint to HREOC is couched in intemperate words. In this particular case, and again reading the correspondence as a whole, I do not think that it could be so described. Certainly [the applicant] says that if he is not offered work he will take the matter up again with HREOC and certainly he suggests he will be calling witnesses and requiring documents to be produced, but he also says that he doesn't want to go to court and he wants to settle the matter by getting back his job and by using the money earned from that job to repay the company the costs he owes them for the previously aborted proceedings before Driver FM.<sup>778</sup>

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776 [2004] FMCA 891, [28]-[29].

777 [2005] FMCA 1226.

778 [2005] FMCA 1226, [31].



# 6 Practice and Procedure

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## Contents

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<b>6.1</b>	<b>Introduction .....</b>	<b>281</b>
<b>6.2</b>	<b>Special Purpose Commissioners as Amicus Curiae .....</b>	<b>282</b>
6.2.1	The nature of the role vis-a-vis an intervener .....	283
6.2.2	Jurisdiction of the court to grant leave.....	285
<b>6.3</b>	<b>Parties to a Complaint to the Commission .....</b>	<b>285</b>
6.3.1	Complainants.....	285
(a)	‘A person aggrieved’ .....	285
(b)	Bodies corporate.....	288
(i)	Can a body corporate be a ‘person aggrieved’? .....	288
(ii)	Determining whether the ‘person aggrieved’ is the body corporate, its members or its directors .....	290
(c)	Unincorporated bodies .....	291
(d)	Complaints in respect of deceased persons .....	292
6.3.2	Respondents .....	293
6.3.3	Representative complaints to the Commission .....	293
<b>6.4</b>	<b>Interim Injunctions .....</b>	<b>294</b>
6.4.1	Section 46PP of the AHRC Act .....	294
6.4.2	Principles governing determination of whether to grant an injunction .....	294
(a)	Serious issue to be tried .....	295
(b)	Balance of convenience .....	296
6.4.3	Ex parte injunctions .....	296
6.4.4	Types of orders that the court can make under section 46PP .....	297
6.4.5	Duration of relief granted under section 46PP and the time period in which such relief must be sought .....	299
<b>6.5</b>	<b>Election of Jurisdiction.....</b>	<b>300</b>
<b>6.6</b>	<b>AHRC Act is an Exclusive Regime .....</b>	<b>302</b>
<b>6.7</b>	<b>Scope of Applications Made Under Section 46PO of the AHRC Act to the Federal Circuit Court and Federal Court .....</b>	<b>303</b>
6.7.1	Parties .....	303
(a)	Applicants .....	303
(b)	Respondents .....	304
(c)	Representative proceedings in the Federal Court.....	305

6.7.2	Relationship between application and terminated complaint .....	306
6.7.3	Validity of termination notice .....	312
6.7.4	Pleading claims in addition to unlawful discrimination .....	312
(a)	Non-federal claims — accrued jurisdiction of the court .....	312
(b)	Concurrent claims for unlawful discrimination and judicial review .....	314
<b>6.8</b>	<b>Relevance of Other Complaints to the Commission .....</b>	<b>314</b>
6.8.1	'Repeat complaints' to the Commission .....	314
6.8.2	Evidence of other complaints to the Commission.....	316
<b>6.9</b>	<b>Pleading Direct and Indirect Discrimination as Alternatives .....</b>	<b>317</b>
<b>6.10</b>	<b>Applications for Extension of Time .....</b>	<b>317</b>
6.10.1	Relevance of nature of human rights jurisdiction .....	318
6.10.2	Principles to be applied .....	318
(a)	Need for an acceptable explanation for delay .....	319
(b)	Prejudice arising from the delay .....	320
(c)	No arguable case .....	321
6.10.3	Examples of where extension of time has been granted .....	322
<b>6.11</b>	<b>State Statutes of Limitation .....</b>	<b>323</b>
<b>6.12</b>	<b>Interim Injunctions Under Section 46PO(6) of the AHRC Act .....</b>	<b>324</b>
<b>6.13</b>	<b>Applications for Summary Disposal.....</b>	<b>325</b>
6.13.1	Changes to the summary disposal provisions .....	325
6.13.2	Principles governing determination of whether there are 'no reasonable prospects' .....	327
6.13.3	Onus/material to be considered by the court.....	330
6.13.4	Examples of matters where the power has been exercised.....	331
6.13.5	Frivolous or vexatious proceedings and abuse of process.....	331
(a)	Vexatious.....	332
(b)	Abuse of process .....	332
6.13.6	Dismissal of application due to non-appearance of applicant.....	335
<b>6.14</b>	<b>Application for Dismissal for Want of Prosecution.....</b>	<b>335</b>
<b>6.15</b>	<b>Application for Suppression Order.....</b>	<b>336</b>
<b>6.16</b>	<b>Transfer of Proceedings Between the FCC and the Federal Court.....</b>	<b>338</b>
6.16.1	Transfer of matters from the Federal Court to the FCC .....	338
6.16.2	Transfer of matters from the FCC to the Federal Court .....	339

<b>6.17</b>	<b>Appeals from the FCC to the Federal Court .....</b>	<b>341</b>
6.17.1	Nature of appeals .....	341
6.17.2	Appeal of a decision on an interlocutory application .....	342
6.17.3	Extension of time for filing appeals .....	343
	(a) Principles to be applied.....	343
	(b) Examples of cases in which applications for leave to appeal out of time have been made.....	343
<b>6.18</b>	<b>Approach to Statutory Construction of Unlawful Discrimination Laws .....</b>	<b>345</b>
<b>6.19</b>	<b>Standard of Proof in Discrimination Matters .....</b>	<b>346</b>
<b>6.20</b>	<b>Contempt of Court.....</b>	<b>349</b>
<b>6.21</b>	<b>Miscellaneous Procedural and Evidentiary Matters.....</b>	<b>351</b>
6.21.1	Request for copy of transcript .....	351
6.21.2	Unrepresented litigants.....	351
6.21.3	Representation by unqualified person .....	354
6.21.4	Consideration of fresh evidence out of time.....	356
6.21.5	Statements made at conciliation .....	357
6.21.6	Security for costs.....	357
6.21.7	Restrictions on commencing proceedings without reasonable prospects of success .....	359
6.21.8	Judicial immunity from suit under federal discrimination law .....	361
6.21.9	Adjournment pending decision of Legal Aid Commission .....	361
6.21.10	Appointment of litigation guardians .....	362
6.21.11	Approval of settlements .....	363
6.21.12	'No case' submission.....	365
6.21.13	Separate decision of questions .....	365
6.21.14	Discovery in the Federal Circuit Court .....	366

# Practice and Procedure

## 6.1 Introduction

The procedure for making complaints of federal unlawful discrimination is set out in Part IIB of the *Australian Human Rights Commission Act 1986* (Cth) ('AHRC Act').<sup>1</sup> That procedure can be summarised as follows:

- A person may make a written complaint to the Australian Human Rights Commission ('Commission') alleging unlawful discrimination under the *Racial Discrimination Act 1975* (Cth) ('RDA'), *Sex Discrimination Act 1984* (Cth) ('SDA'), *Disability Discrimination Act 1992* (Cth) ('DDA') or *Age Discrimination Act 2004* (Cth) ('ADA').<sup>2</sup> The President of the Commission conducts inquiries into and attempts to conciliate such complaints.<sup>3</sup>
- The President may decide not to inquire, or to discontinue an inquiry, if the President is satisfied that the aggrieved person does not want the President to inquire, or to continue to inquire, or if the President is satisfied that the complaint has been settled or resolved.<sup>4</sup>
- The President may terminate a complaint on the grounds set out in section 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;
  - (d) 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;
  - (e) 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;
  - (f) 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;
  - (g) the President is satisfied that the subject matter of the complaint could be more effectively or conveniently dealt with by another statutory authority;
  - (h) 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 Circuit Court; or
  - (i) the President is satisfied that there is no reasonable prospect of the matter being settled by conciliation.<sup>5</sup>
- Once a notice of termination has been issued by the President, an 'affected person in relation to the complaint' may make an application to the Federal Court of Australia ('Federal Court') or the Federal Circuit Court of Australia ('FCC') alleging unlawful discrimination by one or more

<sup>1</sup> *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), Sch 3. The current procedural regime has operated since 13 April 2000, with the commencement of the *Human Rights Legislation Amendment Act (No 1) 1999* (Cth). Previously, hearings into complaints of unlawful discrimination were conducted at first instance by the Commission, rather than the Federal Court or the Federal Circuit Court as is now the case. For a discussion of the changes to the federal unlawful discrimination jurisdiction, see 1.4 above and Human Rights and Equal Opportunity Commission, *Change and Continuity: Review of the Federal Unlawful Discrimination Jurisdiction, September 2000–September 2002* (2003), available for download from the Commission's website <<http://www.humanrights.gov.au/legal/publications/review2002/index.html>>.

<sup>2</sup> AHRC Act, s 46P. The terms of the legislation require a complaint to be in writing, be made by an aggrieved person (see 6.2.1 below) and allege unlawful discrimination. The formal requirements for the making of a valid complaint to the Commission would otherwise seem to be limited: see *Proudfoot v Human Rights & Equal Opportunity Commission* (1991) 100 ALR 557; *Ellenbogen v Human Rights & Equal Opportunity Commission* [1993] FCA 864; *Simplot Australia Pty Limited v Human Rights & Equal Opportunity Commission* (1996) 69 FCR 90, 95 cf *Commonwealth v Sex Discrimination Commissioner* (1998) 90 FCR 179, 187–188; *Price v Department of Education & Training (NSW)* [2008] FMCA 1018, [21]–[29].

<sup>3</sup> AHRC Act, ss 8(6) and 11(aa).

<sup>4</sup> AHRC Act, s 46PF(5).

<sup>5</sup> Note also the power to terminate a complaint under s 46PE of the AHRC Act in relation to complaints against the President, the Commission or a Commissioner.

respondents to the terminated complaint.<sup>6</sup> The application may be made regardless of the ground upon which a person's complaint is terminated by the President.

- An application must be filed within 60 days of the date of issue of the termination notice,<sup>7</sup> although the court may allow further time (discussed at 6.10 below).

The *Federal Court Rules 2011* (Cth) ('Federal Court Rules')<sup>8</sup> and *Federal Circuit Court Rules 2001* (Cth) ('FCC Rules') impose additional procedural requirements in relation to the commencement of applications in unlawful discrimination matters.<sup>9</sup> However, section 46PR of the AHRC Act provides that, subject to Constitutional limitations, in proceedings under Division 2 of Part IIB of the AHRC Act, the Federal Court and the FCC are not bound by technicalities or legal forms. The application of section 46PR has been considered on numerous occasions and the courts have variously described the application of the section as follows:

The capacity to act informally and without regard to legal technicalities is not, however, the provision of a licence to disregard legal principles. The Court must still exercise its powers judicially.<sup>10</sup>

...it is not therefore correct to say that the identity of a respondent is a mere technicality with which the Court can dispense by reason of s 46PR of the AHRC Act.<sup>11</sup>

In my opinion, s 46PR does not prevent the appropriate application of the relevant rules concerning pleadings in Pt 16 of the *Federal Court Rules* which, in part anyway, provide procedural fairness to other parties — here, the respondents — in terms of being faced with a clear statement of the material facts which are said to found the claims against them.<sup>12</sup>

The "substantive directions" given by s 46PO(3) must still be respected, notwithstanding the provisions of s 46PR.<sup>13</sup>

This chapter considers particular procedural and evidentiary issues that have arisen in federal unlawful discrimination matters. The structure of the chapter mirrors the chronological stages of proceedings, from the initial complaint to the Commission through to the Federal Court and FCC. As noted in Chapter 1, not all aspects of procedure and evidence relevant to federal unlawful discrimination matters are discussed: only those aspects that have been considered in cases decided in the jurisdiction.

## 6.2 Special Purpose Commissioners as Amicus Curiae

The Aboriginal and Torres Strait Islander Social Justice Commissioner, Age Discrimination Commissioner, Disability Discrimination Commissioner, Human Rights Commissioner, National Children's Commissioner, Race Discrimination Commissioner and Sex Discrimination Commissioner,

<sup>6</sup> AHRC Act, s 46PO(1).

<sup>7</sup> AHRC Act, s 46PO(2).

<sup>8</sup> The new Federal Court Rules came into effect on 1 August 2011 and involve extensive revision of the former rules. Readers should consult the new Federal Court Rules directly wherever applicable.

<sup>9</sup> AHRC Act, s 46PO; Federal Court Rules rr 34.163 – 34.167 (formerly O 81 r 5); Pt 41 of the FCC Rules. The Federal Court Rules provide that a document (including, an application by which proceedings are sought to be commenced) is not to be accepted for filing if the document is not substantially complete, does not substantially comply with the Federal Court Rules, is not properly signed, is refused by the Registrar, or the court has given a direction that the document not be accepted or not be accepted without leave, and leave has not been obtained: r 2.27 (formerly O 1 r 5A(8)).

<sup>10</sup> *Ejueytsi v Commissioner Of Police (Western Australia)* [2013] FMCA 120 [7] citing *Corcoran & Ors v Bansley Pty Ltd* [2011] FMCA 440, citing *Zoological Board of Victoria v Australian Liquor, Hospitality and Miscellaneous Workers Union* (1993) 49 IR 41, 48 (Moore VP) and *Walker v State of Victoria* [2012] FCAFC 38, [81] (Gray J).

<sup>11</sup> *Eliezer v University of Sydney* [2015] FCA 1045 [47].

<sup>12</sup> *Maiocchi v Royal Australian & New Zealand College of Psychiatrists* [2014] FCA 301 [8].

<sup>13</sup> *Maghiar v Western Australia* [2002] FCA 262, [18] (French J).

are given an amicus curiae function in relation to proceedings arising out of a complaint before the Federal Court or the FCC.<sup>14</sup>

In *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*,<sup>15</sup> Collier J considered the principles to be applied in determining an application by a special purpose Commissioner for leave to appear as amicus curiae. Her Honour noted the following view of Brennan CJ in *Levy v State of Victoria*<sup>16</sup> as to the general basis upon which an amicus curiae is heard:

The footing on which an amicus curiae is heard is that that person is willing to offer the Court a submission on law or relevant facts which will assist the Court in a way in which the Court would not otherwise have been assisted.<sup>17</sup>

Her Honour then referred to the particular position of the special purpose Commissioners by reason of their statutory amicus curiae function under the AHRC Act. Her Honour stated:

The amicus curiae function conferred on the special purpose Commissioners under the HREOC Act, in my view indicates acknowledgement by Parliament that the Court can obtain useful assistance from the Commissioners as statutory amicus curiae. In the HREOC Act, Parliament also recognises the position, expertise and knowledge of the Commissioners, and I note the duties and functions of the Commission as set out in s 10A and s 11 of the HREOC Act to that effect.<sup>18</sup>

## 6.2.1 The nature of the role vis-a-vis an intervener

The High Court has provided guidance as to the nature of the role of an amici vis-à-vis and intervener. In *Roadshow Films Pty Ltd v iiNet Ltd* the High Court stated:

In determining whether to allow a non-party intervention the following considerations, reflected in the observations of Brennan CJ in *Levy v Victoria* (1997) 189 CLR 579 at 600–605; [1997] HCA 31, are relevant. A non-party whose interests would be directly affected by a decision in the proceeding, that is one who would be bound by the decision, is entitled to intervene to protect the interest likely to be affected. A non-party whose legal interest, for example, in other pending litigation is likely to be affected substantially by the outcome of the proceedings in this court will satisfy a precondition for leave to intervene....

3 Where a person having the necessary legal interest can show that the parties to the particular proceedings may not present fully the submissions on a particular issue, being submissions which the court should

14 AHRC Act, s 46PV. That function has been exercised in the following cases in which there have been reported decisions: *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* [2006] FCA 1214 (decision re amicus application) and *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313 (decision re standing of Access For All Alliance (Hervey Bay) Inc); *Kienle & Ors v Commonwealth of Australia* [2011] FMCA 210; *Maddison v Qualtime Association Inc* [2010] FMCA 25; *Haraksin v Murrays Australia Ltd* [2010] FCA 1133; *Forest v Smith & Anor and Forest v Tranter Pty Ltd* [2008] FMCA 1697; *Maslauskas v Queensland Nursing Council* [2008] FMCA 216; *Vijayakumar v Qantas* [2008] FMCA 339; *Kenneth Webb v Child Support Agency* [2007] FMCA 1678; *Forest v Queensland Health* [2007] FCA 1236; *Clarke v Oceania Judo Union* [2007] FMCA 292; *Forest v Queensland Health* [2007] FCA 936; *Vickers v The Ambulance Service of NSW* [2006] FMCA 1232; *AB v Registrar of Births, Deaths & Marriages* [2006] FCA 1071 (2006) 235 ALR 147; *Giblet v Queensland* [2006] FCA 537; *Kelly-Country v Beers* [2004] FMCA 336; *Howe v Qantas Airways Ltd* [2004] FMCA 242; *Jacomb v Australian Municipal Administrative & Clerical Union* (2004) 140 FCR 149; *Gardner v All Australia Netball Association Ltd* [2003] FMCA 81; *John Morris Kelly Country v Louis Beers* [2004] FMCA 336; *Access For all Alliance (Hervey Bay) Inc v Hervey Bay City Council* [2004] FMCA 915; *Ferneley v Boxing Authority of New South Wales* (2001) 115 FCR 306. Further information about the amicus curiae function, including submissions made in these cases, is available at <[http://www.humanrights.gov.au/legal/submissions\\_court/index.html](http://www.humanrights.gov.au/legal/submissions_court/index.html)>.

15 [2006] FCA 1214.

16 (1997) 189 CLR 579, 604–605.

17 [2006] FCA 1214, [5].

18 [2006] FCA 1214, [6]. The decision of Collier J was followed in *Vijayakumar v Qantas Airways Ltd* [2008] FMCA 339, [8]–[10] and *Maslauskas v Queensland Nursing Council* [2008] FMCA 216, [9]–[12].

have to assist it to reach a correct determination, the court may exercise its jurisdiction by granting leave to intervene, albeit subject to such limitations and conditions as to costs between all parties as it sees fit to impose.

4 The grant of leave for a person to be heard as an *amicus curiae* is not dependent upon the same conditions in relation to legal interest as the grant of leave to intervene. The court will need to be satisfied, however, that it will be significantly assisted by the submissions of the *amicus* and that any costs to the parties or any delay consequent on agreeing to hear the *amicus* is not disproportionate to the expected assistance.

...

6 In considering whether any applicant should have leave to intervene in order to make submissions or to make submissions as *amicus curiae*, it is necessary to consider not only whether some legal interests of the applicant may be indirectly affected but also, and in this case critically, whether the applicant will make submissions which the court should have to assist it to reach a correct determination. Ordinarily then, in cases like the present where the parties are large organisations represented by experienced lawyers, applications for leave to intervene or to make submissions as *amicus curiae* should seldom be necessary or appropriate and if such applications are made it would ordinarily be expected that the applicant will identify with some particularity what it is that the applicant seeks to add to the arguments that the parties will advance.<sup>19</sup>

In relation to the observations of Brennan J in *Levy*, the Federal Court has since noted, in *Australian Competition and Consumer Commission v Flight Centre Ltd*<sup>20</sup> that:

Those observations as to the hearing of a person as *amicus curiae* must now be read subject to the statements made by the Full Court in *Sharman Networks* in relation to the position of a non-lawyer entity.<sup>21</sup>

The statements made in *Sharman Networks*, were as follows:

There can be a degree of confusion in the use of the terms “*amicus curiae*” and “intervener”. At the extremes, the distinction is clear enough. Where a court invites a legal practitioner to assist it by ensuring that its attention is drawn to all relevant law and arguments, the legal practitioner is an *amicus curiae*, not an intervener. On the other hand, where a person’s interests may be affected by the outcome, the person, if permitted by the court, becomes an “intervener”, not an *amicus curiae*.

There is, however, a large intermediate area. A non-lawyer entity may seek to become involved in litigation. It may be an official body, such as the Australian Competition and Consumer Commission or the Australian Securities and Investments Commission (we leave to one side any special statutory power to intervene or to apply for leave to intervene). It may be an organisation that puts itself forward as acting in the public interest. ... Yet a further class of case is illustrated by an industry, trade or professional association, whose members’ interests may be affected, directly or indirectly, by the outcome of the litigation.

While it is easy to see the first of these three intermediate categories as comprising entities acting in the public interest, entities in the second and third classes may be acting, to various degrees, both in the public interest and in private interests.<sup>22</sup>

On this analysis, it could be that the special purpose Commissioners would fall into the, category ‘left aside’ by the court in *Sharman Networks*, having ‘special statutory power to intervene or to apply for leave to intervene’ where the use of the word ‘intervene’ would encompass being an *amicus*. In this regard, through the consultation process in the drafting of the new Federal Court Rules in 2011, a note was added to rule 9.12 to specifically allow the court to appoint an *amicus curiae*.

<sup>19</sup> (2012) 248 CLR 37, 38 [2]-[4] and [6], applied in *Hua Wang Bank Berhad v Commissioner of Taxation* [2013] FCAFC 28.

<sup>20</sup> [2012] FCA 1161.

<sup>21</sup> [2012] FCA 1161, [17].

<sup>22</sup> *Sharman Networks Ltd v Universal Music Australia Pty Ltd* (2006) 155 FCR 291, 293, [7]-[9].



## 6.2.2 Jurisdiction of the court to grant leave

Prior to the commencement of the *Federal Court Rules 2011* on 1 August 2011, there was no specific mention of the role of *amicus curiae* in the rules and no specific power given to the court to enable it to grant leave to an *amici*. However, it has been held that Order 6 rule 17 of the Federal Court Rules [Interveners]:

...[is] intended to regulate comprehensively the practice of the Court with respect to the intervention of now-lawyer parties in proceedings... We think it is only the legal practitioner who is invited by the Court to assist it, who stands outside the rule regime....

Order 6 r 17 ...[is] drawn in sufficiently wide terms to enable the Court to craft an intervention order appropriate to the circumstances of the particular case....it would be inconsistent with the obvious intention of the rules for a non-lawyer entity to be free to seek leave to be hard as *amicus curiae* outside the comprehensive framework now provided by O 6 r 17.<sup>23</sup>

Federal Court Rules 2011, Order 9.12 replaced Order 6 rule 17. A note was added to that order in the following terms:

*Note 2* The Court may appoint an *amicus curiae*.

The powers of the court to grant leave for intervention in appeals was set out in Order 52 rule 14AA, now Order 36.32.

## 6.3 Parties to a Complaint to the Commission

### 6.3.1 Complainants

#### (a) 'A person aggrieved'

Under section 46P of the AHRC Act a complaint may be lodged with the Commission alleging unlawful discrimination by:

- a person aggrieved by the unlawful discrimination, on that person's own behalf, or on behalf of that person and one or more other persons who are aggrieved by the alleged unlawful discrimination;<sup>24</sup>
- by two or more persons aggrieved by the alleged unlawful discrimination, on their own behalf, or on behalf of themselves and one or more other persons who are also aggrieved by the alleged unlawful discrimination;<sup>25</sup> or
- by a person or trade union on behalf of one or more other persons aggrieved by the alleged unlawful discrimination.<sup>26</sup>

In all cases there must be 'a person aggrieved' before a complaint can be lodged with the Commission. The AHRC Act does not define 'a person aggrieved'.<sup>27</sup>

<sup>23</sup> (2006) 155 FCR 291, 294 [11]-[12].

<sup>24</sup> AHRC Act, s 46P(2)(a).

<sup>25</sup> AHRC Act, s 46P(2)(b).

<sup>26</sup> AHRC Act, s 46P(2)(c).

<sup>27</sup> The AHRC Act only defines the term 'complainant' as being: 'in relation to a complaint, a person who lodged the complaint, whether on the person's own behalf or on behalf of another person or persons' (s 3(1)).

The meaning of 'person aggrieved' was considered in *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*.<sup>28</sup> In this case, the applicant was a volunteer incorporated association that was established to advance equitable and dignified access to premises and facilities. It alleged that the respondent council was in breach of section 32 of the DDA by maintaining bus stops that failed to comply with the relevant disability standard.<sup>29</sup> Collier J summarily dismissed the application, finding that the applicant was not a 'person aggrieved'.

Collier J outlined the following guiding principles in determining whether an organisation is a 'person aggrieved':

- (a) the question is a mixed question of law and fact;<sup>30</sup>
- (b) the complainant must show that they have a grievance that is beyond that which will be suffered by an ordinary member of the public to satisfy the test;<sup>31</sup>
- (c) the test is an objective, not a subjective one, so the mere fact that a person feels aggrieved or has no more than an intellectual or emotional concern is not sufficient;<sup>32</sup>
- (d) the phrase includes a person who has a genuine grievance because the action prejudicially affects their interests;<sup>33</sup>
- (e) there is a different jurisprudential basis for identifying whether an applicant has a 'special interest' in the subject of proceedings sufficient to be granted standing under general law, compared with whether an applicant is a person aggrieved for the purposes of a statutory right of action such as under the HREOC Act (as it then was), although in resolving these questions, the matters taken into account are often similar;<sup>34</sup> and
- (f) 'person aggrieved' should not be interpreted narrowly and should be given a construction that promotes the purpose of the relevant Act.<sup>35</sup>

Her Honour also identified a number of principles relating to the circumstances in which bodies corporate can be a 'person aggrieved' for the purpose of the AHRC Act: see below.

Collier J noted the view expressed by Ellicott J in *Tooheys Ltd v Minister for Business & Consumer Affairs*<sup>36</sup> that in most cases, it would be more appropriate to deal with the question of whether an applicant is a 'person aggrieved' at a final hearing when all of the facts are before the court and the court has the benefit of full argument on the matter. In spite of this, in *Hervey Bay*, her Honour considered it appropriate to deal with this issue at an early stage because the parties had had an opportunity to file evidence in relation to the issue and the applicant was not disputing the appropriateness of her determining the issue at that stage of the proceedings.

Her Honour found that *Access For All Alliance (Hervey Bay) Inc* was not a 'person aggrieved' as its interest in the proceedings was no greater than the interest of an ordinary member of the public. Justice Collier said:

Notwithstanding its intellectual and emotional concern in the subject matter of the proceedings, the interest of the applicant is no more than that of an ordinary member of the public; the applicant is not affected

28 (2007) 162 FCR 313. For a discussion of this case see Brook Hely, 'Access Denied: Standing of a human rights organisation to commence discrimination proceedings' (2007) 45 *Law Society Journal* 46.

29 See 5.2.6.

30 (2007) 162 FCR 313, 327-328 [40]; see also *Cameron v Human Rights & Equal Opportunity Commission* (1993) 46 FCR 509, 515.

31 (2007) 162 FCR 313, 331 [52].

32 (2007) 162 FCR 313, 328 [40]; see also *Cameron v Human Rights & Equal Opportunity Commission* (1993) 46 FCR 509, 515.

33 *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313, 328 [40].

34 (2007) 162 FCR 313, 328 [42]-[43].

35 (2007) 162 FCR 313, 329 [44]-[45].

36 (1981) 36 ALR 64, 78-79 (Ellicott J).

to an extent greater than an ordinary member of the public, nor would the applicant gain an advantage if successful nor suffer a disadvantage if unsuccessful.<sup>37</sup>

In reaching her decision Justice Collier adopted the reasoning of the Full Court of the Federal Court in *Cameron v Human Rights & Equal Opportunity Commission*<sup>38</sup> and the reasoning of Wilcox J in the *Executive Council of Australian Jewry v Scully*.<sup>39</sup>

The applicant in *Cameron* had made a complaint to the Commission alleging that a scholarship scheme run by the Australian International Development Assistance Bureau for Fijian students constituted racial discrimination in breach of the RDA. The Commission declined the applicant's complaint on the basis that the complainant was not an 'aggrieved person'.

The applicant sought judicial review of the Commission's decision. In the Federal Court he contended that he was a 'person aggrieved' because:

- he was a legal practitioner who had acted for persons in proceedings concerning racial discrimination and civil rights in Fiji;
- he had received a scholarship as a student and was aware of the privileges and duties associated with such an award;
- he had continuing professional and personal links with Fiji; and
- he had a personal sense of moral duty about matters concerning Fiji and its citizens.<sup>40</sup>

At first instance,<sup>41</sup> Davies J dismissed the application saying that the applicant was not an 'aggrieved person'. His finding was upheld on appeal.<sup>42</sup>

Beaumont and Foster JJ held that the question of whether a person is a 'person aggrieved' is a mixed question of law and fact to be determined objectively, and that the mere feeling of being aggrieved will not be sufficient.<sup>43</sup>

In a separate judgment, French J, while also dismissing the appeal, stated that the categories of interest to support *locus standi* should not be considered as being closed:

It is at least arguable that derivative or relational interests will support the claim of a person to be 'aggrieved' for the purposes of the section. A close connection between two people which has personal or economic dimensions, or a mix of both, may suffice. The spouse or other relative of a victim of discrimination or a dependent of such a person may be a person aggrieved for the purposes of the section. It is conceivable that circumstances could arise in which a person in a close professional relationship with another might find that relationship affected by discriminatory conduct and have the necessary standing to lay a complaint.

The categories of eligible interest to support locus standi under this statutory formula or for the purposes of prerogative relief are not closed. This much was demonstrated in *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27. There the qualifying interest was described as 'a cultural and historical interest ...' (at 62). While it will often be the case that such interests or relational interests of the kind referred to above may overlap with intellectual or emotional concerns, the presence of the latter does not defeat the claim to standing. [Therefore] I do not exclude the possibility that a case might arise in which a personal affiliation with a

37 *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313, 334 [67].

38 (1993) 46 FCR 509.

39 (1998) 79 FCR 537. Both *Cameron* and *Scully* were complaints brought prior to the amendment of the HREOC Act by the *Human Rights Legislation Amendment Act (No 1) 1999* (Cth) which resulted in the complaint provisions being moved from each of the discrimination Acts to the HREOC Act (now the AHRC Act). The relevant provision in the RDA at the time was, however, substantially similar to s 46P in that it gave a 'person aggrieved' the right to lodge a complaint.

40 (1993) 46 FCR 509, 512-513.

41 *Cameron v Human Rights & Equal Opportunity Commission* (Unreported, Davies J, 30 July 1993).

42 (1993) 46 FCR 509.

43 (1993) 46 FCR 509, 515.

particular individual or group who claims to be the victim of discrimination might support standing to lay a complaint under the [RDA].<sup>44</sup>

In *Scully*,<sup>45</sup> Wilcox J held that the Executive Vice President of the Executive Council of Australian Jewry, Mr Jones, was a 'person aggrieved'. The complaint related to material distributed to members of the public in Launceston which was alleged to constitute racial hatred in breach of section 18C of the RDA. Wilcox J found that the Executive Vice President was a 'person aggrieved', despite the fact that Mr Jones lived in Sydney, not Launceston. Wilcox J noted that:

Mr Jones' claim of special affection did not depend on his place of residence. He offered himself as complainant because he was the Executive Vice President of a body that represented 85% of the Jewish population of Australia. He was a senior officer of the Council with major responsibility for the achievement of its objects. They included representing Australian Jewry, including Jews resident in the Launceston district. To describe Mr Jones' connection with the matter simply as 'a Jewish Australian living in Sydney' was to ignore his representative role.<sup>46</sup>

His Honour concluded that Mr Jones had a 'special responsibility to safeguard the interests of a group' and was therefore a 'person aggrieved'.<sup>47</sup>

In *Munday v Commonwealth of Australia (No 2)*<sup>48</sup> the applicant had lodged a complaint to AHRC alleging that APRA had breached the DDA in its refusal to grant his wife's request for early release of her superannuation to fund IVF treatment.<sup>49</sup> While the Commonwealth argued that Mr Munday had brought the complaint on behalf of his wife and was therefore not a person aggrieved, the court found that:

Mr Munday's interest in the proceedings is greater than that of an ordinary member of the public. He is no "mere busybody". Nor is he simply a person with an intellectual or emotional concern in the subject matter of the proceeding. The denials of Ms Day's applications affected Mr Munday in a deeply personal way, by depriving him as well as his wife of a source of funds to assist in conceiving *their* child. While it is understandable that the Commission regarded the complaint as having been brought on behalf of Ms Day, Mr Munday had a personal interest in its resolution. He was his wife's agent but he was also aggrieved himself.<sup>50</sup>

The above cases suggest that while a complainant does not necessarily have to be the victim of discrimination to be a 'person aggrieved', the complainant must show that they have a genuine grievance that goes beyond that of an ordinary member of the public in order to be found to be an 'aggrieved person'.<sup>51</sup>

## (b) Bodies corporate

### (i) *Can a body corporate be a 'person aggrieved'?*

In *Koowarta v Bjelke-Petersen*<sup>52</sup>, Mason J held that a body corporate could be 'a person aggrieved', finding that:

44 (1993) 46 FCR 509, 519-520.

45 (1998) 79 FCR 537.

46 (1998) 79 FCR 537, 549.

47 (1998) 79 FCR 537, 550.

48 (2014) 226 FCR 199.

49 (2014) 226 FCR 199, 215, [72]-[82].

50 (2014) 226 FCR 199, 217, [81].

51 Cf *Cuna Mutual Group Ltd v Bryant* (2000) 102 FCR 270, 280 [42].

52 (1982) 153 CLR 168.

By virtue of s 22(a) of the Acts Interpretation Act 1901 (Cth) a reference in a statute to a person includes a reference to a body corporate, unless a contrary intention appears. It is submitted that because, generally speaking, human rights are accorded to individuals, not to corporations, 'person' should be confined to individuals. But, the object of the Convention being to eliminate all forms of racial discrimination and the purpose of s 12 [of the RDA] being to prohibit acts involving racial discrimination, there is a strong reason for giving the word its statutory sense so that the section applies to discrimination against a corporation by reason of the race, colour, or national or ethnic origin of any associate of that corporation.<sup>53</sup>

Applying *Koowarta* in *Woomera Aboriginal Corporation v Edwards*,<sup>54</sup> the Commission held that an Aboriginal community organisation was a 'person aggrieved' for the purposes of the complaint provisions which then existed under the RDA (the terms of which are substantially the same as those contained in section 46P of the AHRC Act). The Commission found that the respondents' conduct had prejudicially affected the interests of the organisation in that it had hindered it from carrying out its objects.<sup>55</sup>

In *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*,<sup>56</sup> Collier J followed the decision of Mason J in *Koowarta* and held that a body corporate, including entities incorporated pursuant to the *Associations Incorporation Act 1981* (Qld),<sup>57</sup> may be a 'person aggrieved' if, for example, the body corporate is treated less favourably based on the race, disability etc of its members, such as by being refused a lease of premises.<sup>58</sup> However, 'merely incorporating a body and providing it with relevant objects does not provide it with standing it otherwise would not have had'.<sup>59</sup>

Her Honour also held that the interests of the members of an incorporated association are arguably irrelevant to determining whether the incorporated association is a 'person aggrieved' because it may sue or be sued in its own name.<sup>60</sup> However, her Honour left open the prospect of an incorporated association being sufficiently 'aggrieved' if **all** of its members were similarly aggrieved by the relevant conduct.<sup>61</sup> Alternatively, an incorporated association may be 'aggrieved' if it is a sufficiently recognised peak body in respect of the relevant issue, although her Honour suggested that this latter point was 'of somewhat debatable significance'.<sup>62</sup>

Her Honour noted that in some cases, courts have accepted that an incorporated association may have standing in human rights or environmental matters, although courts have typically applied principles as to standing strictly in such cases.<sup>63</sup>

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53 (1982) 153 CLR 168, 236.

54 [1993] HREOCA 24 (extract at (1994) EOC 92-653).

55 [1993] HREOCA 24 (extract at (1994) EOC 92-653).

56 (2007) 162 FCR 313.

57 (2007) 162 FCR 313, 330 [49].

58 (2007) 162 FCR 313, 329-330 [46], [54]. In support of her conclusion, Collier J cited the following decisions in which courts accepted that a body corporate had standing as a 'person aggrieved': *National Trust of Australia (Vic) v Australian Temperance & General Mutual Life Assurance Society Ltd* [1976] VR 592; *Tasmanian Conservation Trust Inc v Minister for Resources* (1995) 55 FCR 516; *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492; *Manuka Business Association Inc v ACT Executive* (1998) 146 FLR 464.

59 (2007) 162 FCR 313, 330 [48].

60 (2007) 162 FCR 313, 330-331 [49]-[50].

61 (2007) 162 FCR 313, 333 [60], distinguishing *Manuka Business Association Inc v ACT Executive* (1998) 146 FLR 464.

62 (2007) 162 FCR 313, 333 [63]. See also a decision of the Land and Environment Court, *Haughton v Minister for Planning and Macquarie Generation* (2011) 185 LGERA 373.

63 (2007) 162 FCR 313, [51].

The Full Federal Court in *Animals' Angels eV v Secretary, Dept of Agriculture*<sup>64</sup> considered the primary judge's application of the factors in *North Coast Environment Council Incorporated v Minister of Resources*<sup>65</sup> and found that, contrary to the primary judge's findings:

... the appellant does have sufficient presence in Australia; it has been recognised in Australia by the relevant department of the Commonwealth; it has devoted financial resources to animal welfare in Australia sufficient to found the activities to which we have referred; not a great weight attaches to the appellant's status or standing with respect to other bodies concerned with animal welfare; the broader and global nature of the appellant's objects or purposes do not derogate from the appellant's engagement in Australia; the appellant's Australian activities do intersect with the appellant's objects or purposes; and the nature of the decision sought to be reviewed directly impacts on animal welfare, which is at the centre of the appellant's objects or purposes.

In our view this evidence establishes that the appellant has a special interest to seek the relief set out in its application to the Court. We accept that standing requires a sufficient interest, not one which is a unique interest or the strongest interest compared with others who may have an interest.<sup>66</sup>

**(ii) Determining whether the 'person aggrieved' is the body corporate, its members or its directors**

In *IW v City of Perth*,<sup>67</sup> a case brought under the *Equal Opportunity Act 1984* (WA), the appellant (identified as IW) was a member of an incorporated association (PLWA) which had made an application for planning approval. The withholding of that planning approval was the subject of the complaint. Three members of the High Court held that the appellant was not a person aggrieved for the purposes of that Act. Dawson and Gaudron JJ stated:

It is clear from the structure of the Act generally ... that an 'aggrieved person' is a person who is discriminated against in a manner in which the Act renders unlawful. And when regard is had to the precise terms of the [goods and services section], it is clear that the person discriminated against is the person who is refused the services on terms or conditions or in a manner that is discriminatory ... there was no refusal of services in this case. And if anyone was the recipient of treatment which might constitute discrimination, it was the PLWA, not the appellant. Accordingly, the appellant was not an 'aggrieved person' within the meaning of that expression ... And that being so, he is in no position to assert that the City of Perth engaged in unlawful discrimination in the exercise of its discretion to grant or withhold planning approval for PLWA's drop-in centre.<sup>68</sup>

Toohey and Kirby JJ, however, held that the appellant was an 'aggrieved person'. Their Honours accepted that the benefit of the application for planning approval, if granted, would have gone to members of the PLWA and that the refusal was 'in truth a refusal to provide [a service] to the members of PLWA'.<sup>69</sup> Toohey J noted that '[t]here was never any doubt that the application by PLWA was made on behalf of its members including the applicant'.<sup>70</sup>

In an earlier case, *Simplot Australia Pty Ltd v Human Rights & Equal Opportunity Commission*,<sup>71</sup> the complainant had alleged that she had been discriminated against on the basis of her sex because of the respondent's decision to award a contract for transportation services to a male owned and operated business. At first instance, the appellant had applied to the Commission for the matter to be struck out on the basis that, *inter alia*, as a company can have no gender, the complainant's complaint

64 (2014) 228 FCR 35.

65 (1994) 55 FCR 492.

66 (2014) 228 FCR 35, 72, [120]

67 (1997) 191 CLR 1.

68 (1997) 191 CLR 1, 25 (Dawson and Gaudron JJ); see also 45 (Gummow J).

69 (1997) 191 CLR 1, 30 (Toohey J); see also 77 (Kirby J).

70 (1997) 191 CLR 1, 31; see also 77 (Kirby J).

71 (1996) 69 FCR 90.

was incapable of constituting sex discrimination. However, Commissioner Nettlefold rejected the application on the basis that the aggrieved person was, in fact, the personal complainant and not her company.

[I]t would be open to the Commission to find at the hearing that the decision to award the contract to a male owned and operated business and to reject the application of the complainant's organisation supported, as it was, by comments arguably wrong in fact and sexist, fall within the definition of 'discrimination' in s 5(1) of the [SDA]. The definition would be applied simply on the basis that the aggrieved person was the complainant *and not her company*. On that basis, the fact that the company does not have a gender is a relevant fact, no doubt, but it is not necessarily a decisive fact. It might be seen as a conduit through which the respondent's discriminatory act flowed to and adversely affected the complainant.<sup>72</sup> (original emphasis)

The respondent sought judicial review of the Commission's decision. On review, Merkel J held that Commissioner Nettlefold had not erred in law in rejecting the strike out application, saying that:

Whether the act alleged ... constituted discrimination against an individual or against a corporation is a question of fact which remains to be determined. [The complainant's] complaint is that *she* was discriminated against in the selection by Edgell of the company which was to perform work under a contract for transportation services. The discrimination alleged by her is that on the ground of her sex a company other than the company offered or nominated by her was engaged to carry out the required transportation services. In his decision the Inquiry Commissioner was conscious of the distinction between treatment of an individual and of a corporation and no error of law was made by him in that regard.<sup>73</sup> (original emphasis)

### (c) Unincorporated bodies

In *Executive Council of Australian Jewry v Scully*<sup>74</sup>, a complaint was brought to the Commission by the Executive Council of Australian Jewry ('the Council'). The Council is an unincorporated association whose members are Jewish community councils from across Australia and whose affiliates are national organisations with 'an interest in a particular aspect of Judaism'.<sup>75</sup> The complaint related to the distribution by the respondent of material said to be offensive to Jewish people in breach of section 18C of the RDA which proscribes racial hatred. The impugned act took place in Launceston. Commissioner Nettlefold had dismissed a complaint brought by the Council under the RDA on the basis that the applicant lacked standing.<sup>76</sup>

One issue in the matter was whether a complaint could be brought by an unincorporated association. Wilcox J held:

I agree with Commissioner Nettlefold that, as Executive Council for Australian Jewry is not a 'person' in the eyes of the law, it is incapable of being a 'person aggrieved' within the meaning of s 22(1) of the *Racial Discrimination Act*. Therefore it is not itself a competent complainant. However, this does not mean its complaint is a nullity. It is necessary to go behind the name and consider whether the juristic persons who constitute the unincorporated association are 'persons aggrieved' by the allegedly unlawful act. If they are, the complaint is competent because in law, though not in name, it was made by them.<sup>77</sup>

<sup>72</sup> *Di Petta v Edgells-Birdseye* [1996] HREOCA 3 (extract at (1996) EOC 92-820).

<sup>73</sup> (1996) 69 FCR 90, 97-98.

<sup>74</sup> (1998) 79 FCR 537.

<sup>75</sup> (1998) 79 FCR 537, 538.

<sup>76</sup> *Executive Council of Australian Jewry v Scully* [1997] HREOCA 59.

<sup>77</sup> (1998) 79 FCR 537, 548. Contrast the approach taken by Wilcox J in *Scully* to the approach taken by the Full Federal Court in *Grigor-Scott v Jones* (2008) 168 FCR 450 in determining who the respondent to a complaint is in circumstances where the action complained of is committed by an unincorporated body.



His Honour continued:

Although it is not necessary to reach a firm view about the matter, it is strongly arguable that, considered individually, the constituents of the Council that represent Jewish communities outside Tasmania do not have a sufficient interest to meet the statutory test. However, I think the Hobart Hebrew Congregation clearly has the requisite interest... the constituents of the Council 'are, in each instance, the elected representative organisation of the Jewish communities in each Australian State and the ACT'. It is apparent, therefore, that, despite its name, the Hobart Hebrew Congregation represents the Jewish community throughout Tasmania, including in the Launceston district. If there is truth in the allegations made against Ms Scully, her actions must have had a special impact on members of the Launceston Jewish community. According to the complaint, some of those people received Ms Scully's material in their letter boxes. Probably all of them have come into contact with non-Jews who have received the material and whose attitude to Jews may thereby have been adversely affected. It seems beyond contest that, if the acts occurred, they affected members of the Launceston Jewish community in a manner different in kind to the way they affected non-Jews, or even Jews living outside the Launceston area. Given the recognition in the authorities of the entitlement of representative bodies to obtain relief on behalf of members who have a special interest in a matter, I see no reason to doubt that the Hobart Hebrew Congregation is a 'person aggrieved' by the alleged acts.

If the Hobart Hebrew Congregation could make a competent complaint under s 22(1)(a) of the [RDA]<sup>78</sup> in its own name, it seems to me the Council (through its members) also may do so. As the Hobart Hebrew Congregation is a constituent of the Council, the Council represents at the national level those members of the Launceston Jewish community who were specially affected by Ms Scully's actions. Of course, the Council is not itself a 'person', it is an agglomeration of 'persons', so any complaint is legally the complaint of its members. In their representative role, if not on an individual basis, those persons were 'persons aggrieved' by the alleged unlawful acts. In my opinion, the case falls within para (b) of s 22 (1) of the [RDA]<sup>79</sup>.<sup>80</sup>

In *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*,<sup>81</sup> Collier J agreed with the view taken by Wilcox J in *Scully* that whilst an unincorporated association cannot itself be an aggrieved person, a complaint brought by an unincorporated association may be valid if the members who comprise the unincorporated association are 'aggrieved persons' for the purposes of the HREOC Act (now the AHRC Act).<sup>82</sup>

#### (d) Complaints in respect of deceased persons

In *Stephenson (as executrix of estate of Dibble) v Human Rights & Equal Opportunity Commission*<sup>83</sup> ('*Stephenson*'), Wilcox J (Jenkins and Einfeld JJ agreeing) held that a complaint brought under the former complaint provisions of the SDA survived the death of a complainant.<sup>84</sup> A significant reason for the decision was that a contrary view would frustrate the broad societal objects of the SDA.

In *Cuna Mutual Group Ltd v Bryant*,<sup>85</sup> after considering the decision in *Stephenson*, Branson J held that where a person dies before filing a claim, a complaint could not be brought on behalf of the deceased person under the DDA.

78 The current equivalent provision is AHRC Act, s 46P(2)(a).

79 The current equivalent provision is AHRC Act, s 46P(2)(b).

80 (1998) 79 FCR 537, 548-549.

81 (2007) 162 FCR 313.

82 (2007) 162 FCR 313, 330-331 [50].

83 (1996) 68 FCR 290.

84 (1996) 68 FCR 290, 299.

85 (2000) 102 FCR 270.

While these decisions were determined prior to the complaint provisions being amended and moved from the unlawful discrimination acts to what is now the AHRC Act<sup>86</sup> they may still be relevant to the substantially similar provisions now operating.

### 6.3.2 Respondents

In *Grigor-Scott v Jones*,<sup>87</sup> the Full Federal Court held that a complaint lodged pursuant to section 46P of the HREOC Act (now the AHRC Act) must be against a person and that a person may be an individual or an entity that has a legal personality. In that case, the complaint was treated by the Commission as having been made against a church that was an unincorporated body. The Full Court noted, but did not have to decide, that, for this reason, the complaint may not have been competent.<sup>88</sup>

### 6.3.3 Representative complaints to the Commission

The AHRC Act allows a representative complaint to be made pursuant to section 46P(2)(c) of the AHRC Act in the following circumstances:<sup>89</sup>

- the class members have complaints against the same person;
- all the complaints are in respect of, or arise out of, the same, similar or related circumstances; and
- all the complaints give rise to a substantial common issue of law or fact.

‘Representative complaint’ is defined under the AHRC Act to mean ‘a complaint lodged on behalf of at least one person who is not a complainant’.<sup>90</sup> ‘Class member’ is relevantly defined as ‘any of the persons on whose behalf the complaint was lodged, but does not include a person who has withdrawn under section 46PC’.<sup>91</sup>

In making a representative complaint to the Commission, a complainant need not name all the class members, or specify how many members there are to the complaint.<sup>92</sup> Furthermore, the complaint may be lodged with the Commission without members’ consent.<sup>93</sup> However, class members may, in writing to the President, withdraw from a representative complaint prior to the termination of a complaint (after which they will be entitled to make their own complaint),<sup>94</sup> and the President may, on application in writing by an ‘affected person’, replace ‘any complainant with another person as complainant’.<sup>95</sup> The President may also, at any stage, direct that notice of any matter to be given to a class member or class members.<sup>96</sup>

Representative proceedings may also be brought in the Federal Court pursuant to the *Federal Court of Australia Act 1976* (Cth) (see 6.6.1(c) below).

86 The changes were made by the *Human Rights Legislation Amendment Act (No 1) 1999* (Cth).

87 (2008) 168 FCR 450, 454, [20].

88 (2008) 168 FCR 450, 465, [71].

89 AHRC Act, s 46PB(1).

90 AHRC Act, s 3(1).

91 AHRC Act, s 3(1).

92 AHRC Act, s 46PB(3).

93 AHRC Act, s 46PB(4).

94 AHRC Act, s 46PC(1).

95 AHRC Act, s 46PC(2).

96 AHRC Act, s 46PC(3).

## 6.4 Interim Injunctions

### 6.4.1 Section 46PP of the AHRC Act

Section 46PP of the AHRC Act empowers the FCC and the Federal Court to grant interim injunctions in respect of a complaint lodged with the Commission upon an application from the Commission,<sup>97</sup> a complainant, respondent or affected person. Section 46PP provides:

46PP Interim injunction to maintain status quo etc

- (1) At any time after a complaint is lodged with the Commission, the Federal Court or the Federal Circuit 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.
- (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 decision by a court as to whether or not to grant an interim injunction under section 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 regard to the rights of a respondent.<sup>98</sup>

### 6.4.2 Principles governing determination of whether to grant an injunction

The principles that govern determination of applications under section 46PP of the AHRC Act are the principles that apply under the general law, to the granting of interim injunctions.<sup>99</sup> However, 'in applying the principles to the exercise of the court's discretion under section 46PP, the court should not regard itself as constrained solely by those common law principles'.<sup>100</sup> The common law principles that have been adopted in section 46PP cases by the Federal Court and the FCC include the following requirements:<sup>101</sup>

1. there "is a serious question to be tried or that the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief";
2. the plaintiff "will suffer irreparable injury for which damages will not be an adequate compensation unless an injunction is granted"; and
3. the "balance of convenience favours the granting of an injunction".<sup>102</sup>

<sup>97</sup> The Commission's guidelines for making applications for interim injunctions are available at [http://www.humanrights.gov.au/legal/guidelines/interim\\_injunction.html](http://www.humanrights.gov.au/legal/guidelines/interim_injunction.html).

<sup>98</sup> *Gardner v National Netball League Pty Ltd* [2001] FMCA 50, [10].

<sup>99</sup> *Wood v Lee-Joe* [2013] FCCA 1665.

<sup>100</sup> *Rainsford v Group 4 Correctional Services* [2002] FMCA 36.

<sup>101</sup> In *Hoskin v Victoria (Department of Education and Training)* [2002] FMCA 263, Walters FM cited the following decisions as establishing the principles that apply to determining applications made under s 46PP: *Australian Coarse Grain Pool Pty Ltd v Barley Marketing Board of Queensland* (1982) 57 ALJR 425; *Epitoma Pty Ltd v Australasian Meat Industry Employees Union (No 2)* (1984) 3 FCR 55; *Yunghanns v Yunghanns*.

<sup>102</sup> *Wood v Lee-Joe* [2013] FCCA 1665, [9]-[11] her Honour citing *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148, 153 (Mason ACJ).

These principles/threshold questions should not be considered in isolation. As explained in *Bullock and Others v Federated Furnishing Trades Society of Australasia and Others (No 1)*:

...when it becomes necessary to consider the balance of convenience, it is, I believe, quite proper to continue to bear in mind the apparent strength of the applicants' case; the two legs of the test need not be considered in isolation from each other. Thus an apparently strong claim may lead a court more readily to grant an injunction when the balance of convenience is fairly even. A more doubtful claim (which nevertheless raises 'a serious question to be tried') may still attract interlocutory relief if there is a marked balance of convenience in favour of it.<sup>103</sup>

In considering an application for injunction to stop the "2015 Cronulla Riots Memorial" promoted by the respondent, pending the determination of a complaint by the Commission, the Federal Court in *Sutherland Shire Council v Folkes* considered the nature of an application under section 46PP:

This is not a final judgment. It is necessary to decide this application urgently on evidence that is, or may be, incomplete, or after a full trial when the parties have had more time to prepare, will be found to be wrong or to require substantial qualification. Nothing I say in these reasons will decide the facts or the rights of the parties on a final basis although, of course, it will have an immediate consequence on what may or may not occur tomorrow in respect of Mr Burgess' conduct. That is the nature of an interlocutory decision. The Court must make a decision in circumstances of urgency where the parties have not had a full opportunity to put forward their whole cases. Thus, the Court makes its decision, that will reflect its assessment of how best to balance the parties' conflicting positions. In doing so, the Court must apply the following principles of law.

There are two threshold questions that must be decided on the limited evidence and argument now before me in order to determine whether an interlocutory injunction should be granted, as explained in *Australian Broadcasting Commission v O'Neill* [2006] HCA 46; (2006) 227 CLR 57 at 81-84 [65]- [72] by Gummow and Hayne JJ, with whom Gleeson CJ and Crennan J agreed on this point (at 68 [19]).

Those questions are, *first*, whether the Council and Dr Rifi have made out a *prima facie* case, in the sense that if the evidence remains as it is, there is a probability that subsequently, at the trial of the proceedings, they will be found to be entitled to relief and, *secondly*, whether the inconvenience or injury that the Council and Dr Rifi would be likely to suffer, if an interlocutory injunction were refused, outweighs or is outweighed by the injury that Mr Burgess would suffer if an injunction were granted.<sup>104</sup>

### (a) Serious issue to be tried

This requirement has been held to involve consideration of whether there is an arguable case.<sup>105</sup> In two recent cases, it has also been considered necessary to determine if a *prima facie* case has been made out.<sup>106</sup> In the context of the AHRC Act, it has been held that:

... "genuine issue to be tried" means in the context of this section of the Human Rights and Equal Opportunity Commission Act 1986 (Cth) (HREOC Act), that a dispute exists which is capable of being conciliated by the Commission under the jurisdiction given to it and that the dispute itself is not fanciful or so lacking in merit that no reasonable commission invested with the powers of the Human Rights & Equal Opportunity Commission would decline to entertain it.<sup>107</sup>

103 (1985) 5 FCR 464, 472 and applied in *Lee v Procter and Gamble Australia Pty Ltd and Anor* [2012] FMCA 1000.

104 *Sutherland Shire Council v Folkes* [2015] FCA 1288, [44]

105 See, for example, *Rainsford v Group 4 Correctional Services* [2002] FMCA 36.

106 *Sutherland Shire Council v Folkes* [2015] FCA 1288, [44]; *Harry Wood For Elsie Lynne Neilson v Andrew Mark Lee-Joe* [2013] FCCA 1665, [9]-[11].

107 *Harry Wood For Elsie Lynne Neilson v Andrew Mark Lee-Joe* [2013] FCCA 1665, [9]-[11] references omitted, citing *Beck v Leichhardt Municipal Council* [2002] FMCA 331.

In *De Alwis v Hair*,<sup>108</sup> Bryant CFM refused the application for an injunction because his Honour concluded that there was no arguable basis on which a court could grant the substantive relief sought by the applicant.

### (b) Balance of convenience

The types of factors considered as relevant to determining where the balance of convenience lies include:

- whether an award of damages would be a sufficient remedy;<sup>109</sup>
- in employment cases where an applicant seeks an injunction to prevent their termination the court will consider whether the employment relationship has broken down and if it has whether it can be restored,<sup>110</sup> as well as the appropriateness or desirability of reinstatement during the interim period;<sup>111</sup>
- the effect that the granting of an interim injunction under section 46PP is likely to have on the business or operations of the respondent;<sup>112</sup> and
- the necessity of making an order.<sup>113</sup>

In *Lee v Procter and Gamble Australia Pty Ltd and Anor*<sup>114</sup> the court considered that the relevant arguable case is that before the Commission.<sup>115</sup> Having found that there was such a case, the court found that it was not sufficiently strong to tip the balance of convenience in the applicant's favour. The court observed:

The difficulty that faces Ms Lee in this case is that having regard to all of the circumstances including, insofar as it can be assessed, the strength of her claims, the availability of damages as an adequate remedy, the broad range of remedies (including, in particular, reinstatement) and the parties' acceptance that any disadvantage to Ms Lee in relation to membership of a defined benefit super fund could be addressed by final orders of this Court in substantive proceedings, I am of the view that the balance of convenience does not favour the grant of the injunction that is sought under s.46PP of the Act (see *Mifsud* and *Harcourt* in relation to the relevance of overall remedies ultimately available). I am not persuaded that the balance of convenience is in favour of the first order sought by Ms Lee.<sup>116</sup>

### 6.4.3 Ex parte injunctions

Where an application is made for an interim injunction on an ex parte basis, the applicant would need to establish that there is an element of urgency; and

- (a) proceeding inter partes would cause irreparable damage; or
- (b) notice to the other party will of itself cause harm.<sup>117</sup>

<sup>108</sup> [2002] FMCA 357, [19].

<sup>109</sup> *Gardner v National Netball League Pty Ltd* [2001] FMCA 50, [56].

<sup>110</sup> *McIntosh v Australian Postal Corporation* [2001] FCA 1012.

<sup>111</sup> *Harcourt v BHP Billiton Iron Ore Pty Ltd* [2008] FMCA 1100, [52]-[55].

<sup>112</sup> *Rainsford v Group 4 Correctional Services* [2002] FMCA 36. See also *Sheaves v AAPT Ltd* [2004] FMCA 225; *Sluggett v DIAC* [2008] FMCA 735.

<sup>113</sup> *AB v New South Wales Minister for Education & Training* [2003] FMCA 16.

<sup>114</sup> [2012] FMCA 1000, [45].

<sup>115</sup> [2012] FMCA 1000, [49].

<sup>116</sup> [2012] FMCA 1000, [99].

<sup>117</sup> See *Harcourt v BHP Billiton Iron Ore Pty Ltd* [2008] FMCA 860, [9]. See also *DiSalvo v Davie Family Trust* [2014] FCCA 1851.

There must be strong evidence, particularly to support an allegation that notice to the other party will of itself cause harm.<sup>118</sup>

Injunctive relief may also extend to persons who are not, or are not yet, party to the complaint before the Commission.<sup>119</sup>

In *Harcourt v BHP Billiton Iron Ore Pty Ltd*,<sup>120</sup> the applicant made an application for an interim injunction on an ex parte basis, prior to the finalisation of the complaint at the Commission. Lucev FM refused the application, taking into account the following factors:

- the respondents had not yet been made aware that the applicant had filed a complaint at the Commission;
- there had not yet been any opportunity for the legal representatives of the parties to see whether an appropriate resolution of the issues could be reached, on either a temporary or permanent basis;
- there was no immediate danger, in Lucev FM's view, of a relevant change in the status quo; and
- this was a matter which was more appropriately dealt with on an inter partes basis.

#### 6.4.4 Types of orders that the court can make under section 46PP

The power conferred by section 46PP of the AHRC Act is limited to orders that maintain the status quo as it existed immediately before the complaint was lodged or the rights of a complainant, affected person or respondent.

The power conferred by section 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.<sup>121</sup>

In *AB v New South Wales Minister for Education & Training*,<sup>122</sup> Raphael ACFM confirmed that the type of injunction which could be ordered under section 46PP(1)(a) was restricted to one which preserved the status quo immediately before the relevant complaint is lodged with the Commission<sup>123</sup> and that it existed to prevent rights from being taken away, not to create rights.<sup>124</sup>

This case concerned a 12-year-old boy who 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. He was offered a place at a selective high school - Penrith High School - subject to his complying with the condition that prior to enrolment he be an Australian citizen or permanent resident. The applicant lodged a complaint with the Commission alleging a breach of the RDA. The applicant applied to the FMC for the following orders under section 46PP:

- (a) an order preventing the respondent from withdrawing the place offered at Penrith High School pending the determination of his complaint; and

118 *Harcourt v BHP Billiton Iron Ore Pty Ltd* [2008] FMCA 860, [9].

119 *Harcourt v BHP Billiton Iron Ore Pty Ltd* [2008] FMCA 860, [12].

120 [2008] FMCA 860, [17]-[21].

121 *Li v Minister for Immigration & Multicultural Affairs* [2001] FCA 1414, [36] applied in *Hewit v Dempsey & Anor* [2016] FCCA 904 and *Harry Wood For Elsie Lynne Neilson v Andrew Mark Lee-Joe* [2013] FCCA 1665, [10].

122 [2003] FMCA 16.

123 [2003] FMCA 16, [10].

124 [2003] FMCA 16, [15].

- (b) an order directing the respondent to allow the applicant to attend Penrith High School, pending the determination of his complaint.

Raphael ACFM held that ‘the status quo consists of the offer to the applicant of a place in the Penrith High School subject to his complying with the condition that prior to enrolment he be an Australian citizen or permanent resident’.<sup>125</sup> His Honour therefore refused to make either order sought by the applicant because both orders sought to achieve more than the maintenance of the status quo.<sup>126</sup>

In the case of order one it went beyond maintenance of the status quo because it 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.<sup>127</sup>

In the case of order two, his Honour held it went beyond maintenance of the status quo because the effect of the order would have been to have required the Minister to allow the applicant to attend a school that he was not attending prior to filing his complaint.<sup>128</sup>

In *Hoskin v Victoria (Department of Education & Training)*,<sup>129</sup> the applicant sought orders pursuant to section 46PP(1)(b), 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. Walters FM concluded that the orders sought by the applicant could not properly be categorised as interim injunctions as they did not seek to ‘maintain’ any relevant ‘rights’ of the applicant.<sup>130</sup> His Honour 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.<sup>131</sup>

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.<sup>132</sup>

The limitation on the orders that can be made is reflected in the fourth factor identified in *Hewitt v Dempsey & Anor*,<sup>133</sup> discussed above. The limitations were also recognised by in *Harry Wood For Elsie Lynne Neilson v Andrew Mark Lee-Joe*:

The injunction, however, must be framed to ensure it goes no further than is necessary to protect the asserted rights Ms Neilson has for relief under the Act. It must not be framed in a way which otherwise interferes with the rights the respondent has as owner of the Unit.<sup>134</sup>

125 [2003] FMCA 16, [15].

126 [2003] FMCA 16, [15].

127 [2003] FMCA 16, [15].

128 [2003] FMCA 16, [15].

129 [2002] FMCA 263.

130 [2002] FMCA 263, [60].

131 [2002] FMCA 263, [53].

132 [2002] FMCA 263, [59], [60].

133 [2016] FCCA 904.

134 [2013] FCCA 1665, [48].



## 6.4.5 Duration of relief granted under section 46PP and the time period in which such relief must be sought

By reason of the combined operation of section 46PP(1) and (3), an interim injunction can only be granted under section 46PP during the period between the lodging of a complaint and the termination<sup>135</sup> or withdrawal<sup>136</sup> of a complaint.

A difference of opinion appears to have emerged in the cases as to whether the restrictions in section 46PP(3) mean:

- only that an **application** for an injunction under section 46PP must be made and determined prior to termination or withdrawal.
- in addition, that the **actual order** must be limited so as to end upon termination or withdrawal.<sup>137</sup>

In *Rainsford v Group 4 Correctional Services*<sup>138</sup> (*'Rainsford'*), 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.<sup>139</sup>

Heerey J stated in *McIntosh v Australian Postal Corporation*,<sup>140</sup> that the expression 'interim injunction' in section 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...<sup>141</sup>

However, despite his Honour's reference to 'the trial and determination of an action', the injunction sought in that matter was expressed so as to operate 'until the Commission has completed an inquiry and conciliation process'.<sup>142</sup>

It would be incongruous if the AHRC Act was construed so as to potentially leave an applicant who obtains relief under section 46PP unprotected for the period between the time of the termination of their complaint by the Commission and the time at which that person was able to approach the Federal Court or FCC for interim relief under section 46PO(6). The better approach might therefore be that of Raphael FM in *Beck v Leichhardt Municipal Council*<sup>143</sup> where his Honour, having first noted the need to be 'mindful that the relief granted [under section 46PP] must not be indeterminate',<sup>144</sup> enjoined the respondent from terminating the applicant's employment until seven days following the termination of his complaint to the Commission. 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.<sup>145</sup>

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135 AHRC Act, ss 46PE or 46PH.

136 AHRC Act, s 46PG.

137 *Harry Wood For Elsie Lynne Neilson v Andrew Mark Lee-Joe* [2013] FCCA 1665.

138 [2002] FMCA 36.

139 [2002] FMCA 36, [37].

140 [2001] FCA 1012.

141 [2001] FCA 1012, [7].

142 [2001] FCA 1012, [1].

143 [2002] FMCA 331.

144 [2002] FMCA 331, [21].

145 [2002] FMCA 331, [21]: see order 3.

That form of order may be seen as a satisfactory means of avoiding the perceived difficulties raised by McInnis FM in *Rainsford* in the passage extracted above.

## 6.5 Election of Jurisdiction

Federal discrimination legislation does not purport to displace or limit the operation of state and territory laws capable of operating concurrently with the SDA, RDA, DDA or ADA.<sup>146</sup> However, the SDA, RDA, DDA and ADA preclude a person from bringing a complaint under the federal legislation where a person has ‘made a complaint’, ‘instituted a proceeding’ or (in the case of the SDA and RDA only) ‘taken any other action’ under an analogous state or territory law.<sup>147</sup>

In *Elekwachi v Human Rights & Equal Opportunity Commission*,<sup>148</sup> the applicant had initially made a complaint to the Commission under the RDA but had subsequently written to the South Australian Equal Opportunity Commission seeking that his complaint be referred to it. He sought judicial review of a decision by the Commission to decline his complaint under section 6A of the RDA on the basis that he had ‘made a complaint’ or ‘taken action’ under the *Equal Opportunity Act 1984* (SA) and hence was precluded from making a complaint to the Commission.

Mansfield J held that the later letter requesting that the matter be determined by the South Australian Equal Opportunity Tribunal did not satisfy the requirements of a ‘complaint’ for the purposes of the *Equal Opportunity Act 1984* (SA) and, as such, the South Australian Equal Opportunity Commissioner did not have any jurisdiction to inquire into the matter, or refer it for determination.<sup>149</sup> Accordingly, Mansfield J held that the later letter did not constitute ‘a complaint or any other action’ for the purposes of section 6A of the RDA.

In *Barghouthi v Transfield Pty Ltd*<sup>150</sup> (*‘Barghouthi’*), a case under the DDA, the respondent argued that the appellant was not entitled to make a complaint to the Commission as he had brought an unfair dismissal claim in the New South Wales Industrial Relations Commission in relation to the same factual circumstances. Hill J rejected that submission as the matter had not proceeded in the Industrial Relations Commission for want of jurisdiction saying:

Section 13(4) [of the DDA]...does not operate such that where one forum says that it has no jurisdiction the other ipso facto must be denied jurisdiction. As a matter of policy anti-discrimination legislation should not be read in a way that excludes the rights of claimants to have their cases heard in a court, whether it be State (or Territory) or Federal. Parliament cannot have intended that where a claimant makes a mistake in an application to a court leading to a finding of no jurisdiction in that forum that claimant is then excluded from rights altogether. Section 13(4) operates to ensure that where a claimant elects to bring an action in either the State or Federal jurisdiction that claimant is bound by the consequences of that election but that cannot be so if the claim is not in fact heard because the chosen forum lacks jurisdiction.<sup>151</sup>

146 Some state tribunals may not have jurisdiction to hear complaints against the Commonwealth arising under state anti-discrimination legislation: *Commonwealth of Australia v Anti Discrimination Tribunal (Tasmania)* (2008) 169 FCR 85.

147 SDA, s 10(4); RDA, s 6A(2); DDA, s 13(4); ADA, s 12(4). See also ss 725 and 732 of the *Fair Work Act 2009* (Cth) whose combined effect is to require people seeking relief for termination that is allegedly discriminatory to elect whether to proceed under the AHRC Act or the Fair Work Act.

148 (1997) 79 FCR 271.

149 [1997] 79 FCR 271, 282-283.

150 (2002) 122 FCR 19.

151 (2002) 122 FCR 19, [16]. See also *Alamzeb v Director-General Education Queensland* [2003] FMCA 274 where Baumann FM suggested, in obiter, that the *Industrial Relations Act 1999* (Qld) might similarly constitute a ‘law of the State which furthers the objects of’ ICERD for the purposes of s 6A(2) of the RDA.

In *Price v Department of Education & Training (NSW)*,<sup>152</sup> the applicant first made a complaint to the Anti-Discrimination Board ('ADB') in respect of a matter of alleged disability discrimination. The ADB did not accept his complaint for investigation on the basis that 'no part of the conduct complained of could amount to a contravention of a provision' of the *Anti-Discrimination Act 1977* (NSW).<sup>153</sup> The applicant then made a complaint in respect of the same matter to the Commission. The applicant submitted that section 13(4) of the DDA did not apply to his complaint as the ADB had declined his complaint on the basis that there was no contravention of the state Act.

Cameron FM rejected this argument and held that the fact that the complaint to the ADB was not well-made does not alter the fact that it met the criteria laid down by section 46P of the HREOC Act (now the AHRC Act) and thus section 13(4) of the DDA as well.<sup>154</sup> His Honour referred to the decision in *Barghouthi* and noted that in the present case, the ADB did not lack jurisdiction, it simply concluded that the complaint raised no conduct which could amount to contravention of the state Act. That being so, the applicant was not entitled to institute these proceedings and they must be dismissed'.<sup>155</sup>

In *Ho v Regulator Australia Pty Ltd*,<sup>156</sup> a case under the SDA, the respondent also applied to have the matter dismissed because the applicant had previously made an unfair dismissal and workers' compensation claim to the New South Wales Industrial Relations Commission in relation to the same set of facts. Driver FM dismissed that application and held that those claims did not constitute 'the institution of a proceeding or any other action in relation to a human rights matter' for the purposes of section 11(4) of the SDA, even though the claim 'had the same factual foundation':

Both arose out of an alleged assault on [the applicant by the respondent]. The proceedings in the New South Wales Industrial Relations Commission related to a claim of unfair dismissal arising out of workplace harassment, but not sexual harassment. The claim for workers' compensation had the same factual foundation. While there are some common facts, there was no claim of sex discrimination or harassment in the workers' compensation claim or the Industrial Relations Commission proceedings (which were discontinued without a decision). Accordingly... s 11(4) of the SDA [does] not apply.<sup>157</sup>

In *Reynolds v Minister for Health & Anor (No. 3)*<sup>158</sup> the applicant sought to adjourn proceedings under the DDA in the Federal Magistrates Court (as it was then named) until determination of his proceedings before the Western Australia Industrial Relations Commission (WAIRC). He argued that the WAIRC was the appropriate forum to make a determination on "the substandard performance issue". Lucev FM dismissed the application. His Honour held that performance issues clearly related to the disability discrimination claims and that the Federal Magistrates Court (as it was then named) was in a position to deal with the entire matter. His Honour stated:

Having jurisdiction in relation to the federal disability discrimination claims, the Court also has jurisdiction to hear and determine associated matters, whether federal or not arising from the same factual matrix as the alleged disability discrimination. Indeed, it is the evident policy of the FM Act that all matters in controversy associated with the federal matter within the Court's jurisdiction should be dealt with as a single matter and determined completely and finally by this Court. This is such a matter. The approach posited by (the applicant) is the antithesis of that that ought to be adopted by this Court, and is contrary to the intent of s 14 of the FM Act.<sup>159</sup>

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152 [2008] FMCA 1018.

153 [2008] FMCA 1018, [36].

154 [2008] FMCA 1018, [41]-[45].

155 [2008] FMCA 1018, [44]-[45].

156 [2004] FMCA 62.

157 [2004] FMCA 62, [3].

158 [2010] FMCA 954.

159 [2010] FMCA 954, [10]-[11].

His Honour also noted that any determination of the WAIRC would not be binding, first because it related to a different respondent and secondly, because it is a non-judicial body.<sup>160</sup>

## 6.6 AHRC Act is an Exclusive Regime

The procedure for the resolution of complaints of discrimination under the AHRC Act is an exclusive regime: it is clear that courts will not grant remedies for discrimination unless persons have made a complaint to the Commission in accordance with that regime,<sup>161</sup> that complaint has been terminated<sup>162</sup> and a notice of termination has been issued under section 46PH(2) of the AHRC Act in respect of the complaint.<sup>163</sup>

In *Re East; Ex parte Nguyen*<sup>164</sup> ('*Nguyen*'), the applicant sought a writ of certiorari and declaratory relief in the original jurisdiction of the High Court in respect of a criminal conviction for armed robbery. In part, the applicant argued that the absence of an interpreter constituted racial discrimination, contrary to section 9 of the RDA. The application was dismissed, the High Court describing the complaint provisions as then existed under the RDA (in substance the same as those now found in the AHRC Act) as an 'elaborate and special scheme' that was 'plainly intended by the Parliament to provide the means by which a person aggrieved by a contravention of section 9 of the [RDA] might obtain a remedy'.<sup>165</sup> The court held that the RDA 'provides its own, exclusive regime for remedying contraventions' and that, having not invoked that regime, the applicant did not have a right that could amount to a justiciable controversy.<sup>166</sup>

In *Bropho v Western Australia*<sup>167</sup> ('*Bropho*'), the applicant had sought a declaration that the enactment of the *Reserves (Reserve 43131) Act 2003* (WA) and actions subsequently taken pursuant to it, contravened section 9 of the RDA and, as such, were of no effect. The applicant had *not* made a complaint of unlawful discrimination to the Commission under what is now the AHRC Act, but had commenced proceedings directly in the Federal Court.

Nicholson J accepted that *Nguyen* was binding authority for the principle that the RDA and HREOC Act (now the AHRC Act) provide for an exclusive regime for the remedying of contraventions of the RDA. His Honour therefore struck out those aspects of the claim which sought remedies provided for under the HREOC Act.<sup>168</sup> However, the applicant's argument as to constitutional invalidity based on section 9 of the RDA was able to be litigated without an application first being made to the Commission<sup>169</sup> Applying *Gerhardy v Brown*,<sup>170</sup> his Honour held that 'the issue of constitutional validity precedes the application of any remedy for a contravention'.<sup>171</sup>

160 [2010] FMCA 954, [16].

161 *Carreon v The Honourable Amanda Vanstone* [2005] FCA 865, [10]-[11], *Juries Against Illegal Laws Incorporated v The State of Tasmania* [2010] FCA 578, [41]-[42] and *Wroughton v Catholic Education Office Diocese of Parramatta* [2015] FCA 1236, [63], [64].

162 *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd* [2003] FMCA 160, [69].

163 *Simundic v University of Newcastle* [2007] FCAFC 144, [18] and *Kujundzic v MAS National* [2013] FMCA 8, [36]-[37].

164 (1998) 196 CLR 354.

165 (1998) 196 CLR 354, 365 [26] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

166 (1998) 196 CLR 354, 366 [31]-[32] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

167 [2004] FCA 1209.

168 [2004] FCA 1209, [52].

169 It could be expected that a similar approach might be taken to an argument challenging a law on the basis of RDA, s 10. See further 3.1.3 of the RDA chapter.

170 (1985) 159 CLR 70.

171 [2004] FCA 1209, [56].

The decision in *Nguyen* was also followed in *Williams v Pardoe*.<sup>172</sup> Bignold J dismissed an application to the Land and Environment Court in so far as it alleged racial discrimination under the RDA because, relying upon the decision in *Nguyen*, his Honour held that what is now the AHRC Act provided an exclusive regime for remedying contraventions.<sup>173</sup> The decision was also applied in *French v Gray*,<sup>174</sup> where claims of unlawful discrimination in an application for judicial review of a decision of the Special Minister of State for the Commonwealth of Australia, were struck out on the basis that the court did not have jurisdiction because, as no complaint had been made to the Commission, the unlawful discrimination regime in the AHRC Act had not been engaged. The applicants alleged unlawful discrimination under the RDA.

## 6.7 Scope of Applications Made Under Section 46PO of the AHRC Act to the Federal Circuit Court and Federal Court

### 6.7.1 Parties

#### (a) Applicants

Section 46PO(1) of the AHRC Act provides that:

**(1) If:**

- (a) a complaint has been terminated by the President under section 46PE or 46PH; and
- (b) the President has given a notice to any person under subsection 46PH(2) in relation to the termination; any person who was an affected person in relation to the complaint may make an application to the Federal Court or Federal Circuit Court alleging unlawful discrimination by one or more of the respondents to the terminated complaint.

Accordingly, while a person can bring a complaint to the Commission on behalf of another under section 46P(2)(c) of the AHRC Act, only ‘an affected person’ is entitled to make an application to the FCC or Federal Court.<sup>175</sup>

The AHRC Act defines an ‘affected person’ as being ‘in relation to a complaint, a person on whose behalf the complaint was lodged’.<sup>176</sup> As noted above, a complaint to the Commission may only be lodged by or on behalf of ‘a person aggrieved’. Hence, an application made to the FCC or Federal Court pursuant to section 46PO(1) will only be able to be brought by ‘a person aggrieved’ by the alleged discrimination. The Federal Court has confirmed that:

... the issue of standing is to be determined on the proper construction of the HREOC Act and the DD Act, and not by reference to principles of general law....in determining whether the applicant has standing to sue, the critical question is whether the applicant is “a [sic] person aggrieved” in terms of section 46P HREOC Act.<sup>177</sup>

In *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*<sup>178</sup> Collier J set out 11 general principles in relation to the standing of a body corporate, including that:

- it is an objective test;
- it is a mixed question of fact and law;

<sup>172</sup> [2005] NSWLEC 119.

<sup>173</sup> [2005] NSWLEC 119, [179]. See also *Perry v Howard* [2005] FCA 1702, [37], *Eyueyitsi v Cmr of Police (WA)* [2013] FMCA 120, [12].

<sup>174</sup> (2013) 217 FCR 404.

<sup>175</sup> See, for example, *Oorloff v Lee* [2004] FMCA 893, [54]-[55] and *Wood v Lee-Joe* [2014] FCCA 309, [17].

<sup>176</sup> AHRC Act, s 3(1).

<sup>177</sup> *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313, 327 [33]-[34].

<sup>178</sup> (2007) 162 FCR 313, 327 [38]-[51].

- it should not be interpreted narrowly; and
- it is appropriate to accord a construction that would promote the purpose or object underlying the relevant legislation.

Further, the court can revisit a finding by the Commission that a person is a ‘person aggrieved’ and can dismiss an application if it determines that the applicant is not a ‘person aggrieved’.<sup>179</sup>

In *Stokes v Royal Flying Doctor Service*,<sup>180</sup> Mr Stokes lodged a complaint with the Commission on behalf of the Ninga Mia Christian Fellowship and the Wongutha Birni Aboriginal Corporation. When the matter came to the FMC, 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’.<sup>181</sup> 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’.<sup>182</sup>

## (b) Respondents

Pursuant to section 46PO of the AHRC Act, once a complaint is terminated

... any person who was an affected person in relation to the complaint may make an application to the Federal Court or the Federal Circuit Court, alleging unlawful discrimination by one or more of the respondents to the terminated complaint.

In several cases, courts have reinforced that an application can only be brought against a person if they were a respondent to the complaint to the Commission.<sup>183</sup> This means that any application that names a person who was not a respondent to a complaint can be summarily dismissed<sup>184</sup> and an application to join such a person will be refused.<sup>185</sup>

This issue was considered by the Full Federal Court in *Grigor-Scott v Jones*<sup>186</sup> (*Grigor-Scott*). In this case, the court set aside an order joining Mr Grigor-Scott to the primary proceedings because it found that he was not a respondent to the complaint made to the Commission and should therefore never have been joined.

The original complaint to the Commission did not nominate any person or entity as a respondent but simply alleged that a document described as ‘Bible Believers’ Newsletter # 242’ published on a website contravened provisions of Part IIA of the RDA.

The President of the Commission corresponded with Mr Grigor-Scott, a Minister of the Bible Believers’ Church (‘the Church’), about the complaint. Mr Grigor-Scott also attended the conciliation conference held by the Commission in relation to the complaint. Despite this, the letter from the President to Mr Jones enclosing copies of correspondence from Mr Grigor-Scott referred to the correspondence

<sup>179</sup> (2007) 162 FCR 313, 327 [39].

<sup>180</sup> [2003] FMCA 164.

<sup>181</sup> [2003] FMCA 164, [28].

<sup>182</sup> [2003] FMCA 164, [19].

<sup>183</sup> *Jandruwanda v Regency Park College of TAFE* [2003] FCA 1455; *Jandruwanda v University of South Australia* [2003] FMCA 205; *Keller v Tay* [2004] FMCA 182, [19]–[21]; *Lawrance v Commonwealth* [2006] FMCA 1792, [12], [15]–[16]; *O’Donoghue v State of Western Australia* [2013] FCA 903, [16]–[19] following *Lawrance*.

<sup>184</sup> *Jandruwanda v Regency Park College of TAFE* [2003] FCA 1455, [10]–[11]; *Jandruwanda v University of South Australia* [2003] FMCA 205, [4]; *Keller v Tay* [2004] FMCA 182, [19]–[21].

<sup>185</sup> *Lawrance v Commonwealth* [2006] FMCA 1792, [12], [15]–[16].

<sup>186</sup> (2008) 168 FCR 450, 465 – 467, [71]–[78].

as being from Mr Grigor-Scott 'on behalf of the respondent'. Further, the termination notice named the Church as the respondent and the President's reasons for decision accompanying the termination notice referred to the Church as the respondent.

When Mr Jones filed his original application with the court, he named the Church as the respondent but he subsequently applied and was granted an order joining Mr Grigor-Scott as a respondent.

Mr Jones argued that when identifying the respondent to a complaint the court should consider the subject matter of the complaint and determine who the complaint in substance is about.

The Full Court whilst noting the complaint was about the website, focussed instead on consideration of whom the complainant, the Commission and the President of the Commission treated as the respondent when determining whether Mr Grigor-Scott was a respondent. On the basis of the evidence, the Full Court held that the complainant, the Commission and the President treated the complaint as having being made against the Church not Mr Grigor-Scott and as such Mr Grigor-Scott was never a respondent to the original complaint.<sup>187</sup>

The Full Court also dismissed the proceedings brought against the Church. It did so because, as the Church was not a legal entity, it could not be sued and any proceedings against it were therefore incompetent.<sup>188</sup>

In *Eliezer v University of Sydney*<sup>189</sup> the court confirmed that the ratio in *Grigor-Scott v Jones* was that section 46PO(1) provided only for a statutory cause of action against any respondents to the terminated complaint.<sup>190</sup> In that case Perry J summarily dismissed an application against four respondents who were not respondents to the complaint before the Commission on the basis the court had no jurisdiction to determine the proceedings against those respondents.<sup>191</sup>

### (c) Representative proceedings in the Federal Court

The *Federal Circuit Court of Australia Act 1999* (Cth) (FCC Act) does not enable representative proceedings to be brought in the FCC. Representative complaints can therefore only be pursued in the Federal Court.

Part IVA of the *Federal Court of Australia Act 1976* (Cth) ('Federal Court Act') enables representative complaints to be commenced in the Federal Court by one or more of the persons to the claim as representing some or all of the other persons, if:

- (a) seven or more persons have claims against the same person.<sup>192</sup>
- (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances.<sup>193</sup>
- (c) the claims of all those persons give rise to a substantial common issue of law or fact.<sup>194</sup>

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187 (2008) 168 FCR 450, 467, [77].

188 (2008) 168 FCR 450, 468, [89].

189 (2015) 239 FCR 381.

190 (2015) 239 FCR 381, 395, [50].

191 (2015) 239 FCR 381.

192 FCA, s 33C(1)(a). Note, however, that FCA, s 33L provides that: 'if, at any stage in a representative proceeding, it appears likely to the Court that there are fewer than 7 group members, the Court may, on such conditions (if any) it sees fit order that the proceeding continue'.

193 FCA, s 33C(1)(b).

194 FCA, s 33C(1)(c). Under FCA, s 33N the court may order that a proceeding no longer continue as representative proceedings if it satisfied that it is no longer in the interests of justice to do so for the reasons specified in that section.



Note that while a complaint can be lodged with the Commission *on behalf of* a ‘person aggrieved’ (see 6.3.3 below), representative proceedings can only be commenced in the Federal Court by at least one ‘person aggrieved’ who has had their claim terminated by the Commission. As noted above, under section 46PO(1) of the AHRC Act, upon termination of a complaint by the President only ‘an affected person’ may make an application to the Federal Court.<sup>195</sup> Furthermore, section 33D(1) of the Federal Court Act provides that only a person who has ‘sufficient interest’ to commence a proceeding against the respondent on his or her own behalf has standing to bring a representative proceeding against the respondent on behalf of other persons who have the same or similar claims against the respondent.<sup>196</sup>

## 6.7.2 Relationship between application and terminated complaint

Section 46PO(3) of the AHRC Act places limitations, related to the terminated complaint, upon the nature and scope of applications that may be made to the Federal Court and FCC. 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*,<sup>197</sup> Katz J explained the operation of section 46PO(3) as follows:

Paragraph (a) of subs 46PO(3) of the [AHRC 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 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 [AHRC 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.<sup>198</sup>

His Honour also favoured a construction of the sub paragraphs of section 46PO(3) that does not permit an applicant to rely on acts of discrimination which occur after the complaint has been lodged with the Commission.<sup>199</sup> His Honour held that this conclusion was consistent with ‘the policy of the [AHRC Act]

<sup>195</sup> In *Jones v Scully* (2002) 120 FCR 243, a case decided under the now repealed complaint provisions in the RDA, Hely J held that not all class members to a representative complaint made to the Commission needed to be parties to subsequent court proceedings. The terms of s 46PO of the HREOC Act (now the AHRC Act) and the definition of ‘affected person’ make it clear that under the new complaint provisions in that Act not all of the class members to the representative complaint before the Commission need to be party to the court proceedings, anyone of them can bring proceedings in their own right.

<sup>196</sup> Once a person has commenced representative proceedings they continue to retain a sufficient interest to continue the proceedings and to bring an appeal even though they may cease to have a claim against the respondent (FCA, s 33C(2)).

<sup>197</sup> (2000) 105 FCR 573.

<sup>198</sup> (2000) 105 FCR 573, 580-581 [38]-[39].

<sup>199</sup> (2000) 105 FCR 573, 582 [43]. The decision of Katz J on this issue was cited with approval by Driver FM in *Hinchliffe v University of Sydney* [2004] FMCA 85, and *Howe v Qantas Airways Ltd* [2004] FMCA 242. Justice Tracey also cited the decision of Katz J on this issue with approval in *Crvenkovic v La Trobe University* [2009] FCA 374.

in ensuring that there exists an opportunity for the attempted conciliation of complaints before they are litigated'.<sup>200</sup>

The provisions of section 46PO(3) were further considered in *Travers v New South Wales*<sup>201</sup> ('*Travers*'), in which Lehane J confirmed that an application to the Federal Court cannot include allegations of discrimination which were not included in the complaint made to the Commission. 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.<sup>202</sup>

Lehane J also observed that the initial complaint may be quite brief and the details later elicited during investigation.<sup>203</sup> 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 section 46PO(3)) was limited to the initial letter of complaint to the Commission. His Honour appeared to prefer the contrary submission put by the applicant, stating:

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.<sup>204</sup>

Although not making reference to the decision in *Travers*, a similar approach to the requirements of section 46PO(3) was taken by Driver FM in *Ho v Regulator Australia Pty Ltd*.<sup>205</sup> His Honour ruled that the scope of the proceedings was to be determined by the complaint as terminated by the Commission, including any amendments which may have been made to the complaint while the matter was before the Commission, rather than the original terms of the complaint to the Commission.<sup>206</sup>

Driver FM also took this approach in *Hollingdale v Northern Rivers Area Health Service*,<sup>207</sup> where his Honour stated that:

The task for the Court is to determine the parameters of the complaint that has been terminated. The documents on which that determination may properly be based include, but are not necessarily limited to, the notice of termination and accompanying letter from the President [of the Commission], and the terms of the document or documents setting out the complaint or complaints to HREOC.<sup>208</sup>

Driver FM upheld the respondent's application to strike out the claim of disability harassment made by the applicant as it had not formed part of her complaint to the Commission. In finding that the applicant had not made a complaint of disability harassment to the Commission, his Honour considered it 'significant that the letter from [HREOC terminating the complaint] makes no reference at all to harassment', saying it indicated that the Commission 'did not regard the complaint as including a complaint of harassment'.<sup>209</sup> In any event, his Honour said that, if he was wrong and the complaint had intended to make a complaint about disability harassment, 'it was not seen as such by HREOC and it has not been terminated'.<sup>210</sup>

200 (2000) 105 FCR 573, 581-582 [42]. See also *Haraksin v Murrays Australia Limited (No 2)* (2013) 211 FCR 1.

201 [2000] FCA 1565.

202 [2000] FCA 1565, [8].

203 [2000] FCA 1565, [8].

204 [2000] FCA 1565, [8].

205 [2004] FMCA 62.

206 [2004] FMCA 62, [4].

207 [2004] FMCA 721.

208 [2004] FMCA 721, [10], the 'parameters of the complaint' test was cited with approval in *Vijayakumar v Qantas Airways Ltd* [2009] FMCA 736.

209 [2004] FMCA 721, [21].

210 [2004] FMCA 721, [21]. See also *Price v Department of Education & Training (NSW)* [2008] FMCA 1018, [32]-[35].

In *Bender v Bovis Lend Lease Pty Ltd*,<sup>211</sup> 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 the Commission as required by section 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 section 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'.<sup>212</sup>

In *Vijayakumar v Qantas Airways Ltd (No 2)*<sup>213</sup> Scarlett FM held that the Amended Application was significantly different to the complaint lodged with the Commission such that it was outside the limits of section 46PO(3) because the Applicant raised the following matters that were not included in his complaint:

- the Applicant claimed to have additional disabilities;
- the Applicant sought to rely on the Conditions of Carriage contract between himself and the Respondent; and
- the Applicant claimed discrimination: against a person who uses a therapeutic device, in access to premises and a breach of the Disability Standards for Accessible Public Transport 2002.

Accordingly, his Honour refused the Applicant leave to file the Amended Application and Points of Claim.<sup>214</sup>

In *King v Jetstar*,<sup>215</sup> the applicant claimed indirect discrimination under section 6 of the DDA and discrimination in the provision of goods and services under section 24(1)(b) for the first time in her claim before the court. This was found to be within section 46PO(3). Finding that the unlawful discrimination alleged in the application to the court arose out of the same or substantially the same acts, omissions or practices that were the subject of the terminated complaint, the court found:

The point of reference in s 46PO(3) is the unlawful discrimination alleged in the application to the Court: it is that which must either be the same as or the same in substance as the unlawful discrimination that was the subject of the terminated complaint or which must arise out of the same or substantially the same acts, omissions or practices that were the subject of the terminated complaint. I emphasise the alternative. It is sufficient if the unlawful discrimination alleged in the application to the Court arises out of the same or substantially the same acts, omissions or practices that were the subject of the terminated complaint.<sup>216</sup>

In 2006 in *Gama v Qantas Airways Ltd*,<sup>217</sup> Raphael FM held that in order to satisfy the requirement set out in section 46PO(3)(b):

...it is not enough that it arises out of the same general allegation. There must be a close connection between what was told to the Commission and what is alleged in the court proceedings. A new incident, even if it is an incident of the same type as advised to the Commission, would be unlikely to pass this test

211 [2003] FMCA 277.

212 [2003] FMCA 277, [21].

213 [2009] FMCA 736.

214 The decision to refuse the Applicant leave to amend his Application was affirmed on appeal to the Federal Court: *Vijayakumar v Qantas Airways Ltd* [2009] FCA 1121.

215 *King v Jetstar Airways Pty Ltd (No 2)* [2012] FCA 8 – the applicant claimed indirect discrimination under s 6 of the DDA and discrimination in the provision of goods and services under s 24(1)(b) for the first time in her claim before the court. This was found to be within s 46PO(3).

216 [2012] FCA 8, [25].

217 [2006] FMCA 11.

because, if unknown at the time of the attempted conciliation, it could not have been part of it. Difficulties will arise where a complaint to the Commission lacks details or is expressed in general forms, eg by saying words to the effect 'frequently during a particular period I was subjected to verbal abuse about my sex/disability/race/age'. What if the applicant identifies four such incidents before the Commission but then recalls another before the court? I think it would be for the court to decide whether the evidence given arises out of the same practice that was the subject of the terminated complaint.<sup>218</sup>

In *Dye v Commonwealth Securities Limited*<sup>219</sup>, the applicant sought to amend her statement of claim to include an allegation of sexual assault that was not raised in her complaint of sexual harassment and discrimination to Commission. Katzmann J stated:

To fall within s 46PO(3) it is not enough that an act is similar in kind to the acts complained of in the terminated complaint. Nor is it sufficient that the act is alleged to be the act of the same individual. A new incident is different-not the same or substantially the same-conduct: cf. *Gama v Qantas Airways Ltd* [2006] FMCA 11 at [9].

A new incident, even if it is an incident of the same type as advised to the Commission, would be unlikely to pass this test because, if unknown at the time of the attempted conciliation, it could not have been a part of it.<sup>220</sup>

Ms Dye argued that the allegation of sexual assault was part of her complaint to the Commission because it occurred in the same episode as an event described in her complaint. Katzmann J noted that Ms Dye claimed to have been sexually assaulted on a different date to the date nominated in her complaint as the date on which the relevant episode occurred. Katzmann J also noted that the alleged sexual assault was not referred to in Ms Dye's description of the episode in question in her complaint to the Commission. Her honour was prepared to accept that the allegation did not relate to a new incident but rather was a new set of allegations about the same incident and therefore fell within the scope of the terminated complaint.<sup>221</sup>

On appeal, the Full Federal Court agreed with Katzmann J's assessment that the allegations of sexual assault were within the scope of the complaint that Ms Dye made to the Commission within the meaning of section 46PO(3) of the AHRC Act.<sup>222</sup>

Referring to the above cases, the court observed that:

1. section 46PO(3) contemplates some ambit for additional conduct, acts, omissions or practices to constitute unlawful discrimination;
2. the terms of section 46PO(3) suggest 'a degree of flexibility';
3. it is not appropriate for a court considering an application for leave to amend to preclude an amendment that raises an arguable claim for relief; and
4. the Commission's notice of termination 'was not an exhaustive description of his impugned behaviour.'<sup>223</sup>

218 [2006] FMCA 11, [9]. This aspect of the decision was not challenged on appeal: *Qantas Airways Ltd v Gama* (2008) 167 FCR 537.

219 [2010] FCA 720.

220 [2010] FCA 720, [105].

221 [2010] FCA 720, [106]. However, the requested amendment was refused on grounds of significant delay and prejudice to the respondent.

222 *Dye v Commonwealth Securities Ltd* (No. 2) [2010] FCAFC 118. On appeal, the decision not to grant the amendment (on other grounds) was overruled and the amendment allowed. See also *Haile-Michael v Konstantinidis* (No 2) [2012] FCA 167 and *Fernandez v University Of Technology, Sydney* [2015] FCCA 3432 which applied *Dye*.

223 [2010] FCA 720, [46]-[49].

Ultimately, the court found that:

Ms Dye's description of the 9 June 2006 events in her police statement could be seen as conduct that arguably arose out of substantially the same acts, omissions and practices she had alleged amounted to sexual harassment by Mr Patterson. She had specified to the Commission two alleged sexual assaults on 1 and 13 June 2006. Although the alleged assault of 9 June 2006 was, if true, a more serious sexual assault, it was capable of being viewed as in substance a further allegation of a sexual assault by the same alleged harasser in the course of Ms Dye's employment. Her complaint to the Commission was that he had engaged in a course of sexual harassment of her in a variety of forms over a period of months. The alleged incident on 9 June 2006 was, if it occurred, capable of being characterised as an act that arose out of the same unlawful discrimination of which she complained or it was the same in substance.

A useful summary of the current state of authorities is provided by the Nicholls J in *Desouza v Secom Australia Pty Limited*<sup>224</sup> where his Honour considered the impact of the Full Courts decision in *Dye*. On the state of the authorities on section 46PO(3), the court found that while the Full Court in *Dye* did not say that *Gama* was wrongly decided, the decision in *Gama* must be seen in light of the decision by the Full Court<sup>225</sup>:

In this regard, I note the following from *Dye*, [46] – [53] ...as being relevant to the understanding of s.46PO(3) of the Act and of application to the disposition of the respondent's Application in a Case:

1. The complaint for consideration is "...the shape which it had assumed at the time of its termination" before the AHRC (*Travers v State of New South Wales* [2000] FCA 1565 ("*Travers*") at [8] per Lehane J, see also *Simplot Australia Pty Ltd v Human Rights and Equal Opportunity Commission* (1996) 69 FCR 90 at 94).
2. There is a balance to be achieved between "a degree of flexibility", as suggested by s.46PO(3), and the important "constraint" in raising a complaint before the Court not raised before the AHRC (*Travers* at [8] per Lehane J, see also *Dye* at [46]).
3. An applicant is permitted to allege "different facts" before the Court "...provided, however, that the facts now alleged are not different in substance from the facts formerly being alleged" (*Charles* at [39] per Katz J).
4. In light of the flexibility permitted by s.46PO(3) of the Act, the application of that section "should not be read with the same strictures as apply to a pleading in a Court" (*Dye* at [48]).
5. An alleged incident falls within s.46PO(3) where it is "capable of being characterised as an act that arose out of the same unlawful discrimination of which [the applicant] complained or it was the same in substance" (*Dye* at [50]).<sup>226</sup>

His Honour also warned that:

The reliance on other authorities of this Court, particularly those that predate the Full Federal Court decision in *Dye*, must be treated with the same caution. Preference must be given to *Dye* (see, in particular, *Hollingdale v Northern Rivers Area Health Service* [2004] FMCA 721 ("*Hollingdale*") and *Vijayakumar v Qantas Airway Ltd* [2009] FMCA 736 ("*Vijayakumar*").<sup>227</sup>

In *Department of Land & Housing v Douglas*<sup>228</sup> it was argued that the application before the FMC introduced a significantly different set of facts from the original complaint before the Commission, contrary to section 46PO(3), because the applicant sought to plead his case in the FMC in terms of indirect discrimination for the first time. Lloyd-Jones FM stated:

A self-represented litigant, with limited or no knowledge of the operation of discrimination law, would not be aware of the concept of indirect discrimination and how it should be pleaded in the complaint form. In the

224 [2013] FCCA 659 where the claim before the court was particularised in a different way to that before the Commission and the court analysed each of the challenged claims and applied the analysis below.

225 [2013] FCCA 659, [48].

226 [2013] FCCA 659, [46].

227 [2013] FCCA 659, [50].

228 [2011] FMCA 75.

absence of any reference of this aspect in the Commission's dismissal letter, it is not unreasonable for a self-represented litigant to not make reference to indirect discrimination in his original Application to this Court.<sup>229</sup>

The applicant was subsequently provided with legal representation and his complaint framed in terms of indirect discrimination. Lloyd-Jones FM held that the factual matrix had not however changed and that the application to dismiss could not be sustained.

In *Arnold v Compass Group (Australia) Pty Ltd & Anor*<sup>230</sup> the respondents challenged the applicants claim of sex discrimination in a situation where it was not included in the complaint to the Commission but the complaint alleged sexual harassment and victimisation. On the basis of its finding that:

...it is arguable that conduct which constitutes sexual harassment can also constitute sex discrimination for the purposes of the SD Act. Thus, the same facts can give rise to an action of a different legal character. That is a sufficient basis to conclude that it will be arguable at final hearing in this matter that the allegations of sexual harassment made in the AHRC Complaint might found the Sex Discrimination Claim.<sup>231</sup>

The court held that:

Having regard to:

- (a) the fact that s.46PO(3)(b) of the *AHRC Act* allows a different legal characterisation to be asserted based on the same facts;
- (b) section 46PO(3)(b) of the *AHRC Act* is intended to permit some flexibility, and is not intended to preclude amendments giving rise to arguable claims for relief;
- (c) the factual matters involved in the Sex Discrimination Claim are, for all intents and purposes, the same as those asserted in the AHRC Complaint and the Substantive Application;
- (d) the proceedings are still not significantly advanced, with no Points of Defence filed and no affidavit evidence for hearing yet filed;
- (e) the Sex Discrimination Claim does not fall outside of any issue reasonably justiciable in these proceedings; and
- (f) by reason of s.46PR of the *AHRC Act* the Court is not bound by technicalities or legal forms in these proceedings,

the Court is of the view that the Sex Discrimination Claim is within the jurisdiction of the Court to hear by reason of s.46PO(3)(b) of the *AHRC Act*, and that in the circumstances of these proceedings there are no discretionary reasons for the Court not to exercise its power arising from its jurisdiction to hear the Sex Discrimination Claim.<sup>232</sup>

The court in *Mulligan v Virgin Australia Airlines Pty Ltd*<sup>233</sup> considered the application of section 46PO(3) to respondents and noted that:

It might be noted at this point that, while s 46PO(3) operates to restrict an applicant's allegation of unlawful discrimination in the Court by reference to matters relating to the terminated complaint, there is no comparable constraint imposed by the AHRC Act on the respondent. In particular, it is notable that the AHRC Act is silent on such matters as whether a respondent is obliged to act in good faith in participating in the AHRC's inquiry into a complaint. Nor does it contain any provision which precludes a respondent from raising in its defence in subsequent Court proceedings which involve an allegation of unlawful discrimination matters which were not raised by it in the AHRC's inquiry.<sup>234</sup>

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229 [2011] FMCA 75, [40].

230 [2014] FCCA 1999

231 [2014] FCCA 1999, [59].

232 [2014] FCCA 1999, [68] (references omitted).

233 (2015) 234 FCR 207

234 (2015) 234 FCR 207, 231, [85].

### 6.7.3 Validity of termination notice

In *Speirs v Darling Range Brewing Co Pty Ltd*,<sup>235</sup> two of the respondents sought an order that the proceedings against them be summarily dismissed on the ground that a termination notice issued by the Commission was invalid and/or a nullity. While the initial complaint to the Commission 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 the Commission 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. McInnis 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.<sup>236</sup>

As mentioned by McInnes FM, the time for the first notice to be revoked is set out in section 46PH(4) of the AHRC Act which provides that:

The President may revoke the termination of a complaint, but not after an application is made to the Federal Court or the FCC under section 46PO in relation to the complaint.

### 6.7.4 Pleading claims in addition to unlawful discrimination

#### (a) Non-federal claims — accrued jurisdiction of the court

In a line of authorities commencing with *Philip Morris Inc. v Adam P. Brown Male Fashions Pty Ltd*,<sup>237</sup> federal courts have found that the court will have jurisdiction to hear certain non-federal claims in addition to claims of unlawful discrimination if they are within the scope of one controversy. This "accrued jurisdiction" of federal courts has been explained as follows:

<sup>235</sup> [2002] FMCA 126.

<sup>236</sup> [2002] FMCA 126, [36]-[37].

<sup>237</sup> (1981) 148 CLR 457. See also Gibbs J in *Moorgate Tobacco Co Ltd v Philip Morris Ltd* 1980) 145 CLR 457, [472] where this principle was initially relied on.



... when jurisdiction is conferred on the Federal Court with respect to a matter, that Court has jurisdiction to determine all the questions which form part of that matter, including questions which in themselves would not be federal in nature, and which accordingly the Federal Court would not have had jurisdiction to determine if they had arisen in separate proceedings.<sup>238</sup>

...the exercise of the “accrued” jurisdiction, as he called it, was discretionary and not mandatory, and went on to say (1983) 152 CLR, at p 608 that “in the end, it is a matter of impression and of practical judgment whether a non-federal claim and a federal claim joined in a proceeding are within the scope of one controversy and thus within the ambit of a matter”.<sup>239</sup>

The court maintains the non-federal, “accrued jurisdiction” even if the federal aspect of the matter falls away.<sup>240</sup>

The question that arises is whether the Court retains this accrued jurisdiction in circumstances where, for one reason or another, it is unnecessary for the Court to determine the federal aspect of the matter. The answer is that it is well accepted that if the federal question is decided adversely, is struck out, or is found not necessary to be decided the matter does not cease to be in the jurisdiction of the Court: *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212 at 219; *Unilan Holdings Pty Ltd v Kerin* [1993] FCA 420; (1993) 44 FCR 481; *Beck v Spalla* [2005] FCAFC 82; (2005) 142 FCR 555 at [25]; and, *Moorgate* at 476 (see generally, the article by Allsop J (as his Honour then was) “Federal Jurisdiction and the Jurisdiction of the Federal Court of Australia in 2002”, (2002) 23 Australian Bar Review 29 at 41ff).<sup>241</sup>

The accrued jurisdiction can include: a common law claim for the tort of assault,<sup>242</sup> conspiracy,<sup>243</sup> misfeasance in public office<sup>244</sup> and copyright infringements.<sup>245</sup>

In *Thomson v Orica Australia Pty Ltd (No 2)*<sup>246</sup> 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’<sup>247</sup> and that the respondent was ‘seriously disadvantaged’<sup>248</sup> 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’<sup>249</sup> 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

238 *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261, [11] and *Fencott v. Muller* (1983) 152 CLR 570.

239 *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261, [17] referring to the judgement of Barwick C.J in *Philip Morris Inc. v Adam P Brown Male Fashions Pty Ltd* (1980) 145 CLR 457

240 *Dorotea Pty Ltd v Vancleve Pty Ltd* (1987) 75 ALR 629 and *Petrotimor Companhia de Petroleos S.A.R.L. v Commonwealth of Australia* (2003) 126 FCR 354.

241 *Fernandez v University Of Technology, Sydney* [2015] FCCA 3432, [45].

242 *Ho v Regulator Australia Pty Ltd & Anor* [2004] FMCA 62.

243 *Perry v Howard* [2005] FCA 1702, [34].

244 [2005] FCA 1702, [35].

245 *Vakras v Cripps & Anor* [2016] FCCA 20.

246 [2001] FCA 1563.

247 [2001] FCA 1563, [26].

248 [2001] FCA 1563, [33].

249 [2001] FCA 1563, [32], [33].

repudiation in contract and an associated claim for damages as opposed to an allegation of repudiation of the employment contract in the context of the SDA. However, his Honour made orders allowing 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. The respondent declined to file any further evidence. When the matter came back before Allsop J on the issue of liability only, relying on the accrued jurisdiction of the court to deal with a common law claim for breach of contract, his Honour found:

There is no dispute that the contractual claim arises out of the identical substratum of facts as gives rise to the federal claim under s 46PO. In that sense, there can be no doubt (and no argument was put to the contrary) that the contract claim is in the accrued jurisdiction of the Court: *Re Wakim; Ex parte McNally* [1999] HCA 27; (1999) 198 CLR 511 at [136] to [150].<sup>250</sup>

His Honour made declarations that:

- (i) the respondent, in breach of contract, wrongfully dismissed the applicant in or about April 2000; and
- (ii) the respondent engaged in unlawful discrimination under pars 14(2)(a), (b), (c) and (d) and 7(1)(b) of the SD Act and thereby s 46PO of the HREOC Act.<sup>251</sup>

Similar findings, that is, breach of contract and unlawful discrimination were made by the court in *Rispoli v Merck Sharpe & Dohme & Ors*<sup>252</sup> in reliance on the accrued jurisdiction of the court.<sup>253</sup>

A court will, however, only be able to deal with claims in addition to unlawful discrimination if it otherwise falls within its jurisdiction. In *Artinos v Stuart Reid Pty Ltd*,<sup>254</sup> Driver FM refused the applicant's application to join an additional respondent because the claim against the additional respondent was a claim of defamation where the alleged defamation occurred after the cessation of the applicant's employment, and the complaint to the Commission related to discrimination and harassment during her employment.<sup>255</sup>

## **(b) Concurrent claims for unlawful discrimination and judicial review**

An applicant cannot bring concurrent claims for unlawful discrimination pursuant to section 46PO and judicial review pursuant to the ADJR Act. The court has found that such concurrent applications are inconsistent and an abuse of process.<sup>256</sup>

## **6.8 Relevance of Other Complaints to the Commission**

### **6.8.1 'Repeat complaints' to the Commission**

In *McKenzie v Department of Urban Services*,<sup>257</sup> Raphael FM considered whether or not a person could bring a case before the (then) FMC if the subject matter of the complaint was a 'repeat' complaint. The applicant had made complaints to the Commission in 1997 and 1998, which were dismissed on the basis that there was no evidence or no sufficient evidence of discrimination. The applicant made

<sup>250</sup> *Thomson v Orica Australia Pty Ltd* (2002) EOC 93-227; [2002] FCA 939, [31].

<sup>251</sup> *Thomson v Orica Australia Pty Ltd* (2002) EOC 93-227; [2002] FCA 939.

<sup>252</sup> (2003) EOC 93-304.

<sup>253</sup> Also in *Howe v QANTAS Airways Ltd* [2004] FMCA 242, *Dare v Hurley* (2005) EOC 93-405, *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* (2014) 231 FCR 403.

<sup>254</sup> [2007] FMCA 1141.

<sup>255</sup> [2007] FMCA 1141, [6], [18].

<sup>256</sup> *Margan v President, Australian Human Rights Commission* [2013] FCA 109, *Ugur v Human Rights and Equal Opportunity Commission* (2008) [2008] FCA 1461, [45].

<sup>257</sup> [2001] FMCA 20.

an application for an order of review pursuant to section 5 of the ADJR Act in relation to the dismissal but subsequently discontinued the proceedings. The applicant then made a further complaint to the Commission in November 1999, which was terminated by the Commission on the basis that, amongst other things, the complaint had already been dealt with. The applicant subsequently made an application to the FMC under section 46PO of the AHRC 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 the Commission. Raphael FM considered a number of authorities on the issue of estoppel and res judicata in relation to administrative decisions.<sup>258</sup> His Honour concluded that there was nothing to prevent the applicant from having her case heard pursuant to section 46PO of the HREOC Act (now the AHRC 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 HREOC not to grant them an inquiry into their complaint. Such a person would make a further application to HREOC 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.<sup>259</sup>

In a later case heard by Raphael FM,<sup>260</sup> his Honour dismissed an application on the grounds that none of the grounds for review pursuant to section 5 of the ADJR Act suggested by Mr Peacock have been made out. On appeal, the Full Court upheld the decision and stated that:

The appellant's claim before the Federal Magistrate failed principally because it involved an attempt by him to litigate again matters that had already been finally and conclusively determined against him. Although his Honour did not refer in his reasons for judgment to 'Anshun estoppel' (*Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45; (1981) 147 CLR 589), that case was cited during the course of argument below. There is no doubt, in our minds, that his Honour could properly have invoked *Anshun* as a basis for refusing to grant the appellant relief. His claim, as formulated before the Federal Magistrate, was so closely connected with the subject matter of the various proceedings before Wilcox J, before Moore J, and before the Full Court on appeal from Moore J, that it would clearly have been an abuse of process to allow that issue to be agitated again. As the High Court has recently observed, albeit in a somewhat different context, there must eventually be some finality to litigation: *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12.<sup>261</sup>

In addition, the court may find that repeated applications in relation to the same subject matter are an abuse of process.<sup>262</sup>

258 *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.

259 [2001] FMCA 20, [84].

260 *Peacock v HREOC* [2004] FMCA 466.

261 *Peacock v Human Rights and Equal Opportunity Commission* [2005] FCAFC 45, [83].

262 *Scott v Human Rights and Equal Opportunity Commission* [2010] FCA 1323 where the court found that repeated complaints to the Commission and applications to the court were an abuse of process and therefore, did not need to consider the issue of estoppel.

Further, both the Federal Court Rules and the FCC Rules contain provisions relating to vexatious litigants. Rules 6.02 and 6.03 (formerly Order 21) of the Federal Court Rules and rule 13.11 of the FCC Rules enable a court to limit the ability of persons found to have instituted ‘vexatious proceedings’<sup>263</sup> to continue or institute further proceedings.<sup>264</sup>

In *Lawrance v Watson*,<sup>265</sup> Cameron FM noted that while the applicant had commenced at least six proceedings in the Federal Magistrates Court (as it was then named) against some or all of the respondents in the present case concerning similar allegations of discrimination, this did not necessarily mean that the applicant was a vexatious litigant. In Cameron FM’s view, as there had not yet been a judgment in most of the proceedings, the applicant’s claims against the various respondents to these proceedings remained, at this point, essentially untested. By contrast, a vexatious litigant was one who repeatedly litigated an issue which had already been the subject of a judgment.

However, in a later decision concerning the same applicant, *Lawrance v Macarthur Legal Centre*,<sup>266</sup> Scarlett FM was satisfied that orders should be made to prevent the applicant from commencing or continuing proceedings against two of the respondents against whom she had brought six sets of proceedings in the space of two years.<sup>267</sup> His Honour cited *Ramsey v Skyring*<sup>268</sup> in which Sackville J held that the expression ‘habitually and persistently’ appearing in Order 21 rule 1 of the Federal Court Rules implies more than ‘frequently’. Scarlett FM was satisfied that the test of ‘habitually and persistently’ had been met. His Honour declined to make an order in relation to another of the respondents who had been a respondent in proceedings commenced by the applicant on only two occasions (although the applicant had sought, unsuccessfully, to have them joined in three other proceedings).

In addition, both the Federal Court Rules and the FCC Rules permit a Registrar to refuse to accept a document which appears to the Registrar on its face to be an abuse of the process of the court or to be ‘frivolous or vexatious’ for filing.<sup>269</sup> Under the FMC Rules the Registrar can also refuse to accept a document for filing if it appears on its face to be ‘scandalous’.<sup>270</sup>

## 6.8.2 Evidence of other complaints to the Commission

In *Paramasivam v Jureszek*,<sup>271</sup> the respondent attempted to adduce evidence relating to other complaints made by the applicant of racial discrimination against 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 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.

263 Note that the definition of ‘vexatious proceedings’ in rr 6.02 and 6.03 (see the Dictionary in Sch 1 of the Federal Court Rules) now differs from the definition used in FCR, r 13.11.

264 For example, see *Scott v Human Rights and Equal Opportunity Commission* [2010] FCA 1323, *Lawrance v Cth of Aust & Ors and Lawrance v AAT & Ors* [2008] FMCA 1340, *Rana v Deakin University* [2012] FMCA 575.

265 [2008] FMCA 984, [82]-[91].

266 [2008] FMCA 1420.

267 [2008] FMCA 1420, [131]-[138].

268 [1999] FCA 907, [55].

269 FCR, r 2.26 (formerly O 46 r 7A(1)); FMC rr, r 2.06(1).

270 FMC Rules, r 2.06(1).

271 [2001] FCA 704.

## 6.9 Pleading Direct and Indirect Discrimination as Alternatives

Although the grounds of direct and indirect discrimination have been held to be mutually exclusive,<sup>272</sup> an incident of alleged discrimination may nonetheless be pursued by an applicant as a claim of direct or indirect discrimination, pleaded as alternatives.

In *Minns v New South Wales*<sup>273</sup> ('*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 her claim as a claim of direct or indirect discrimination. In rejecting that submission Raphael FM stated that:

The authorities are clear that [the] definitions [of direct and indirect discrimination] are mutually exclusive (*Waters v Public Transport Corporation* (1991) 173 CLR 349 at 393; *Australian Medical Association v Wilson* (1996) 68 FCR 46 at 55 [*Siddiqui's case*]). That which is direct cannot also be indirect ...<sup>274</sup>

That statement means that the same set of facts cannot constitute both direct and indirect discrimination. It does not mean that a complainant must make an election. 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. There is nothing in the remarks of Sackville J in *Siddiqui's case* which would dispute this and the reasoning of Emmett J in [*State of NSW (Department of Education) v HREOC* [2001] FCA 1199] and of Wilcox J in *Tate v Rafin* [2000] FCA 1582 at [69] would appear to suggest that the same set of facts can be put to both tests.<sup>275</sup>

Similarly, in *Hollingdale v Northern Rivers Area Health Service*,<sup>276</sup> a case under the DDA, the respondent sought to strike out that part of the applicant's points of claim that sought to plead the same incident in the alternative as direct and indirect discrimination. The respondent argued that the complaint terminated by the Commission appeared to only concern direct discrimination. Driver FM rejected the respondent's argument, finding that the applicant is not 'bound by the legal characterisation given to a complaint by HREOC', and stating that '[t]hat is especially so when more than one legal characterisation is possible based on the terms of the complaint'.<sup>277</sup> His Honour continued:

There is, in my view, no obligation upon an applicant to make an election between mutually exclusive direct and indirect disability claims. If both claims are arguable on the facts, they may be pleaded in the alternative. The fact that they are mutually exclusive would almost inevitably lead to a disadvantageous costs outcome for the applicant, but that is the applicant's choice.<sup>278</sup>

## 6.10 Applications for Extension of Time

Section 46PO(2) of the AHRC Act provides that applications made to the Federal Court or FCC must be made within 60 days after the date of the issue of a termination notice under section 46PH(2), 'or within such further time as the court concerned allows'.

This time limit not only has to be considered when filing an application, it also needs to be considered when applying to join a person as a respondent to an application. The relevance of the time limit

272 *Australian Medical Council v Wilson* (1995) 68 FCR 46, 55 (Sackville J); *Waters v Public Transport Corporation* (1991) 173 CLR 349, 393 (McHugh J); *Mayer v Australian Nuclear Science & Technology Organisation* [2003] FMCA 209; *Bropho v Western Australia* [2007] FCA 519, [289].

273 [2002] FMCA 60.

274 [2002] FMCA 60, [173].

275 [2002] FMCA 60, [245].

276 [2004] FMCA 721.

277 [2004] FMCA 721, [14].

278 [2004] FMCA 721, [19].

imposed by section 46PO(2) to applications to join a new respondent was considered by the Full Federal Court in *Grigor-Scott v Jones*<sup>279</sup> at a time prior to the amendments brought about by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) when the relevant time period was 28 days. In the primary proceedings, the applicant had applied and was granted an order joining Mr Grigor-Scott as a respondent. The application for joinder and the filing of the amended application naming Mr Grigor-Scott as a respondent was filed outside of the 28 day period and no application had ever been made for an extension of time to make an application against Mr Grigor-Scott. The primary judge found in favour of the applicant and the respondent appealed. On appeal the Full Court held:

No order should have been made to join him [Mr Grigor-Scott] in circumstances where the application had not been brought within the time prescribed in s 46PO(2). It was always open to the applicant to have sought to have time extended but no such application was ever made.<sup>280</sup>

### 6.10.1 Relevance of nature of human rights jurisdiction

Section 46PO(2) gives a court a broad discretion as to whether to grant an extension of time. In *Lawton v Lawson*<sup>281</sup> 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.<sup>282</sup>

McInnis FM in *Phillips v Australian Girls' Choir Pty Ltd*<sup>283</sup> 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* (ADJR Act) 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.<sup>284</sup>

### 6.10.2 Principles to be applied

McInnis FM in *Phillips v Australian Girls' Choir Pty Ltd*<sup>285</sup> ('*Phillips*') 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

279 [2008] FCAFC 14.

280 [2008] FCAFC 14, [83].

281 [2002] FMCA 68.

282 [2002] FMCA 68, [30], [31].

283 [2001] FMCA 109.

284 [2001] FMCA 109, [8].

285 [2001] FMCA 109.

rights application (based upon the principles set out by Wilcox J in *Hunter Valley Developments Pty Ltd v Cohen*<sup>286</sup>):

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 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).<sup>287</sup>

The seven principles have been summarised as concerning the following three matters:<sup>288</sup>

- explanation for delay;
- any prejudice to the respondent; and
- whether the applicant has an arguable case – the merits of the substantive case.

### (a) Need for an acceptable explanation for delay

Whilst the principles identified by McInnis FM in *Phillips* have generally found approval with the Federal Court,<sup>289</sup> Marshall J in *Low v Commonwealth*<sup>290</sup> has, in contrast to McInnis FM, suggested that an acceptable explanation for delay is a pre-condition to granting an application for an extension of time. In *Low*, Marshall J had to consider whether Driver FM was correct when he said that a 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.<sup>291</sup>

Marshall J said:

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

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286 (1984) 3 FCR 344.

287 [2001] FMCA 109, [10].

288 *Drew v Bates* [2005] FMCA 1221, [14]. Approved in *Ferrus v Qantas Airways Ltd* [2006] FCA 702, [20], applied in *Amponsem v Laundry (Exhibition) Pty Ltd* [2014] FCA 94, [7].

289 *Pham v Commonwealth* [2002] FCA 669, [11]; *Ferrus v Qantas Airways Ltd* [2006] FCA 702, [19].

290 [2001] FCA 702.

291 [2001] FCA 702, [11].



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.<sup>292</sup>

It is relevant to note that in *Low*, Marshall J did not consider the decision of McInnis FM in *Phillips* and therefore was not expressly rejecting the view of McInnis FM. In subsequent decisions, some judges have applied the reasoning of Marshall J in *Low*<sup>293</sup> and some judges have approved the principles identified by McInnis FM in *Phillips*.<sup>294</sup> However, none of these cases have expressly considered whether McInnis FM or Marshall J is correct about this issue. Therefore, it remains open as to whether an acceptable explanation for delay is a precondition to succeeding in an application for an extension of time.

Note however, that in a different context (section 29(7) of the *Administrative Appeals Tribunal Act 1975* (Cth)) the Full Court has found that a reasonable explanation is not a pre-condition:

Although it is to be expected that such an explanation will normally be given, as a relevant matter to be considered, there is no rule that such an explanation is an essential precondition: see *Dix v Crimes Compensation Tribunal* [1993] VicRp 21; (1993) 1 VR 297 at 302 per Brooking J, with whom Fullagar and Tadgell JJ agreed; cf *Hunter Valley Developments Pty Ltd v Cohen* [1984] FCA 176; (1984) 3 FCR 344 at 348 and *Maric v Comcare* (1993) 40 FCR 244 at 247-249.<sup>295</sup>

In *Dellios v Zegarac*<sup>296</sup> Marshall J applied his reasoning in *Low* and refused an application for extension, partially on the basis of the lack of a reasonable explanation for the delay. A further example of the lack of reasonable explanation, in part leading to a refusal, is *Tomas v Technicolor Pty Ltd and Anor*<sup>297</sup> where the court found:

So the real explanation for the delay is quite different from the explanation that Ms Tomas put forward.

The very significant weaknesses in the applicant's substantive case was also a factor in the refusal.<sup>298</sup>

Likewise, in *Vergara v Living and Leisure Australia Ltd*<sup>299</sup> the court found that while there was no prejudice and there was a factual foundation for the claims of racial discrimination, the lack of any acceptable reason for the delay of nearly three months was inexcusable and unjustifiable.<sup>300</sup>

## (b) Prejudice arising from the delay

In *Ingram-Nader v Brinks Australia Pty Ltd*,<sup>301</sup> Cowdroy J held that Driver FM had incorrectly applied the test of whether the respondent had been prejudiced by delay. The appellant had made his application to the FMC under section 46PO of the HREOC Act (now the AHRC Act) prior to the amendments brought about by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth). The appellant made his application 58 days after the expiry of the then prescribed

292 [2001] FCA 702, [11].

293 *Saddi v Active Employment* [2001] FMCA 73, [10]-[11]; *Keller v Commonwealth Department of Foreign Affairs & Trade* [2001] FMCA 96, [10]-[11].

294 *Pham v Commonwealth* [2002] FCA 669, [11]; *Ferrus v Qantas Airways Ltd* [2006] FCA 702, [19]; *Ingram-Nader v Brinks Australia Pty Ltd* (2006) 151 FCR 524, 527 [10]; *Drew v Bates* [2005] FMCA 1221, [13]; *Rainsford v Victoria* [2002] FMCA 266, [42]-[44]; *Forest v City of Sydney* [2011] FMCA 480.

295 *Comcare v A'Hearn* (1993) 45 FCR 441.

296 [2006] FCA 1733.

297 [2012] FMCA 984.

298 Above, [13].

299 [2013] FCA 775.

300 See also *Tang v AHG Services (NSW) Pty Ltd* [2011] FCA 1532.

301 (2006) 151 FCR 524.

28 day period. In declining leave to file his application out of time, Driver FM took into account the prejudice arising from the period of time which had elapsed since the alleged conduct had occurred (some five years at the time the complaint was made). The appellant argued that in assessing prejudice to the respondent arising from the delay the only prejudice Driver FM was entitled to take into account was that caused by the 58 day delay in lodging his application with the FMC. Upholding the appeal, Cowdroy J stated that:

I have not been referred to any authority in which a court has taken into account prejudice caused by delay occurring prior to the commencement of the prescribed period.

...

I agree with the submission of the appellant that Driver FM erred in taking into account the prejudice suffered by the respondent which predated the expiry of the prescribed period. The only relevant period for consideration of prejudice is the 58 days following the expiry of the prescribed period.<sup>302</sup>

It is evident from the various decisions on such applications that an assessment of prejudice from delay will turn on the facts of each case.

In *Wu v University of Western Sydney*<sup>303</sup> the court considered an application for extension of time where the application was made nearly seven years late. Jagot J accepted the relevant documentary records of the University were no longer complete and the difficulties of locating potential witnesses who were no longer employees or students of the University. Her Honour was of the view that the University would suffer a not insubstantial degree of prejudice from the delay. Further, although the applicant argued that the delay was due to a combination of mental health issues and difficulties in obtaining legal advice, Jagot J did not accept that this adequately explained the entire period of delay. The application was dismissed.

In *Amponsem v Laundry (Exhibition) Pty Ltd & Anor*<sup>304</sup> the court found that the fact that the respondent had sold a hotel at the centre of the controversy and was unable to locate most of the witnesses to the complaint meant a delay of 50 days was sufficiently prejudicial to warrant refusal of the extension. This finding was upheld on appeal.<sup>305</sup>

### (c) No arguable case

In *Bahonko v Royal Melbourne Institute of Technology*,<sup>306</sup> the applicant had made her application to the Federal Court under section 46PO of what is now the AHRC Act approximately 11 days after the expiry of the then prescribed 28 day period. Weinberg J refused the application for extension of time even though he found the reason for the delay was acceptable because there was no evidence to support the applicant's claims of unlawful discrimination and '[i]t would therefore be futile to extend time to enable her to pursue a hopeless case'.<sup>307</sup>

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302 [2006] FCA 624, [17], [19].

303 [2011] FCA 1143.

304 [2013] FCCA 1982.

305 *Amponsem v Laundry (Exhibition) Pty Ltd* [2014] FCA 94.

306 [2006] FCA 1325, [24]. Ms Bahonko's application for leave to appeal against the decision of Weinberg J was refused: *Bahonko v Royal Melbourne Institute of Technology* [2006] FCA 1492.

307 [2006] FCA 1325, [83]. Similarly, in *Keller v Commonwealth Department of Foreign Affairs & Trade* [2001] FMCA 96, Phipps FM rejected an application for extension of time where the delay was 11 days because he found the applicant did not have an arguable case.

In *Forest v City of Sydney*<sup>308</sup> the applicant had made his application six days after the now prescribed 60 day period. The most significant point in the application for extension of time was whether the applicant had an arguable case. Burnett FM noted that in such cases:

... the arguments overall fall to be determined on fine points, often only able to be resolved following a close examination of the evidence and findings of fact.<sup>309</sup>

Burnett FM was particularly mindful of the observations made in cases considering the court's approach to summary judgment for a party on the basis of there being no reasonable prospect of success (pursuant to section 17A of the FMC Act). His Honour stated:

It seems to me that when one has regard to the question of whether or not there is indeed an arguable case, one ought to at least allow the applicant to place before the court that material which would enable it to determine whether it meets, as a minimum, the requirements are of s17A which would, of itself, entitle a respondent to have the application dismissed.<sup>310</sup>

Burnett FM was not satisfied that there was no real prospect of the applicant succeeding on a number of contended points. It was held that as there was insufficient evidence to demonstrate no arguable case at this stage of proceedings, the applicant should have leave to proceed.

### 6.10.3 Examples of where extension of time has been granted

The FCC and the Federal Court have granted extensions of time for the filing of an application under section 46PO(2) in circumstances including the following:

- eight days out of time - the applicant had provided a reasonable explanation for the delay, the delay was not of great magnitude and the merits of the applicant's claims against the respondent demonstrated that the applicant's case was arguable;<sup>311</sup>
- approximately eight months out of time - 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;<sup>312</sup>
- seven months out of time — the applicant, who had a disability, was under the age of 18 years, not familiar with the legal process and had an arguable case;<sup>313</sup>
- three months out of time — 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;<sup>314</sup>
- ten days out of time — the reason for the delay (being that the solicitor with carriage of the matter who came from a small firm had been unexpectedly and seriously injured in an accident) was reasonable and there was sufficient merit in the application;<sup>315</sup>
- eight days out of time – the applicant had attended the registry when he was three days out of time and thought that because he had indicated in his application that he sought an extension of time, he had received an extension of time. Whilst this did not explain the initial three day

308 [2011] FMCA 480.

309 [2011] FMCA 480, [42].

310 [2011] FMCA 480, [45].

311 *Lawton v Lawson* [2002] FMCA 68.

312 *Creek v Cairns Post Pty Ltd* [2001] FCA 293.

313 *Phillips v Australian Girls' Choir Pty Ltd* [2001] FMCA 109.

314 *Rainsford v Victoria* [2002] FMCA 266, [55], [110].

315 *Drew v Bates* [2005] FMCA 1221.

delay, no substantial prejudice to the respondent resulted from the delay and Driver FM was not satisfied that applicant did not have an arguable case;<sup>316</sup> and

- six days out of time – the applicant had provided reasonable explanation for the delay, there was no prejudice to the respondent and on the facts stated to date there was insufficient evidence to demonstrate no arguable case.<sup>317</sup>

## 6.11 State Statutes of Limitation

The AHRC Act does not provide for any strict time limit for bringing a complaint of unlawful discrimination to the Commission. The President has a discretion to terminate a complaint if it is lodged more than 12 months after the alleged unlawful discrimination took place: see section 46PH(1)(b). Termination on this basis does not, however, prevent a complainant from making an application to the Federal Court or FCC in relation to that alleged discrimination. Such an application must, however, be brought within 28 days of termination or such further time as the court concerned allows.

The applicability of State statutes of limitation to unlawful discrimination proceedings has arisen in a number of cases.<sup>318</sup> Section 79(1) of the *Judiciary Act 1903* (Cth) (Judiciary Act) provides as follows:

The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

In *McBride v Victoria*<sup>319</sup> ('*McBride*'), McInnis FM expressed doubt as to whether the terms of the *Limitation of Actions Act 1958* (Vic) applied to proceedings commenced under the HREOC Act (now the AHRC Act). Similarly in *Artinos v Stuart Reid Pty Ltd*,<sup>320</sup> Driver FM rejected an argument based on a state limitation act and ruled that the only relevant limitation period in relation to proceedings under what is now the AHRC Act is the time limit set by section 46PO(2) of that Act. This was also the approach taken in *Kujundzic v MAS National*<sup>321</sup> where the court found that:

... to the extent that s 14(1) of the Limitation Act purports to impose on the commencement of actions under the AHRC Act a time-based limitation which is different from the time limitation set out in s 46PO(2) of the AHRC Act, it is invalid."

Having considered the relevant authorities, Cameron FM found that the State Limitation Act was not a state law relating to procedure. As required by section 79 of the Judiciary Act, it was a law relating to substance. On that basis, as it was inconsistent with section 46PO of the AHRC Act, it was invalid.<sup>322</sup>

Cameron FM also found that the cause of action accrues when the Notice of Termination is issued.<sup>323</sup>

By contrast, in *Baird v Queensland (No 2)*<sup>324</sup> ('*Baird*'), and *Gama v Qantas Airways Ltd*<sup>325</sup> ('*Gama*') Dowsett J and Raphael FM respectively formed the view that State limitation acts did apply to

316 *Zoltaszek v Downer EDI Engineering Pty Limited* [2010] FMCA 100.

317 *Forest v City of Sydney* [2011] FMCA 480.

318 For discussion of these cases, see Jonathon Hunyor, 'Time limits for unlawful discrimination claims' (2006) 44 *Law Society Journal* 40.

319 [2001] FMCA 55, [10].

320 [2007] FMCA 1141, [12].

321 [2013] FMCA 8.

322 [2013] FMCA 8, [41] - [45].

323 [2013] FMCA 8, [39].

324 (2005) 146 FCR 571.

325 [2006] FMCA 11, [5]-[8].

proceedings commenced under what is now the AHRC Act, although they expressed different views about the date from which the limitation period commences to run.

In *Baird* the Federal Court assumed that the *Limitation of Actions Act 1974* (Qld) applied to the proceedings and found that its effect is to bar proceedings commenced in court more than six years after termination by the President of the Commission<sup>326</sup> The court noted that the limitation period established by the Queensland Act was to be calculated from the date on which the ‘cause of action’ arose.<sup>327</sup> Dowsett J held that a ‘cause of action’ only existed under what is now the AHRC Act upon termination by the President as before such time there was no right to relief before a court (and the Commission has no power to grant such relief).<sup>328</sup>

In *Gama* Raphael FM expressed the view in obiter that the *Limitation Act 1969* (NSW), which has similar wording to the State limitation act considered in *McBride*, applied to proceedings under the HREOC Act (now the AHRC Act).<sup>329</sup> Raphael FM observed that events taking place more than six years before proceedings were commenced in court would be statute-barred. This suggests that his Honour took the view, contrary to that taken by Dowsett J in *Baird*, that the limitation period commences running from the date on which the alleged act of discrimination occurs and not the date on which the complaint was terminated.<sup>330</sup> His Honour did not, however, in reaching this conclusion, consider the decision of Dowsett J in *Baird*. On appeal, the correctness of Raphael FM’s approach was not considered by the Full Federal Court, which noted explicitly:

Nothing that we say in this judgment should be taken as agreeing with his Honour’s opinion about the application of the *Limitation Act 1969* (NSW).<sup>331</sup>

It has been suggested that the approach in *Baird* is the preferable one.<sup>332</sup> However, following *Kujundzic v MAS National* it is arguable that the State Limitation Acts do not apply. This position is also supported by s 79(1) of the Judiciary Act itself, which provides:

The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, **except as otherwise provided by** ... the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.<sup>333</sup>

## 6.12 Interim Injunctions Under Section 46PO(6) of the AHRC Act

After a complaint is terminated by the Commission and proceedings are commenced in the Federal Court or FCC under section 46PO(1), an interim injunction may be granted by the relevant court under s 46PO(6), which provides:

(6) The court concerned may, if it thinks fit, grant an interim injunction pending the determination of the proceedings.

<sup>326</sup> (2005) 146 FCR 571, 572 [1].

<sup>327</sup> (2005) 146 FCR 571, 572 [2].

<sup>328</sup> (2005) 146 FCR 571, 575 [9].

<sup>329</sup> [2006] FMCA 11, [5]–[8].

<sup>330</sup> [2006] FMCA 11, [6]–[9].

<sup>331</sup> *Qantas Airways Ltd v Gama* [2008] FCAFC 69, [18] (French and Jacobson JJ, with whom Branson J generally agreed, [122]).

<sup>332</sup> See Jonathon Hunyor, ‘Time limits for unlawful discrimination claims’ (2006) 44 *Law Society Journal* 40. See also the decision in *McBride v Victoria* [2001] FMCA 55 in which the court analysis seems to be similar to that in *Baird*, but suggests that it is necessary for an application to be lodged with the Commission within 6 years of the date of the alleged act of discrimination.

<sup>333</sup> See Chris Molnar, Bringing and defending discrimination claims: when does a cause of action accrue under Commonwealth discrimination legislation? (2013) 19(3) *Employment Law Bulletin* 43.

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.<sup>334</sup>

As with injunctions granted under section 46PP, the court cannot, as a condition of granting an interim injunction under section 46PO(6), require a person to give an undertaking as to damages.<sup>335</sup>

Unlike section 46PP, section 46PO(6) has not received significant judicial attention.<sup>336</sup> However, the factors discussed in 6.3 above would seem likely to apply to the exercise of the discretion conferred by section 46PO(6).

## 6.13 Applications for Summary Disposal

The Federal Court Act and the FCC Act both provide for summary judgement to be given if the court is satisfied that the party prosecuting the proceeding has no 'reasonable prospect' of either prosecuting or defending the proceeding.<sup>337</sup> In addition, the rules of both courts<sup>338</sup> allow a party to apply to the court for judgement because

- the proceeding is frivolous or vexatious; or
- the proceeding is an abuse of the process of the court.

The Federal Court Rules also allow a party to apply to the court for judgement because no reasonable cause of action is disclosed.<sup>339</sup>

### 6.13.1 Changes to the summary disposal provisions

The current language in the Federal Court Act and the FCC Act was introduced in 2005.<sup>340</sup> The Explanatory Memorandum to the legislation that effected the changes makes clear that the new provisions were intended to introduce a broader and less demanding assessment of the lack of merits compared with the former general law principles relating to summary judgment:

Section 31A moves away from the approach taken by the courts in construing the conditions for summary judgment by reference to the 'no reasonable cause of action' test, in *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 and *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125. These cases demonstrate the great caution which the courts have exercised in regard to summary disposal, limiting this to cases which are manifestly groundless or clearly untenable.

Section 31A will allow the Court greater flexibility in giving summary judgment and will therefore be a useful addition to the Court's powers in dealing with unmeritorious proceedings.<sup>341</sup>

334 *Li v Minister for Immigration & Multicultural Affairs* [2001] FCA 1414, [35]. Applied in *Rainsford v Group 4 Correctional Services* [2002] FMCA 36, [35].

335 AHRC Act, s 46PO(8).

336 For an example of an unsuccessful application made under s 46PO(6), see *Li v Minister for Immigration & Multicultural Affairs* [2001] FCA 1414.

337 FCA, s 31A, and FCC Act s17A.

338 FCR, rr 26.01, 13.10.

339 FCR, r 26.01(1)(c).

340 The FCR, the FMC Rules and the *Judiciary Act* 1903 (Cth) were amended by the *Migration Litigation Reform Act 2005* (Cth). Section 2 of the *Migration Litigation Reform Act* provides that the changes take effect from 1 December 2005.

341 *Migration Litigation Reform Act 2005* (Cth) Explanatory Memorandum, [22]-[23]. The same comments were made in relation to the equivalent provisions affecting the FCC and High Court, see [27]-[28] and [32]-[33] respectively.

Prior to the amendments, there were no provisions in the courts' Acts. The only provisions were in the rules<sup>342</sup> and the common law test of 'no reasonable cause of action' applied in the *Dey* and *General Steel* cases mentioned above.

To reinforce the decision to lower the threshold and give the courts greater flexibility, the newly inserted section in both Acts contains a subsection providing that the proceeding need not be hopeless or bound to fail for it to have no reasonable prospect of success.<sup>343</sup>

The new approach has been reflected in a number of decisions implementing the new provisions.<sup>344</sup> A number of decisions have, however, suggested that courts may still continue to exercise the power of summary dismissal sparingly.

In *Hicks v Ruddock*,<sup>345</sup> Tamberlin J acknowledged that the standard under the new provisions was less strict compared with the pre-existing general law principles.<sup>346</sup> However, his Honour nevertheless emphasised that such principles remained pertinent to the need for caution in approaching summary dismissal applications:

As Barwick CJ said in *General Steel* at 129-130, great care must be exercised to be sure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of the opportunity to have his or her case tried by the appointed tribunal. The general principle that a person should not lightly be shut out from a hearing is cogent – the onus on the party applying for summary judgment is heavy.<sup>347</sup>

Similarly, in *Paramasivam v New South Wales (No 2)*<sup>348</sup> Smith FM whilst acknowledging that the new test allowed a broader and in some ways less demanding assessment of the lack of merits of a case, still expressed the view that the FMC needed to exercise caution before summarily dismissing a matter. Smith FM said:

In this Court, the flexibility and informality of its proceedings which are intended by the legislation and rules setting up the Federal Magistrates' Court, make it particularly important to be cautious at early stages of a proceeding before forming a conclusion that a litigant has 'no prospect of success'. The need for this caution in an application for summary dismissal was referred to by Lander J in *Rana v The University of South Australia* [2004] FCA 559; (2004) 136 FCR 344 under the previous rule allowing summary dismissal. However, in my opinion, the points made by his Honour in support of caution remain equally, if not more, relevant to a consideration of the Court's current power of summary dismissal. His Honour said at [75]:

In my view, because the FMCA Rules do not require pleadings; the parties are not obliged to tender all their evidence when the application and response is filed; there are few, if any, interlocutory processes available; and the Federal Magistrates Court is a low cost court, the Federal Magistrates Court should be very cautious about summarily dismissing an applicant's proceeding. That course should only be adopted when it is clear, beyond any doubt, that the applicant has not, and cannot, articulate in writing a reasonable cause of action. As I have already said, the philosophy of the Federal Magistrates Court is to provide inexpensive justice and a streamlined dispute resolution process. Litigants will often be self-represented and the documents they rely on as founding their claim will no doubt often be imprecisely

342 FCR, O 20 r 1; FCCR, r 13.07.

343 Federal Court Act s 31A(3), and FCC Act s 17A(3).

344 See, for example, *Vans Inc v Offprice.com.au Pty Ltd* [2006] FCA 137, [10]-[12]; *Jewiss v Deputy Commissioner of Taxation* [2006] FCA 1688 [26]-[29]; *Fortron Automotive Treatments Pty Ltd v Jones (No 2)* [2006] FCA 1401, [21]; *Duncan v Lipscombe Child Care Services Inc* [2006] FCA 458, [6] (which was disapproved in *Fortron Automotive Treatments Pty Ltd v Jones (No 2)* [2006] FCA 1401; *Spencer v Commonwealth of Australia* (2010) 241 CLR 118 [24], [58]-[60]

345 (2007) 156 FCR 574.

346 (2007) 156 FCR 574, 582 [12].

347 (2007) 156 FCR 574, 582 [12]-[13]. See also *MG Distribution Pty Ltd v Khan* [2006] FMCA 666, [38]-[44].

348 [2007] FMCA 1033.



articulated. In those circumstances, there is even more reason for the Federal Magistrates Court to be cautious before summarily dismissing an applicant's claim.<sup>349</sup>

In *Cate v International Flavours & Fragrances (Aust) Pty Ltd*,<sup>350</sup> McInnis FM noted the importance of human rights proceedings in this context, stating:

It is also relevant at the outset to note that human rights proceedings necessarily involve what might be described as significant claims where it is in the public interest for those claims to be the subject of a hearing so that the allegations can be properly tested. It is in the interests of both parties for serious allegations of unlawful discrimination to be fully tested in an open court.

However, balanced against the desire to provide an opportunity for an Applicant to pursue proceedings based upon unlawful discrimination must be the need to ensure a Respondent is not put to the trouble and expense of meeting all allegations which have no reasonable prospect of success.<sup>351</sup>

### 6.13.2 Principles governing determination of whether there are 'no reasonable prospects'

As mentioned above, section 31A(3) of the Federal Court Act provides the following guidance for determining whether or not a claim or defence has 'no reasonable prospects':

- (3) For the purposes of this section a defence or a proceeding or part of a proceeding need not be:
  - (a) hopeless; or
  - (b) bound to fail;for it to have no reasonable prospect of success.

Section 17A(3) of the FCC Act is identical to section 31A(3) of the Federal Court Act.

Additional guidance on determining whether a claim or defence has 'no reasonable prospects' can be found in recent decisions.

In *Boston Commercial Services Pty Ltd v GE Capital Finance Australasia*,<sup>352</sup> shortly after the introduction of the new provisions, Rares J considered the meaning of the phrase 'no reasonable prospects of success' concluding:

Unless only one conclusion can be said to be reasonable, the moving party will not have discharged its onus to enliven the discretion to authorise a summary termination of the proceedings which s 31A envisages.<sup>353</sup>

His Honour rejected a submission by the respondents that the new provisions required the court to engage in a predictive assessment of prospects holding that:

The purpose of the enactment is to enable the court to deal with matters which should not be litigated because there is no reasonable prospect of any outcome but one.<sup>354</sup>

In *Vivid Entertainment LLC v Digital Sinema Australia Pty Ltd*<sup>355</sup> ('*Vivid Entertainment*'), Driver FM followed the approach taken by Rares J in *Boston Commercial*. After extensively reviewing the

349 [2007] FMCA 1033, [11]. See also *Price v Department of Education & Training (NSW)* [2008] FMCA 1018, [17].

350 [2007] FMCA 36.

351 [2007] FMCA 36, [74]-[75].

352 [2006] FCA 1352.

353 [2006] FCA 1352, [45]. See also *Commonwealth Bank of Australia v ACN 000 247 601 Pty Ltd (in liq) (formerly Stanley Thompson Valuers Pty Ltd)* [2006] FCA 1416, [30]-[33].

354 [2006] FCA 1352, [47].

355 [2007] FMCA 157.

authorities dealing with the new provisions,<sup>356</sup> Driver FM concluded that the principles to be applied in summary dismissal cases were as follows:

In assessing whether there are reasonable prospects of success on an application or a response, the Court must be cautious not to do an injustice by summary judgment or summary dismissal.

There will be reasonable prospects of success if there is evidence which may be reasonably believed so as to enable the party against whom summary judgment or summary dismissal is sought to succeed at the final hearing.

Evidence of an ambivalent character will usually be sufficient to amount to reasonable prospects.

Unless only one conclusion can be said to be reasonable, the discretion ... cannot be enlivened.

The Court should have regard to the possibility of amendment and additional evidence in considering whether only one conclusion can be said to be reasonable. In that consideration, the conduct of the parties and the other circumstances of the case may be relevant.<sup>357</sup>

The principles identified in *Boston Commercial* and *Vivid Entertainment* have been applied in summary dismissal applications in unlawful discrimination proceedings.<sup>358</sup>

There has been some discussion, however, as to whether the test in *Boston Commercial* is the correct test to be applied. In *Price v Department of Education & Training (NSW)*,<sup>359</sup> Cameron FM noted that both Finkelstein and Gordon JJ in *Jefferson Ford Pty Ltd v Ford Motor Company of Australia Ltd*<sup>360</sup> (*'Jefferson Ford'*) expressed views that differed both from each other and from Rares J's view in *Boston Commercial*. Cameron FM also observed that Edmonds J in *Spiteri v Nine Network Australia Pty Ltd*<sup>361</sup> had noted the differing views of Finkelstein and Gordon JJ in *Jefferson Ford*, although Edmonds J did not reach an express conclusion regarding which of their Honours' judgments was to be preferred. Cameron FM concluded that, at this point, in the absence of a clear expression by the Full Federal Court to the contrary, he was bound to follow Rares J's test in *Boston Commercial*.

Further guidance has since been provided by the High Court in *Spencer v Commonwealth of Australia*.<sup>362</sup> French CJ and Gummow J stated:

Section 31A(2) of the Federal Court of Australia Act requires a practical judgment by the Federal Court as to whether the applicant has more than a "fanciful" prospect of success. That may be a judgment of law or of fact, or of mixed law and fact. Where there are factual issues capable of being disputed and in dispute, summary dismissal should not be awarded to the respondent simply because the Court has formed the view that the applicant is unlikely to succeed on the factual issue. Where the success of a proceeding depends upon propositions of law apparently precluded by existing authority, that may not always be the end of the matter. Existing authority may be overruled, qualified or further explained. Summary processes must not be used to stultify the development of the law.<sup>363</sup>

In the judgment of Hayne, Crennan, Kiefel and Bell JJ their Honours concluded that "full weight must be given to the expression [no reasonable prospects of success] as a whole. The Federal Court may exercise power under s 31A if, and only if, satisfied that there is "no reasonable prospect of success".<sup>364</sup>

356 [2007] FMCA 157, [18]-[30].

357 [2007] FMCA 157, [30].

358 See *Paramasivam v University of New South Wales* [2007] FCAFC 176, [4]; *Paramasivam v New South Wales (No 2)* [2007] FMCA 1033, [8]; *Yee v North Coast Area Health Service* [2007] FMCA 1788.

359 [2008] FMCA 1018, [19]-[20].

360 [2008] FCAFC 60.

361 [2008] FCA 905, [11]-[16].

362 (2010) 241 CLR 118.

363 (2010) 241 CLR 118, 131-132, [24]-[25]

364 (2010) 241 CLR 118, 141, [60]

The approach in *Spencer*, together with the principles in *Boston Commercial* and *Vivid Entertainment*, have been applied to subsequent applications for summary dismissal in unlawful discrimination proceedings.<sup>365</sup>

In *Ali-Hossaini & Anor v NSW Land & Housing Corporation*<sup>366</sup> Driver FM granted an application for summary dismissal on the basis that there was no evidence to support the claims of either direct or indirect disability discrimination in the provision of public housing.

However, in *Department of Land & Housing v Douglas*<sup>367</sup> Lloyd-Jones FM rejected an application for summary dismissal, despite the “significant deficiencies” in the presentation of the applicant’s claim of indirect disability discrimination in the provision of public housing. His Honour relied on *Spencer* and *Boston Commercial* in reaching his decision. Particular emphasis was placed on the statement in *Boston Commercial* that “experience shows that there are cases which appear to be almost bound to fail yet they succeed”.<sup>368</sup>

In *Sandor v Department of Communities, Child Safety and Disability Services*<sup>369</sup> in allowing an application to set aside orders dismissing an application under section 46PO, the court found that:

As the above discussion of the issues indicates, there may be some merit to the applicant’s claims of discrimination. Yet the analysis also highlights the significant deficiencies that exist in Mr Sandor’s claims. In those circumstances, I conclude that Mr Sandor has demonstrated an arguable case that reopening the matter might reasonably produce a materially different result. Whilst I think that his arguable case is weak, it exists nonetheless.<sup>370</sup>

The decision of Walters FM in *Oorloff v Lee*,<sup>371</sup> (*‘Oorloff’*) suggests that when determining summary dismissal applications in discrimination proceedings brought by an unrepresented litigant certain additional considerations need to be taken into account. In that case, Walters FM identified the following principles as being particularly relevant in such cases:

4. In the context of discrimination legislation, both the Federal Magistrates Court and Federal Court have emphasised that the power to summarily dismiss a matter must be exercised with ‘exceptional caution’ and be ‘sparingly invoked’. In particular, the power should be used with great care when the litigant is unrepresented.

...

8. Special considerations apply in applications for summary dismissal with an unrepresented litigant. Sackville J in *Re Morton; Ex parte Mitchell Products Pty Ltd* surveyed the authorities and noted that the Court:

‘must ... have regard not merely to the litigant in person but also to the position of the other party or parties concerned and to what is required, in justice, to prevent the unnecessary expenditure of public and private resources.’

9. In conclusion, at 514 Sackville J quoted with approval the words of Mahoney JA in *Rajski v Scitec*:

‘Where a party appears in person, he will ordinarily be at a disadvantage. That does not mean that the court will give to the other party less than he is entitled to. Nor will it confer upon the party in person

365 *Ali-Hossaini & Anor v NSW Land and Housing Corporation* [2010] FMCA 644. See also *Department of Land & Housing v Douglas* [2011] FMCA 75, *Huang v Abayawickrama & Anor* [2011] FMCA 235.

366 [2010] FMCA 644.

367 [2011] FMCA 75.

368 *Boston Commercial Services Pty Ltd v GE Capital Finance Australasia Pty Ltd* [2006] FCA 1352, [42].

369 [2015] FCCA 2187.

370 [2015] FCCA 2187, [28].

371 [2004] FMCA 893, [49].

advantages which, if he were represented, he would not have. But the court will, I think, be careful to examine what is put to it by a party in person to ensure that he has not, because of lack of legal skill, failed to claim rights or put forward arguments which otherwise he might not have done.’

...

11. In determining whether there is an arguable case, the Court is not limited to considering the arguments put before it by the party defending the application, but may look at all the material to assess independently whether an arguable case based on the material could be made out.<sup>372</sup>

*Oorloff* was determined prior to the changes to the *Federal Magistrates Act 1999* (Cth) (as it then was). However, the principles identified in that case have been applied by Raphael FM in *Yee v North Coast Area Health Service*,<sup>373</sup> when considering an application for summary dismissal against an unrepresented litigant in unlawful discrimination proceedings under the new provision.

Other principles identified by courts as being relevant to applying the ‘no reasonable prospects’ test are:

- that the prospects of the claim or defence must be determined according to the claim or defence underlying any pleadings and as such a claim cannot be summarily dismissed simply because the pleadings are deficient;<sup>374</sup> and
- the court should take into account the stage the proceedings have reached when applying the test.<sup>375</sup>

Further, in *Paramasivam v New South Wales (No 2)*,<sup>376</sup> mentioned above, Smith FM suggested that issues of fairness should be taken into account when determining whether to summarily dismiss part of an application. In that case, his Honour rejected an application for dismissal of the part of the applicant’s claim based on indirect discrimination and discrimination in the provision of goods and services. His Honour held that even though he might have been inclined to form a view that the applicant had not shown reasonable prospects of succeeding in these claims, he was:

not persuaded that requirements of fairness to the respondent require these claims to be foreclosed, nor that the respondent’s ability to prepare for a final hearing would be advanced by my making such orders.<sup>377</sup>

A recent summary of the principles to be applied in the application of section 31A has been provided by Perry J in *Eliezer v University of Sydney*.<sup>378</sup>

### 6.13.3 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’.<sup>379</sup>

In determining the issue of whether there is an arguable case, the FCC has held that it is not limited to considering the arguments put before it by the party defending the application but rather will ‘independently consider whether an arguable case based on the material could be made out’.<sup>380</sup>

372 [2004] FMCA 893, [17].

373 [2007] FMCA 1788.

374 *Fortron Automotive Treatments Pty Ltd v Jones (No 2)* [2006] FCA 1401, [20].

375 *Paramasivam v New South Wales* [2007] FMCA 1033, [10]. In so far as Smith FM in *Paramasivam* suggests that the summary dismissal test requires a predictive assessment this is contrary to the view expressed by Rares J in *Boston Commercial Services Pty Ltd v GE Capital Finance Australasia* [2006] FCA 1352, [42].

376 [2007] FMCA 1033.

377 [2007] FMCA 1033, [23].

378 *Eliezer v University of Sydney* [2015] FCA 1045, [35]-[40].

379 *Paramasivam v Wheeler* [2000] FCA 1559, [8].

380 *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].

### 6.13.4 Examples of matters where the power has been exercised

The FCC and Federal Court have summarily dismissed unlawful discrimination matters where:

- the matter complained of did not involve the provision of a service for the purposes of section 24 of the DDA;<sup>381</sup>
- the subject matter of the application before the FCC was different from the complaint that was made to the Commission and terminated by the President;<sup>382</sup>
- there was no causal nexus between the alleged acts of discrimination and the complainant's race or disability;<sup>383</sup>
- the claims made by the applicant were vague and general and failed to show a case to answer;<sup>384</sup>
- the respondent was not the subject of the complaint to the Commission;<sup>385</sup>
- 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;<sup>386</sup>
- a deed of release previously entered into by the parties acted as a bar to the employees claim of unlawful discrimination;<sup>387</sup>
- it was accepted that the applicant (an incorporated association) was not a 'person aggrieved' for the purposes of commencing proceedings, on the basis that it was not itself affected by the relevant conduct but had merely an emotional or intellectual interest in the proceedings;<sup>388</sup>
- the discrimination occurred outside of Australia;<sup>389</sup>
- the allegations did not amount to discrimination;<sup>390</sup>
- the respondent was protected by immunity from suit with respect to any acts done in the exercise of his judicial functions;<sup>391</sup> and
- there was no evidence to support the claim of discrimination.<sup>392</sup>

### 6.13.5 Frivolous or vexatious proceedings and abuse of process

As discussed above in 6.12, in addition to the power to summarily dismiss proceedings on the basis that the party has no reasonable prospect of success, proceedings in the Federal Court and the FCC may be summarily dismissed on the basis that the proceedings are frivolous or vexatious, or are an abuse of process.<sup>393</sup>

381 *Vintila v Federal Attorney General* [2001] FMCA 110.

382 *Soreng v Victorian State Director of Public Housing* [2002] FMCA 124; *Price v Department of Education & Training (NSW)* [2008] FMCA 1018; *Fernandez v University Of Technology, Sydney* [2015] FCCA 3432.

383 *Chung v University of Sydney* [2001] FMCA 94; *Neate v Totally & Permanently Incapacitated Veterans Association of NSW Ltd* [2007] FMCA 488; *Paramasivam v University of New South Wales* [2007] FCA 875.

384 *Rana v University of South Australia* [2003] FMCA 525, [15]; *Hassan v Hume* [2003] FMCA 476, [23], [28]; *Croker v Sydney Institute of TAFE* [2003] FMCA 181, [14]-[16], [18]; *Jandruwanda v University of South Australia (No 2)* [2003] FMCA 233, [13]-[15]; *Applicant N v Respondent C* [2006] FMCA 1936.

385 *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; *Eliezer v University of Sydney* [2015] FCA 1045.

386 *Firew v Busways Trust (No 2)* [2003] FMCA 317, [12]-[13].

387 *Dean v Cumberland Newspaper Group* [2003] FMCA 561; see also *Seidler v The University of New South Wales* [2011] FCA 640 and *Seidler v The University of New South Wales* [2011] FCA 830.

388 *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313.

389 *Vijayakumar v Qantas Airways Ltd* [2009] FMCA 736.

390 *Gaffney v RSM Bird Cameron (a firm)* [2013] FCA 661; *ABC v Smith* [2013] FCCA 177; *Prosser v Trustees of the Roman Catholic Church for the Diocese of Wagga Wagga* [2014] FCCA 1476; *Myatt v Queensland (Queensland Police Service)* [2016] FCA 133; *Fernandez v University Of Technology, Sydney* [2015] FCCA 3432,

391 *Mathews v Queensland* [2015] FCA 1488.

392 *Wilson v Community and Public Sector Union* [2011] FCA 448.

393 FCR, r 26.01(1) (formerly O 20 r 5); FMCR, r 13.10(b) and (c). This power to summarily dismiss a proceeding or part of a proceeding because the proceeding is vexatious, is in addition to the powers set out in s 37AO of the Federal Court Act and s 88Q of the FCC Act relating to vexatious litigants.

### (a) Vexatious

In *Lawrance v Watson*,<sup>394</sup> the applicant had initiated several sets of proceedings against the respondents alleging almost identical claims of unlawful discrimination in each case. In Cameron FM's view:

The duplication in allegations and factual assertions and the requirement placed by the applicant on the various respondents to meet all of these proceedings is vexatious. Consequently, even if they had reasonable prospects of success, the proceedings would be dismissed as against all the respondents other than the first respondent on the basis that they are vexatious.<sup>395</sup>

Cameron FM also held that the multiplicity of proceedings against the same parties raising the same issue was also an abuse of process of the court.<sup>396</sup>

In *Rana v Commonwealth of Australia*<sup>397</sup> (2013 decision), Mansfield J commented on the meaning of 'vexatious' as follows:

Proceedings have been held to be "vexatious" in the past if they are instituted with the intention of annoying or embarrassing the person against whom they are brought; they are brought for collateral purposes, and are not for the purpose of having the court adjudicate on the issues to which they give rise; irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless; or they are scandalous, disclose no reasonable cause of action, are oppressive, are embarrassing, or are an abuse of the process of the court: see generally *Attorney-General v Wentworth* (1988) 14 NSWLR 481.

It has also been pointed out that "vexatiousness" is a quality of the proceeding rather than a litigant's intention so that the "question is not whether they have been instituted vexatiously but whether the legal proceedings are in fact vexatious": *Re Vernazza* [1960] 1 QB 197 at 208.<sup>398</sup>

As indicated below the court found the proceedings to be an abuse of process and made a 'vexatious proceedings order'.

This understanding of the meaning of 'vexatious' was applied in *Sims v Jooste & Ors*<sup>399</sup> in making a finding that the proceedings were frivolous, vexatious and an abuse of process.<sup>400</sup>

### (b) Abuse of Process

In *Rana v Commonwealth*,<sup>401</sup> (2008 decision) Lander J referred to *Rogers v The Queen*<sup>402</sup> in which Mason CJ had identified three categories within which abuse of process usually falls:

- the court's procedures are invoked for an illegitimate purpose;
- the use of the court's procedures is unjustifiably oppressive to one of the parties; or
- the use of the court's procedures would bring the administration of justice into disrepute.

In *Rana*, Lander J held that the proceedings constituted an abuse of process on the basis that the proceedings threatened to bring the administration of justice into disrepute.

<sup>394</sup> [2008] FMCA 984.

<sup>395</sup> [2008] FMCA 984, [80].

<sup>396</sup> [2008] FMCA 984, [81]. See also *Lawrance v Macarthur Legal Centre* [2008] FMCA 1420, [112]-[130].

<sup>397</sup> [2013] FCA 189.

<sup>398</sup> [2013] FCA 189 [42]-[43].

<sup>399</sup> [2016] FCCA 1343.

<sup>400</sup> [2016] FCCA 1343 [139].

<sup>401</sup> [2008] FCA 907.

<sup>402</sup> (1994) 181 CLR 251, 286.

The applicant had previously challenged a refusal by the Australian Army to grant him a disability pension. The applicant's challenge had been rejected by Mansfield J at first instance and by the Full Federal Court on appeal. The applicant now sought to challenge the Australian Army's refusal on the basis of unlawful discrimination. In Lander J's view, if the applicant wanted to challenge the refusal on this basis, he should have raised it in the proceedings before Mansfield J, and held:

It is an abuse of process, in my opinion, to proceed in the way in which the applicant has. It could lead to the very unsatisfactory result that, contrary to the decision of Mansfield J, the decisions would be quashed for reasons not considered by him. That would tend to bring the administration of justice into disrepute.<sup>403</sup>

Lander J also held that the applicant was seeking to use these proceedings to secure interlocutory relief which had been sought in other bankruptcy proceedings but had been denied.<sup>404</sup> Lander J held that this was an abuse of process on the basis of the proceedings being brought for an illegitimate purpose.

Finally, Lander J also accepted the submissions of the respondents that the proceeding was vexatious.<sup>405</sup> The respondents had argued that the proceeding would have the effect of re-litigating issues which had already been determined against the applicant by the Administrative Appeals Tribunal and the Federal Court on a number of other occasions.

In *Rana v Commonwealth of Australia*<sup>406</sup> (2013 decision) the Federal Court dismissed three applications made by Mr Rana in the High Court and made orders under Order 2.06 of the Federal Court Rules 2011<sup>407</sup> requiring Mr Rana to obtain the leave of the court before commencing or continuing any proceedings relating to five specific proceedings on the basis that they were an abuse of process in light of the previous proceedings. The court stated:

In my view, the material shows that the applicant has refused to accept the principle of finality of litigation by commencing this proceeding after losing the earlier proceedings referred to at [2] to [10] above. It is not necessary to repeat what has been discussed at length above.<sup>408</sup>

The court decided it was not necessary to consider 'the respondent's alternative contention that the Further Documents fail to disclose a reasonable cause of action, are scandalous or vexatious, are likely to cause prejudice, embarrassment or delay, or are otherwise an abuse of process for the purposes of rules 16.21(a)-(b), (d)-(f) of the Federal Court Rules.'<sup>409</sup>

In *Seidler v The University of New South Wales*<sup>410</sup> the applicant had instituted new proceedings in the Federal Court concerning claims that were the subject of a Deed of Release and the findings of an earlier decision of the Federal Magistrates Court (as it was then named). Cowdroy J ordered that the respondents be granted summary judgment in the proceedings pursuant to section 31A(2) of the Federal Court Act. Cowdroy J was also of the view that the applicant was clearly seeking to challenge the findings of the Federal Magistrates Court (as it was then named). However, the applicant had not sought to appeal the decision and was attempting by these new proceedings to re-litigate matters already determined adversely to the applicant. His Honour cited a number of authorities concerning the inherent power of any court of justice to prevent misuse of its procedure as well as the provision

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403 [2008] FCA 907, [62]-[63].

404 [2008] FCA 907, [60].

405 [2008] FCA 907, [65].

406 [2013] FCA 189.

407 Note that this Rule was amended by *Federal Court Amendment Rules 2013 (No. 1)* effective from 11 June 2013.

408 [2013] FCA 189, [70].

409 [2013] FCA 189, [72].

410 [2011] FCA 640.



in Order 20 rule 5 of the Federal Court Rules.<sup>411</sup> Cowdroy J concluded that the institution of these proceedings was an abuse of process.<sup>412</sup>

In *Seidler v The University of New South Wales*<sup>413</sup> the applicant had instituted a second set of substantially identical proceedings in the Federal Court as those that had come before Cowdroy J some weeks earlier. Flick J stated that “the substantial identity between the two proceedings is in itself a further reason to conclude that the present proceeding is a manifest abuse of process”.<sup>414</sup> The applicant’s request to amend the second set of proceedings was rejected. Flick J held that the proposed amendments had already been resolved by the decision of Cowdroy J and would in any event fall within the terms of the Deed of Release. The proposed amendments had no prospect of success. Flick J ordered that the respondents also be granted summary judgment in these proceedings pursuant to section 31A(2) of the Federal Court Act.<sup>415</sup>

In *Seidler v Royal Melbourne Institute of Technology*<sup>416</sup> the court was again asked to make an order under section 88Q of the FCC Act to summarily dismiss the application by Ms Seidler. The court noted the previous litigation history of Ms Seidler and the previous ‘vexatious litigant order’, and gave judgement to the respondents. The orders prevented Ms Seidler from commencing or continuing any proceedings in the court without leave.

*Seidler v Royal Melbourne Institute Of Technology & Anor (No.2)*<sup>417</sup> noted the existing orders under section 88G of the Federal Court Act, discussed above, and refused leave to continue with the proceedings.

In *Hinton v Alpha Westmead Private Hospital Pty Ltd*,<sup>418</sup> the FCC found that the proceedings were both vexatious and an abuse of process noting that:

None of the circumstances raised in the present complaint the subject of this application rise above a mere trifle, the pursuit of which is vexatious and as such an abuse of process. The Court’s jurisdiction is not to be invoked for trifles as that is vexatious and an abuse of process.<sup>419</sup>

In *Pitt v OneSteel Reinforcing Pty Ltd*,<sup>420</sup> Gray J refused an application for leave to appeal on the basis that it had been open to the federal magistrate to conclude that there was an abuse of process even though the application to the Federal Magistrate’s Court (as it was then named) was made within the statutory time limit.<sup>421</sup> Gray J held that the Federal Magistrate was justified in taking into account the very long delays that had occurred between the date of the alleged sexual harassment and the applicant’s second complaint to the Commission as well as the material provided by the respondent to the effect that a number of possible witnesses, who might have been called in proceedings had they been commenced earlier, were no longer available to the respondent as witnesses.<sup>422</sup>

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411 FCR, r 26.01.

412 [2011] FCA 640, [79] – [85].

413 [2011] FCA 830.

414 [2011] FCA 830, [34].

415 The applicant’s application for leave to appeal the decisions of both Cowdroy J and Flick J was dismissed and she was ordered to pay the respondents’ costs on an indemnity basis: *Seidler v University of New South Wales* [2011] FCA 1156. Note also that the Federal Court is considering whether, of its own motion pursuant to FCR, r 6.03(1), to prevent the applicant from commencing any further proceedings in the Federal Court without leave.

416 [2016] FCCA 1205.

417 [2016] FCCA 1622.

418 [2016] FCCA 270.

419 [2016] FCCA 270, [15].

420 [2008] FCA 923.

421 [2008] FCA 923, [14].

422 [2008] FCA 923, [14].

In a slightly different context, the court in *Margan v President, Australian Human Rights Commission*<sup>423</sup> found that bringing an application for judicial review of the President's decision to terminate a complaint at the same time as an application under section 46PO of the AHRC Act was an abuse of process. Summary judgement was given to the respondent in the judicial review proceedings on that basis but pursuant to section 10(2)(b) of the ADJR Act.<sup>424</sup>

### 6.13.6 Dismissal of application due to non-appearance of applicant

Rule 30.21(1) of the new Federal Court Rules (formerly Order 32 rule 2(1)) deals with the non-appearance of a party. This rule provides that if a party is absent when a proceeding is called for trial, another party may apply to the court for an order that:

- (a) if the absent party is the applicant:
  - (i) the application be dismissed; or
  - (ii) the application be adjourned; or
  - (iii) the trial proceed only if specified steps are taken; or
- (b) if the absent party is the respondent:
  - (i) the hearing proceed generally or in relation to a particular aspect of the application; or
  - (ii) the hearing be adjourned; or
  - (iii) the trial proceed only if specified steps are taken.

In *Pham v University of Queensland*<sup>425</sup> ('Pham'), Drummond, Marshall and Finkelstein JJ upheld the decision of Heerey J<sup>426</sup> dismissing the appellant's application pursuant to the former Federal Court Rule in regard to non-appearances, being Order 32, rule 2(1), when he failed to attend at his trial. The Full Court held that Order 32, rule 2(1)(c) did 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 before dismissing an application pursuant to that rule.<sup>427</sup>

## 6.14 Application for Dismissal for Want of Prosecution

In *Boda v Department of Corrective Services*<sup>428</sup> Driver FM held that the Federal Magistrates Court (as it was then named) had an inherent power to stay a proceeding or dismiss an application on the basis that there has been a want of prosecution with due diligence.<sup>429</sup> In that case the applicant had brought an application seeking adjournment of the proceedings for a period of 6 months in order to enable her to find suitable legal representation and also on account of a range of health problems which impacted on her ability to conduct her case. The respondent brought an application for summary dismissal on the ground that there had been a want of prosecution with due diligence. Driver FM accepted the respondent's submission that there had been a lack of progress in the matter which was likely to continue and on that basis made an interlocutory order that the proceedings be dismissed for want of prosecution.<sup>430</sup> In doing so his Honour accepted that as it was an interlocutory order it would be open to Ms Boda in the future to bring an application under rule 16.05 of the FMC Rules for the order to be set aside.<sup>431</sup>

423 [2013] FCA 109.

424 [2013] FCA 109, [13].

425 [2002] FCAFC 40.

426 *Pham v University of Queensland* [2001] FCA 1044.

427 See also *NAET of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 304, [8]; *Ogawa v The Australian Human Rights Commission & Anor* [2014] FCCA 358 and *Mathews v Queensland* [2015] FCA 1488, [44].

428 [2007] FMCA 2019.

429 [2007] FMCA 2019, [7].

430 [2007] FMCA 2019, [13].

431 [2007] FMCA 2019, [14].

## 6.15 Application for Suppression Order

Both the Federal Court<sup>432</sup> and the FCC<sup>433</sup> have the power to make a suppression order or non-publication order to prohibit or restrict the publication or other disclosure of various information relating to a proceeding before the court.

Section 37AF of the Federal Court Act provides:

The Court may, by making a suppression order or non-publication order on grounds permitted by this Part, prohibit or restrict the publication or other disclosure of:

- (a) information tending to reveal the identity of or otherwise concerning any party to or witness in a proceeding before the Court or any person who is related to or otherwise associated with any party to or witness in a proceeding before the Court; or
- (b) information that relates to a proceeding before the Court and is:
  - i. information that comprises evidence or information about evidence; or
  - ii. information obtained by the process of discovery; or
  - iii. information produced under a subpoena; or
  - iv. information lodged with or filed in the Court.

Pursuant to section 37AH of the Federal Court Act, the court may make such order on its own initiative or on the application of a party to the proceeding or any other person with sufficient interest in the making of the order.

In *CC v Djerrkura*,<sup>434</sup> 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 applied the principles formulated by courts for determining whether or not to make non-publication orders under section 50 of the Federal Court Act (a provision which is in similar terms to the former s 61 of the Federal Magistrates Act) when determining whether to make an order under s 61. In particular his Honour relied upon the principles identified by Madgwick J in *Computer Interchange Pty Ltd v Microsoft Corporation*<sup>435</sup> as governing determination of applications for non-publication orders, namely, that in deciding whether to make a non-publication order, the court must weigh the public interest of open justice against ensuring justice between the parties and it is only if the latter public interest outweighs the former that the order should be made.

Brown FM accepted that mere embarrassment to an applicant flowing from publication of her name was insufficient. However, he referred to a number of decisions in which the Federal Court had made orders suppressing the identity of the applicants under section 50 because the harm that would flow to the applicant from the publication of their identity was such that it may deter them from bringing or prosecuting their claims.<sup>436</sup>

Brown FM accepted, on the basis of the evidence before him, that the applicant may 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.<sup>437</sup>

<sup>432</sup> FCA, Pt VAA s 37AF.

<sup>433</sup> FCC Act, Pt 6A s 88F (in identical terms to that in the FCA).

<sup>434</sup> [2003] FMCA 372.

<sup>435</sup> (1999) 88 FCR 438, 442.

<sup>436</sup> *E v The Australian Red Cross Society* (1991) 27 FCR 310; *TK v Australian Red Cross Society* (1989) 1 WAR 335; *A v Minister for Immigration & Ethnic Affairs* (1994) 54 FCR 327.

<sup>437</sup> [2003] FMCA 372, [50]-[51].

In the circumstances, Brown FM ordered that identifying details of the applicant were not to be published in any publication in connection with the proceedings, or in relation to the circumstances giving rise to these proceedings.

In *Lawrance v Commonwealth*,<sup>438</sup> Smith FM rejected an application by the applicant for an anonymity order to suppress her name. He held that before he could make an order under section 61 of the Federal Magistrates Act, he had to be satisfied that suppressing her name was necessary for the purpose of preventing prejudice to the administration of justice.<sup>439</sup> In rejecting the application for an anonymity order, Smith FM found that the applicant's claims in the case did not involve confidential dealings nor matters of privacy and secrecy, which must be preserved in the interests of the administration of justice. His Honour stated that:

As in many human rights cases in this Court, the applicant seeks vindication in a judicial determination of her claims that she has suffered infringements of her human rights. In my opinion, both the general and particular interests of justice suggest that generally this should be performed in public, once the complaint has passed from the administrative forum of the Human Rights and Equal Opportunities Commission.<sup>440</sup>

In *Lawrance v Watson*,<sup>441</sup> Cameron FM noted that the applicant's submissions seeking a suppression order under section 61 relied principally on the stigma the applicant said she would suffer, if her name was published. In His Honour's view, that submission provided no adequate basis to depart from the usual practice of publishing the names of all the parties, including the applicant.<sup>442</sup> His Honour also noted that the lack of a suppression order had not inhibited the applicant from commencing many proceedings in the Federal Magistrate's Court, and that, in these circumstances, a suppression order was not necessary to prevent prejudice to the administration of justice.<sup>443</sup>

In *L v Commonwealth*,<sup>444</sup> Cameron FM granted an application for an anonymity order, despite the applicant having led no evidence to support the application. The application was granted on the basis that the proceedings were unavoidably related to another set of proceedings involving the applicant, in which an anonymity order had been granted.

In *Dye v Commonwealth Securities Limited*<sup>445</sup> the Full Court of the Federal Court initially granted an order under section 50 of the Federal Court Act suppressing the name of a female referred to in the applicant's police statement. There was a possibility that she may have been the victim of a sexual offence and the court was not in a position at that time to assess whether she was entitled to have her identity suppressed under other legislation. However, no jurisdictional foundation was provided in this regard. The Full Court subsequently vacated the suppression order.<sup>446</sup> It was noted that "the mere consideration that the evidence is of an unsavoury character is not enough" but rather, it must be necessary to prevent prejudice to the administration of justice.<sup>447</sup>

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438 [2006] FMCA 172.

439 [2006] FMCA 172, [48].

440 [2006] FMCA 172, [52].

441 [2008] FMCA 984.

442 [2008] FMCA 984, [95].

443 [2008] FMCA 984, [96].

444 [2008] FMCA 658, [85]-[86].

445 [2010] FCAFC 115.

446 *Dye v Commonwealth Securities Limited* (No.2) [2010] FCAFC 118.

447 [2010] FCAFC 118, [122]- [124]. See also *Seidler v University of NSW & Anor* [2010] FMCA 887.

## 6.16 Transfer of Proceedings Between the FCC and the Federal Court

### 6.16.1 Transfer of matters from the Federal Court to the FCC

Under section 32AB of the Federal Court Act, the Federal Court may at any time, by motion of a party,<sup>448</sup> or by its own motion,<sup>449</sup> transfer a proceeding or appeal from the Federal Court to the FCC. In determining whether to transfer a proceeding or appeal to the FCC, section 32AB(6) requires the court to have regard to the following matters:

- (a) the matters set out in the Federal Court Rules (now Federal Court Rule 27.12(3), formerly Order 82 r 7), namely:
  - i. whether the appeal or proceeding is likely to involve questions of general importance;<sup>450</sup>
  - ii. whether it would be less expensive and more convenient to the parties if the appeal or proceeding were transferred;<sup>451</sup>
  - iii. whether the appeal or proceeding would be determined more quickly in the FCC;<sup>452</sup> and the wishes of the parties;<sup>453</sup>
  - iv. whether proceedings in respect of an associated matter are pending in the FCC;
- (b) whether the resources of the FCC are sufficient to hear and determine the proceedings; and
- (c) the interests of the administration of justice.

In *Charles v Fuji Xerox Australia Pty Ltd*,<sup>454</sup> Katz J ordered that the matter be transferred from the Federal Court to the FC. Having regard to the matters set out in section 32AB(6) of the Federal Court Act his Honour stated that:

In particular, I am satisfied that the resources of that Court are sufficient to hear and determine the proceeding and to do so sooner than could be done by me. I am also satisfied that the parties will both benefit by having the proceeding heard by that Court, not only by reason of an earlier determination of the proceeding, but also by reason of reduced exposure to costs in that Court as compared to this Court.<sup>455</sup>

Similarly, in *Travers v New South Wales*,<sup>456</sup> Lehane J ordered that the matter be transferred from the Federal Court to the FCC saying that, having regard to the matters set out in section 32AB(6) of the Federal Court Act, he was satisfied that the resources of the FMC were sufficient to hear and determine the matter and that the interests of justice would be served by ordering the transfer.<sup>457</sup>

A matter cannot be transferred, however, if the applicant is seeking damages and the order for damages is, or is likely to be, greater than the jurisdictional limit of the FCC.<sup>458</sup>

In *Finch v The Heat Group Pty Ltd (No 5)*,<sup>459</sup> the Federal Court noted that while the matter had been in the Federal Court list for over three years, it was still at a stage where transfer was appropriate.

<sup>448</sup> FCR, r 27.11 (formerly O 82 r 5).

<sup>449</sup> FCR, r 1.40 (formerly O 82 r 6).

<sup>450</sup> FCR, r 27.12(3)(a) (formerly O 82 r 7(a)).

<sup>451</sup> FCR, r 27.12(3)(b) (formerly O 82, r 7(b)).

<sup>452</sup> FCR, r 27.12(3)(c) (formerly O 82, r 7(c)).

<sup>453</sup> FCR, r 27.12(3)(d) (formerly O 82, r 7(d)).

<sup>454</sup> (2000) 105 FCR 573.

<sup>455</sup> (2000) 105 FCR 573, 583 [47].

<sup>456</sup> [2000] FCA 1565 see also *Rixon v Business Parcel Express Pty Ltd* [2006] FCA 969; *Barnes v Northern Territory Legal Aid Commission* [2012] FMCA 274; *Ogawa v The Australian Human Rights Commission & Anor* [2014] FCCA 358.

<sup>457</sup> [2000] FCA 1565, [21].

<sup>458</sup> *Ogawa v Federal Magistrate Phipps* (2006) 151 FCR 311, 313 [4].

<sup>459</sup> [2016] FCA 191.

The court indicated it would have done this earlier but had formed the view that the FCC in Melbourne was in no position to accept the transfer of a case, where the estimated of the length of the trial exceeded five days a matter which was no longer of relevance as the estimated hearing time had dropped to three days. The court noted as follows:

The case involves the claim of a single individual against the company who previously employed her. It is, in my view, exactly the kind of proceeding for the disposition of which the Federal Circuit was established. It is in that court that the parties are likely to find a more expeditious and economical means of having their dispute resolved by adjudication. By contrast, the preoccupation of this court with cases of greater complexity would militate against the achievement of these outcomes. In short, I take the view that it is in the interests of the administration of justice, within the meaning of s 32AB(6)(d) of the Federal Court Act, that the proceeding be transferred to the Federal Circuit Court.<sup>460</sup>

Section 32AB(8) of the Federal Court Act prohibits an appeal of the decision of the court to transfer the matter. An attempt to appeal such a decision was found to be incompetent in *Cavar v Green Gate Pty Ltd*.<sup>461</sup>

## 6.16.2 Transfer of matters from the FCC to the Federal Court

Substantially mirroring section 32AB of the Federal Court Act, section 39 of the FCC Act provides that the FCC can, by request of a party or of its own motion,<sup>462</sup> transfer a proceeding to the Federal Court. Rule 8.02 of the FCC Rules provides that, unless the court otherwise orders, a request for transfer must be made on or before the first court date for the proceeding<sup>463</sup> and, unless the court otherwise orders, the request must be included in a response or made by application supported by affidavit.<sup>464</sup> Under section 39(3) of the FCC Act, in determining whether to transfer a proceeding to the Federal Court, the FCC is required to have regard to the following matters:

- (a) the matters set out in rule 8.02(4) of the FCC Rules, namely:
  - whether the proceeding is likely to involve questions of general importance, such that it would be desirable for there to be a decision of the Federal Court on one or more of the points in issue;<sup>465</sup>
  - whether, if the proceeding is transferred, it is likely to be heard and determined at less cost and more convenience to the parties than if the proceeding is not transferred;<sup>466</sup>
  - whether the proceedings will be heard earlier in the FCC;<sup>467</sup>
  - the availability of particular procedures appropriate for the class of proceeding;<sup>468</sup> and
  - the wishes of the parties;<sup>469</sup>
- (b) whether proceedings in respect of an associated matter are pending in the Federal Court;
- (c) whether the resources of the FCC are sufficient to hear and determine the proceeding; and
- (d) the interests of the administration of justice.

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460 [2016] FCA 191, [119].

461 [2016] FCA 82.

462 FCCR, r 8.02(1).

463 FCCR, r 8.02(2).

464 FCCR, r 8.02(3).

465 FCCR, r 8.02(4)(a).

466 FCCR, r 8.02(4)(b).

467 FCCR, r 8.02(4)(c).

468 FCCR, r 8.02(4)(d).

469 FCCR, r 8.02(4)(e).

In *Nizzari v Westpac Financial Services*,<sup>470</sup> Driver FM ordered that the matter be transferred from the FCC 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.<sup>471</sup>

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’.<sup>472</sup> His Honour further noted that the matter would be heard more quickly if it were transferred to the Federal Court,<sup>473</sup> though there was not likely to be a significant cost difference for the parties.<sup>474</sup>

Similarly, in *Mason v Methodist Ladies College*,<sup>475</sup> Lucev FM was satisfied that the matter should be transferred from the FMC to the Federal Court on the basis that the matter concerned the *Disability Standards for Education 2005* (Cth) and there were no cases on disability discrimination in education relevant to the application of that Act.<sup>476</sup> Federal Magistrate Lucev also noted this was a matter in which there were significant human rights issues at stake in relation to disability discrimination. There were also relevant international human rights conventions which may be called in aid to interpret both the AHRC Act and the DDA, read in conjunction with the *Disability Standards for Education 2005* (Cth).<sup>477</sup> For these reasons, Lucev FM was satisfied that the matter involved questions of general importance.<sup>478</sup>

In *King v Office National Ltd*<sup>479</sup> Smith FM transferred the matter from the FMC to the Federal Court for the following reasons:

- the case was going to place a strain on the resources of the FMC – the case was complex, there were likely to be a number of interlocutory hearings and the ultimate hearing was likely to be 10 days; and
- his Honour was not persuaded that he would be able to case manage the matter anymore expeditiously than the Federal Court, nor that the costs would be any less if the matter remained in the FMC.

Accordingly, Smith FM concluded that the case was better suited for case-management in the Federal Court and it was in the interests of the administration of justice that the matter be transferred.<sup>480</sup>

In *Clarke v West Australian Newspapers Ltd*<sup>481</sup> Raphael FM ordered that the matter be transferred from the Federal Magistrates Court (as it was then named) to the Federal Court. In doing so, Raphael FM considered whether the matter would be heard more quickly or at less cost if transferred to the Federal Court and found that it would not. However, Raphael FM considered the fact that both parties wished for the case to be transferred to be a significant matter weighing in favour of transferring the matter. His Honour stated:

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470 [2003] FMCA 255.

471 [2003] FMCA 255, [8].

472 [2003] FMCA 255, [12]. Cf the views expressed by the Federal Court in the cases referred to in 6.15.1 above.

473 [2003] FMCA 255, [12].

474 [2003] FMCA 255, [11].

475 [2009] FMCA 570.

476 [2009] FMCA 570, [15].

477 [2009] FMCA 570, [11].

478 [2009] FMCA 570, [15].

479 [2007] FMCA 1840, [13]–[14].

480 [2007] FMCA 1840, [15]. See the decision of Driver FM in *Warner Music Australia Pty Ltd v Swiftel* [2005] FMCA 627 for an example of a case where an application for a transfer of proceedings to the Federal Court was rejected.

481 [2010] FMCA 502.



Courts are provided so that society's disputes can be resolved in a peaceable and effective manner. Governments in Australia and elsewhere have chosen to make very significant charges for the provision of this service. The preferences of parties who are required to pay for that service should be respected, if not always indulged.<sup>482</sup>

Raphael FM also accepted the arguments of the parties that the matter was complex, that it involved issues of law which may not have been thoroughly tested in previous decisions and that those matters of law are of considerable importance to the community. Raphael FM found that these matters weighed very heavily on any decision to transfer the proceedings.<sup>483</sup>

The capacity of the Federal Magistrates Court (as it was then named) to deal with trials of five days or more has also been a factor in the courts deciding to transfer a matter to the Federal Court. For example, it seems to have been a factor in *Linke v TT Builders Pty Ltd*.<sup>484</sup>

## 6.17 Appeals from the FCC to the Federal Court

### 6.17.1 Nature of appeals

Appeals from decisions of the FCC in unlawful discrimination cases are heard either by a single judge of the Federal Court or a Full Court of the Federal Court.<sup>485</sup>

In relation to the conduct of an appeal by the Federal Court from a decision of the FMC, Marshall J stated in *Low v Commonwealth*:<sup>486</sup>

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.<sup>487</sup>

The nature of the appeal was further elaborated on by the court in *Karabassis v Deputy Commissioner of Taxation*:<sup>488</sup>

As already noted, the jurisdiction of this Court to entertain an appeal from a final decision of the Federal Magistrates Court is conferred by s 24(1)(d) of the Federal Court Act. As Marshall J has pointed out in *Low v Commonwealth of Australia* [2001] FCA 702, at [3], the appeal provided for in the present circumstances is of an intermediate kind; it is neither an appeal de novo (like the review by a Federal Magistrate of a Registrar's decision) nor an appeal stricto sensu. It is an appeal, rather, by way of rehearing. Thus, the powers of this Court, as Kenny J said in *Farrington*, (supra), at [4];

are exercisable only if the appellant can demonstrate that, having regard to the evidence before the appellate court, the judgment under appeal is a consequence of some legal, factual, or discretionary error:

482 [2010] FMCA 502 [13].

483 [2010] FMCA 502 [9].

484 [2014] FCA 672.

485 The Federal Court is given jurisdiction to hear such appeals by s 24 of the *Federal Court Act 1976* (Cth). The Court may be constituted by a single Judge or as a Full Court: s 14(1). Note, however, that there is only one level of appeal available at the Federal Court from decisions of the FCC: s 24 (1AAA) provides that there is no further right of appeal from a judgment of a single judge of the Federal Court exercising the appellate jurisdiction of the Court in relation to an appeal from the FMC.

486 [2001] FCA 702. This case has been cited with approval in cases involving appeals from the decision of a Federal Magistrate to the Federal Court under the *Migration Act 1958* (Cth): *George v Deputy Commissioner of Taxation* [2004] FCA 1433 [11]-[12]; *MZWDG v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCA 497, [29].

487 [2001] FCA 702, [3]. See also *Chung v University of Sydney* [2002] FCA 186, [40].

488 [2011] FCA 434

In the passage from *Allesch v Maunz* (2000) 203 CLR 172 at 180, it is observed, (omitting footnotes);

the critical difference between an appeal by way of rehearing and a hearing de novo is that, in the former case, the powers of the appellate court are exercisable only where the appellant can demonstrate that, having regard to all the evidence now before the appellate court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error, whereas, in the latter case, those powers may be exercised regardless of error. ... And the critical distinction, for present purposes, between an appeal by way of rehearing and an appeal in the strict sense is that, unless the matter is remitted for rehearing, a court hearing an appeal in the strict sense can only give the decision which should have been given at first instance whereas, on an appeal by way of rehearing, an appellate court can substitute its own decision based on the facts and the law as they then stand.<sup>489</sup>

Despite the broader nature of appeals conducted by way of re-hearing it will only be in exceptional circumstances that an appellant will be permitted to raise a point on appeal that was not raised at first instance. This was confirmed by French J in *WAJR v Minister for Immigration and Multicultural & Indigenous Affairs*.<sup>490</sup> In this case, his Honour found that the circumstances in the case before him were exceptional because the appellant was unrepresented and seriously disadvantaged when he formulated his case before the Federal Magistrate and the new grounds that had been formulated by counsel for the appellant were coherent and were not objected to by the respondent.<sup>491</sup> His Honour therefore granted the appellant leave to amend his grounds of appeal to raise factual issues that were not raised before the Federal Magistrate.<sup>492</sup>

## 6.17.2 Appeal of a decision on an interlocutory application

Pursuant to section 24(1A) and section 24(1D) of the Federal Court Act, an appeal must not be brought from a judgement that is an interlocutory judgement, unless the court or a judge gives leave to appeal. Interlocutory judgement includes summary dismissal by the FCC and the Federal Court.<sup>493</sup>

The nature of such an application has been described as follows:

The principles governing the grant of leave to appeal from an interlocutory judgment are well established and are not in dispute. They are largely reflected in the following passage from the Full Court's decision in *Décor Corporation Pty Ltd v Dart Industries Inc* [1991] FCA 655; (1991) 33 FCR 397 at 398-399:

The first test, which relates to the prospects of the proposed appeal, is "whether, in all the circumstances, the decision is attended with sufficient doubt to warrant its being reconsidered by the Full Court". The second "is whether substantial injustice would result if leave were refused, supposing the decision to be wrong.

...

In my opinion, the sufficiency of the doubt in respect of the decision and the question of substantial injustice should not be isolated in separate compartments. They bear upon each other, so that the degree of doubt which is sufficient in one case may be different from that required in another. Ultimately, a discretion must be exercised on what may be a fine balancing of considerations. (citations omitted)"

A further relevant principle is that, where the practical effect of an interlocutory order is final, leave will usually be granted if there is any doubt about the decision at first instance (see *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2000] FCA 1572; (2000) 104 FCR 564 at [43]). It is also appropriate to note that in a case

489 [2011] FCA 434, [14] and [15] (references omitted) and *Farrington v Deputy Commissioner of Taxation* (2002) 50 ATR 429.

490 [2004] FCA 106, [18].

491 [2004] FCA 106, [19].

492 [2004] FCA 106, [19].

493 FCA, s 24(1D)(b), (ca).

where an applicant for leave is a self-represented litigant, the Court must be alert to ensure that there may be an arguable error of law which, with appropriate amendment or permissible assistance, could be put into proper form (see *Atieh v Civil Aviation Safety Authority* [2013] FCA 20 at [18]) per McKerracher J.)<sup>494</sup>

### 6.17.3 Extension of time for filing appeals

#### (a) Principles to be applied

An appeal against a final decision of a Federal Magistrate to the Federal Court or against a final decision of a single judge of the Federal Court to the Full Court of the Federal Court must be filed within 21 days after the date on which the judgment the subject of the appeal was given.<sup>495</sup> The Federal Court Rules give the Federal Court the power to give leave to file an appeal out of time.<sup>496</sup>

In *Gauci v Kennedy*,<sup>497</sup> Collier J applied the principles set out by Wilcox J in *Hunter Valley Developments Pty Ltd v Cohen*<sup>498</sup> when determining an application for extension of time to file an appeal. Collier J summarised the principles as follows:

1. applications for an extension of time are not to be granted unless it is proper to do so; the legislated time limits are not to be ignored. The applicant must show an 'acceptable explanation for the delay'; it must be 'fair and equitable in the circumstances' to extend time
2. action taken by the applicant, other than by way of making an application for review, is relevant to the consideration of the question whether an acceptable explanation for the delay has been furnished
3. any prejudice to the respondent in defending the proceedings that is caused by the delay is a material factor militating against the grant of an extension
4. however, the mere absence of prejudice is not enough to justify the grant of an extension
5. the merits of the substantial application are to be taken into account in considering whether an extension of time should be granted.<sup>499</sup>

Collier J granted the applicant an extension of time to file his notice of motion seeking leave to appeal Jarrett FM's decision to summarily dismiss his discrimination application. Her Honour held that whilst the applicant's reasons for the delay were 'barely adequate', the second respondent had not suffered any 'substantial' prejudice as a result of the delay, and the case before Jarrett FM could not be said to be 'so very clear' as to justify summary dismissal.<sup>500</sup>

#### (b) Examples of cases in which applications for leave to appeal out of time have been made

In *Horman v Distribution Group Ltd*,<sup>501</sup> 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 affairs so far as the legal

494 *Margan v Australian Human Rights Commission* [2013] FCA 612 [34]-[35]

495 Federal Court Rules 36.01 and 36.03 (formerly O 52 r 15(1)(a)). Section 24(1)(d) of the Federal Court Act gives the Federal Court the jurisdiction to hear and determine appeals against the decision of the FCC and s 24(1)(a) of the Federal Court gives the Court jurisdiction to hear an appeal against the decision of a single judge of the Federal Court.

496 FCR, r 36.05 (formerly O 52 r15(2))

497 [2006] FCA 869.

498 (1984) 3 FCR 344. These principles were adopted by the Full Court in *Parker v R* [2002] FCAFC 133, [6] and have been applied in subsequent cases such as *Munswamy v Australian Postal Corporation* [2016] FCA 116, *Johnson v Monti-Haitsma Enterprises Pty Ltd (in external administration)* [2014] FCA 906.

499 *Gauci v Kennedy* [2006] FCA 869, [21].

500 [2006] FCA 869, [29]-[30], [44].

501 [2002] FCA 219.

representation of the applicant is concerned.<sup>502</sup> His Honour said the circumstances went ‘well beyond error’, suggesting rather ‘a lack of diligence on the part of the lawyers representing the applicant’.<sup>503</sup>

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:

If 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.<sup>504</sup>

In *Kennedy v ADI Ltd*,<sup>505</sup> 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.<sup>506</sup>

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’.<sup>507</sup>

In *Jandruwanda v University of South Australia*,<sup>508</sup> 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.<sup>509</sup>

In *Foster v Queensland*,<sup>510</sup> an application for leave to appeal was made 14 days out of time. Greenwood J held that three important considerations justified granting an extension of time in that case: first that there were a number of applicants; second that the applicants lived in a remote community where ‘the orthodoxy of access and communication accepted within concentrated metropolitan communities does not apply’; and third that the issues had to be explained to each applicant and instructions taken from each individual resident in a remote community.<sup>511</sup>

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502 [2002] FCA 219, [22].

503 [2002] FCA 219, [24].

504 [2002] FCA 219, [25].

505 [2002] FCA 1603.

506 [2002] FCA 1603, [11], [13].

507 [2002] FCA 1603, [11]–[12].

508 [2003] FCA 1456.

509 [2003] FCA 1456, [13]–[14].

510 [2006] FCA 1680.

511 [2006] FCA 1680, [52]. See also *Penhall-Jones v State of NSW (Ministry of Transport)* [2008] FCA 1122.

## 6.18 Approach to Statutory Construction of Unlawful Discrimination Laws

Remedial legislation, such as the RDA, SDA, DDA and ADA, which is designed to prevent discrimination and protect human rights should be construed beneficially and not narrowly.<sup>512</sup> Furthermore, in construing such legislation the courts have a special responsibility to take account of and give effect to the objects and purposes of such legislation.<sup>513</sup> In accordance with this principle, exemptions and other provisions which restrict rights conferred by such legislation are strictly construed by Australian courts.<sup>514</sup>

It is also a well-established principle of the common law that statutes are to be interpreted and applied, as far as their language permits, so as to be in conformity with the established rules of international law and in a manner which accords with Australia's international treaty obligations.<sup>515</sup> The courts have also accepted that the meaning of provisions in a statute implementing a convention or conventions is to be ascertained by reference to the relevant provisions of that convention or those conventions.<sup>516</sup> This is particularly relevant in the case of unlawful discrimination laws which implement, in part, conventions such as ICERD, CEDAW, the ICCPR and ICESCR.

In interpreting the meaning of relevant convention provisions, it is necessary to refer to the rules applicable to the interpretation of treaties, particularly the *Vienna Convention on the Law of Treaties*<sup>517</sup> (Vienna Convention). Recourse may also be had to their interpretation by expert international bodies responsible for considering States Parties' implementation of human rights treaties.<sup>518</sup> Such bodies are generally responsible for considering reports prepared by States Parties on the legislative, judicial, administrative or other measures adopted to give effect to their obligations and have the power to make 'suggestions and general recommendations' based on that material.<sup>519</sup> The General Recommendations

- 512 *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359 (Mason CJ and Gaudron J, Deane J agreeing), 372 (Brennan J), 394 (Dawson and Toohey JJ), 406-407 (McHugh J); *Australian Iron & Steel v Banovic* (1989) 168 CLR 165, 196-7 (McHugh J); *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 332 [151] (Kirby J); *New South Wales v Amery* (2006) 230 CLR 174, 215 [138] (Kirby J); *Baird v Queensland* (2006) 156 FCR 451, 468 [60] (Allsop J, Spender J agreeing).
- 513 *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359 (Mason CJ and Gaudron J); *IW v City of Perth* (1997) 191 CLR 1, 14 (Brennan CJ and McHugh J), 22-23 (Gaudron J), 27 (Toohey), 39 and 41-42 (Gummow J), 58 (Kirby J); *X v Commonwealth* (1999) 200 CLR 177, 223 [147] (Kirby J); *New South Wales v Amery* (2006) 230 CLR 174, 215 [138] (Kirby J). See also s 15AA of the *Acts Interpretation Act 1901* (Cth).
- 514 *X v Commonwealth* (1999) 200 CLR 177, 223 [146]-[147] (Kirby J); *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 333 [151] and footnotes 168-169 (Kirby J). This approach has been applied to Part II, Division 4 of the SDA in *Gardner v All Australia Netball Association Ltd* [2003] FMCA 81, [19], 34 [23]-[24]; *Ferneley v Boxing Authority of New South Wales* (2001) 115 FCR 306, 325 [89].
- 515 *Jumbunna Coal Mine NL v Victorian Coalminers' Association* (1908) 6 CLR 309, 363 (O'Connor J); *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J); *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 384 [97] (Gummow and Hayne JJ). See also, D Pearce and R Geddes, *Statutory Interpretation in Australia*, (6<sup>th</sup> ed, 2006), [5.16]. *Maloney v R* (2013) 252 CLR 168.
- 516 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 264-265 (Brennan J); *Gerhardy v Brown* (1985) 159 CLR 70, 124 (Brennan J); *Qantas v Christie* (1998) 193 CLR 280, 303-305 [69]-[72] (McHugh J), 332-333 [151] (Kirby J). It has been held that approach is not confined in its application to ambiguous statutory provisions: *X v Commonwealth* (1999) 200 CLR 177, 223 [147] (Kirby J); *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 333 [151] and footnotes 168-169 (Kirby J).
- 517 Opened for signature 10 May 1969, 1155 UNTS 331 (entered into force 27 January 1980). See D Pearce and R Geddes, *Statutory Interpretation in Australia*, (6<sup>th</sup> ed, 2006), [2.16] and the cases cited therein. In *AB v Registrar of Births, Deaths & Marriages* (2007) 162 FCR 528, 550 [80] Kenny J (with whom Gyles J agreed) had regard to the Vienna Convention when interpreting s 9(10) of the SDA.
- 518 For example, the CEDAW Committee, which considers reports by States Parties on the legislative, judicial, administrative or other measures adopted to give effect to CEDAW and the progress made by States Parties in that respect. The CERD Committee has a similar responsibility for monitoring States Parties' progress in implementing ICERD.
- 519 See, for example, in relation to the CEDAW Committee, arts 18 and 21(1) of CEDAW. In relation to the CERD Committee, see art 9 of ICERD.

made by those committees are interpretive comments which further develop analysis of the relevant convention provisions and are aimed at guiding States Parties as to the best ways in which to implement their human rights obligations at the domestic level. In addition, some expert committees are also responsible for considering communications from individuals, or groups of individuals claiming to be victims of a violation of their convention rights by a State Party.

While the General Recommendations and decisions made by expert committees are not binding on Australian courts,<sup>520</sup> they are significant, being those of a committee composed of experts from a wide range of countries.<sup>521</sup> It has been suggested that decisions of bodies such as the UN Human Rights Committee in relation to communications brought under the ICCPR are of 'considerable persuasive authority'<sup>522</sup> or 'highly influential, if not authoritative'<sup>523</sup> or 'may usefully direct attention to possible arguments about how the RDA should be construed'.<sup>524</sup> Australian courts have accepted that guidance as to the meaning and effect of international conventions may be gathered from the writings and decisions of such bodies.<sup>525</sup>

In addition to the decisions of expert committees courts have also had regard to preparatory work in relation to conventions. In *AB v Registrar of Births, Deaths and Marriages*<sup>526</sup> Kenny J (with whom Gyles J agreed) noted that pursuant to the Vienna Convention, recourse may be had to the preparatory work of a treaty and the circumstances of its conclusion and had regard to preparatory work done in relation to CEDAW when considering whether a provision in the SDA gave effect to the Convention for the purposes of section 9(10) of the SDA.<sup>527</sup>

## 6.19 Standard of Proof in Discrimination Matters

The complainant bears the onus of proof in establishing a complaint of unlawful discrimination. The application of the standard of proof in relation to allegations of discrimination has been the subject of

<sup>520</sup> *Maloney v R* (2013) 252 CLR 168.

<sup>521</sup> H Burmester, 'Impact of Treaties and International Standards' (1995) 17 *Sydney Law Review* 127, 145.

<sup>522</sup> *Nicholls v Registrar Court of Appeal* [1998] 2 NZLR 385, 404 (Eichelbaum CJ). See also R Rishworth 'The Rule of International Law' in G Hushcroft and R Rishworth, *Litigating Rights: Perspectives from Domestic and International Law* (2002), 267-279, 275.

<sup>523</sup> E Evatt 'The Impact of International Human Rights on Domestic Law' in Hushcroft and Rishworth above n 388, 281-303, 295. See also S Joseph et al, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2<sup>nd</sup> ed, 2004), 24 [1.51].

<sup>524</sup> *Maloney v R* (2013) 252 CLR 168, 198, [61].

<sup>525</sup> *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 392 (Mason CJ), 396-397 and 399-400 (Dawson J), 405 (Toohey J), 416 (Gaudron J), 430 (McHugh J); *Somaghi v Minister for Immigration, Local Government & Ethnic Affairs* (1991) 31 FCR 100, 117 (Gummow J); *Commonwealth v Hamilton* (also cited as *Commonwealth of Australia v Human Rights & Equal Opportunity Commission*) (2000) 108 FCR 378, 388 (Katz J); *Commonwealth v Bradley* (1999) 95 FCR 218, 237 (Black CJ). Note also *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 294-295 (Lord Scarman). For references to the jurisprudence of human rights treaty bodies see *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42 (Brennan J, Mason CJ and McHugh J agreeing); *Dietrich v The Queen* (1992) 177 CLR 292, 307 (Mason CJ and McHugh J); *Johnson v Johnson* (2000) 201 CLR 488, 501, [38] (Kirby J); *Commonwealth v Bradley* (1999) 95 FCR 218, 237 (Black CJ); *Commonwealth v Hamilton* (also cited as *Commonwealth of Australia v Human Rights & Equal Opportunity Commission*) (2000) 108 FCR 378, 387 [36] (Katz J); *Minister for Immigration and Multicultural & Indigenous Affairs v Al Masri* (2003) 126 FCR 54. *Minister for Immigration and Border Protection v WZAPN; WZARV v Minister for Immigration and Border* (2015) 254 CLR 610; A number of internet links that may be of assistance in researching international human rights and discrimination material can be found at <<http://www.humanrights.gov.au/about/links/index.html#legal>>.

<sup>526</sup> (2007) 162 FCR 528.

<sup>527</sup> (2007) 162 FCR 528, 553-554 [88]-[90].



frequent discussion in the case law. In particular, the courts have considered the manner in which the test in *Briginshaw v Briginshaw*<sup>528</sup> 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.<sup>529</sup>

The essence of 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.<sup>530</sup> It is clear from Dixon J's statement that there is no 'higher standard of proof'.<sup>531</sup> Similarly, it would not appear to be strictly correct to speak of 'invoking', or 'resorting to', the 'principle in *Briginshaw*':<sup>532</sup> The principle is to be applied in all cases.

In *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*,<sup>533</sup> Mason CJ, Brennan, Deane and Gaudron JJ, after reviewing the authorities, made the following statement about the *Briginshaw* principle:

The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains even so where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary 'where so serious a matter as fraud is to be found'. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.<sup>534</sup>

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528 (1938) 60 CLR 336.

529 (1938) 60 CLR 336, 361-362.

530 See, for example, *X v McHugh (Auditor-General for the State of Tasmania)* [1994] HREOCA 15 (extract at (1994) EOC 92-623): 'any allegation requires that degree of persuasive proof as is appropriate to the seriousness of the allegation'.

531 See *Rejcek v McElroy* (1965) 112 CLR 517, 521-522 (Barwick CJ). This terminology is, however, sometimes used. See, for example, *Sharma v Legal Aid Queensland* [2001] FCA 1699, [40].

532 As the Full Federal Court appears to do, for instance, in *Victoria v Macedonian Teachers' Association of Victoria Inc* (1999) 91 FCR 47, 50-51.

533 [1992] HCA 66.

534 (1992) 110 ALR 449, 449-450 (footnotes omitted).



Varying approaches have been taken to the application of the *Briginshaw* principle in previous RDA,<sup>535</sup> SDA<sup>536</sup> and DDA<sup>537</sup> cases.<sup>538</sup>

However, the application of *Briginshaw* in discrimination matters appears to have now been settled by the Full Federal Court in *Qantas Airways Ltd v Gama*<sup>539</sup> ('*Gama*'). This was an appeal and a cross-appeal against the decision of Raphael FM in relation to a race and disability discrimination complaint. Justice Branson<sup>540</sup> (French and Jacobson JJ agreeing)<sup>541</sup> outlined a number of guiding principles in relation to the application of *Briginshaw* and the standard of proof, which, in essence, confirms that discrimination complaints should be approached no differently to other civil matters. In particular, courts should not approach discrimination matters with a presumption that they are of such 'seriousness' that a higher standard of evidence is required.

Her Honour observed that the use of expressions such as 'the *Briginshaw* test' or 'the *Briginshaw* standard' should be avoided 'because of its tendency to mislead'.<sup>542</sup> Rather, section 140 of the *Evidence Act 1995* (Cth) (Evidence Act) sets out the rules governing the standard of proof in all civil matters, including discrimination cases<sup>543</sup> and confirms that the standard of proof is the balance of probabilities.<sup>544</sup>

Section 140 provides as follows:

Civil proceedings: standard of proof

- (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
- (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
  - (a) the nature of the cause of action or defence; and
  - (b) the nature of the subject-matter of the proceeding; and
  - (c) the gravity of the matters alleged.

In deciding the strength of the evidence required to satisfy the court to the requisite standard of proof, the court has to take into account the three matters specifically referred to in section 140(2).

535 *Victoria v Macedonian Teachers' Association of Victoria Inc* (1999) 91 FCR 47; *D'Souza v Geyer* [1996] HREOCA 4; *Ebber v Human Rights & Equal Opportunity Commission* (1995) 129 ALR 455; *Sharma v Legal Aid Queensland* [2001] FCA 1699, [62]; *Sharma v Legal Aid Queensland* [2002] FCAFC 196, [40] and *Batzialas v Tony Davies Motors Pty Ltd* [2002] FMCA 243, [87].

536 *Harris v Hingston* [1992] HREOCA 20; *Wiggins v Department of Defence – Navy* [1994] HREOCA 15 (extract at (1994) EOC 92-623); *Correia v Juergen Grundig* [1995] HREOCA 19; *Patterson v Hookey* [1996] HREOCA 35; *Dobrovsk v AR Jamieson Investments Pty Ltd* [1995] HREOCA 32 (extract at (1996) EOC 92-794); *McAlister v SEQ Aboriginal Corporation* [2002] FMCA 109, [39], [70]; *Wattle v Kirkland* [2001] FMCA 66, [34], [35]; *Kirkland v Wattle* [2002] FCA 145, [5]; *Wattle v Kirkland (No.2)* [2002] FMCA 135, [45]; *Font v Paspaley Pearls Pty Ltd* [2002] FMCA 142, [121], [127]; *Daley v Barrington* [2003] FMCA 93, [28]; *Fenton v Hair & Beauty Gallery Pty Ltd* [2006] FMCA 3; *Ilian v ABC* (2006) 236 ALR 168.

537 *X v McHugh (Auditor-General for the State of Tasmania)* (1994) EOC 92-623; *Penhall-Jones v New South Wales (No 2)* [2006] FMCA 927, [122]; *Applicant N v Respondent C* [2006] FMCA 1936, [28]-[29], [31]; *Wiggins v Department of Defence – Navy* [2006] FMCA 800, [52]; *Tyler v Kesser Torah College* [2006] FMCA 1, [100]; *Hollingdale v North Coast Area Health Service* [2006] FMCA 5, [138].

538 For discussion see L De Plevitz, 'The *Briginshaw* "Standard of Proof" in Anti-Discrimination Law: "Pointing With a Wavering Finger"', (2003) 27 *Melbourne University Law Review*, 308; Jonathon Hunyor, 'Skin-deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25 *Sydney Law Review* 537.

539 (2008) 167 FCR 537. The Commission was granted leave to appear as intervener in the appeal and its submissions are available at <[http://www.humanrights.gov.au/legal/submissions\\_court/intervention/qantas\\_v\\_gama.html](http://www.humanrights.gov.au/legal/submissions_court/intervention/qantas_v_gama.html)> and <[http://www.humanrights.gov.au/legal/submissions\\_court/intervention/gama.html](http://www.humanrights.gov.au/legal/submissions_court/intervention/gama.html)>.

540 (2008) 167 FCR 537, 573-576, [122]-[139].

541 (2008) 167 FCR 537, 571, [110].

542 (2008) 167 FCR 537, 573, [123].

543 (2008) 167 FCR 537, 574-575, [127], [132].

544 (2008) 167 FCR 537, 575, [132].

First, the court must have regard to the ‘nature of the cause of action’.<sup>545</sup> Her Honour noted that as the gravity of the matters alleged is the third matter referred to in section 140(2) ‘it may be assumed that this is not the primary concern of the reference to the nature of the cause of action’.<sup>546</sup>

Second, the court must take account of the ‘subject matter of the proceeding’.<sup>547</sup>

Third, the court must consider the ‘gravity of the matter alleged’.<sup>548</sup>

In addition to the matters referred to in section 140(2), Branson J stated that the court may also take into account any other matter relevant to determining whether a case has been proven to the requisite standard. Her Honour gave the following examples of other such relevant matters:

- the inherent unlikelihood, or otherwise, of the occurrence of the matter of fact alleged; and
- ‘the long standing common law rule that evidence is to be weighed according to the proof which it was in the power of one party to produce and the power of other party to contradict’.<sup>549</sup>

Her Honour summed up the position in respect of the application of the standard of proof as follows:

... in my view, for the reasons given above, references to, for example, ‘the *Briginshaw* standard’ or ‘the onerous *Briginshaw* test’ and, in that context, to racial discrimination being a serious matter not lightly to be inferred, have a tendency to lead a trier of facts into error. The correct approach to the standard of proof in a civil proceeding in a federal court is that for which s 140 of the Evidence Act provides. It is an approach which recognises, adopting the language of the High Court in *Neat Holdings*, that the strength of the evidence necessary to establish a fact in issue on the balance of probabilities will vary according to the nature of what is sought to be proved - and, I would add, the circumstances in which it is sought to be proved.<sup>550</sup>

The decision in *Gama* therefore confirms that not all cases of racial discrimination will be of such gravity or seriousness as to require evidence of a higher persuasive value and it is necessary to consider the facts of each case to determine what evidence is necessary to satisfy the court on the balance of probabilities. The decision also confirms that the appropriate starting point for applying the standard of proof is s140 of the Evidence Act, rather than the decision in *Briginshaw*. The guidance provided in *Gama* has been followed in subsequent cases albeit in different contexts.<sup>551</sup>

Whilst the reasoning in *Gama* was primarily concerned with a complaint of racial discrimination, the reasoning is equally applicable to complaints of disability, age or sex discrimination. For example, in *Penhall-Jones v State of NSW*,<sup>552</sup> the reasoning of the Full Federal Court was applied by Raphael FM to a disability discrimination case.<sup>553</sup>

## 6.20 Contempt of Court

If a person disobeys a court order the Federal Court has the power to punish that person for contempt of court. In *Jones v Toben*<sup>554</sup> the court’s power to punish contempt was used to penalise Dr Frederick

545 Evidence Act, s 140(2)(a).

546 [2008] FCAFC 69, [133].

547 Evidence Act, s 140(2)(b).

548 Evidence Act, s 140(2)(c).

549 (2008) 167 FCR 537, [138].

550 (2008) 167 FCR 537, [139].

551 *Australian Competition and Consumer Commission v Energy Watch Pty Ltd* [2012] FCA 425, *Ashby v Slipper* (2014) 219 FCR 322.

552 [2008] FMCA 832.

553 [2008] FMCA 832, [5]-[12].

554 [2009] FCA 354.

Toben for repeatedly disobeying court orders not to publish material that contravened section 18C of the RDA.

In *Jones v Toben*<sup>555</sup> Justice Lander declared Dr Toben was guilty of wilful and contumacious contempt of court on 24 occasions by publishing anti-Semitic material in contravention of orders made by Justice Branson in 2002 and an undertaking by Dr Toben to Justice Moore in 2007 that Dr Toben would comply with Justice Branson's orders.<sup>556</sup>

Section 31(1) of the Federal Court Act provides that the Federal Court has the same power to punish contempt as the High Court. In his review of the authorities on contempt, Justice Lander stated:

The law recognises a distinction between civil and criminal contempts. A civil contempt usually involves disobedience to a court order or a breach of an undertaking. On the other hand, a criminal contempt is committed where there is contempt in the face of the court or an interference with the administration of justice.<sup>557</sup>

His Honour noted that a civil contempt may be classed as a criminal contempt if there has been a contumacious defiance of the court's order or an undertaking given to the court.<sup>558</sup>

His Honour stated that Dr Toben's conduct was 'one of publically expressed deliberate and calculated disobedience to the orders made by this court and the undertakings given to the court'<sup>559</sup> His Honour concluded:

The Courts have held, but [Dr Toben's] conduct shows he does not accept, that the freedom of speech citizens of this country enjoy does not include the freedom to publish material calculated to offend, insult or humiliate or intimate people because of their race, colour or national or ethnic origin. His conduct has been proved to be wilful and contumacious because he has steadfastly refused to comply with a law of the Commonwealth Parliament and refused to recognise the authority of this court.<sup>560</sup>

In a separate judgment on the question of the appropriate penalty to be imposed for 24 counts of contempt Justice Lander observed that the applicant was entitled to expect that the court would do what is necessary to require Dr Toben to comply with the orders restraining him from continuing to unlawfully publish material that is likely to offend, insult, humiliate or intimidate people or a group of people because of their race or nationality or ethnic origin.<sup>561</sup> His Honour stated:

The Court has the duty of ensuring that its orders are complied with. If its orders can be disobeyed with impunity, public confidence in the administration of justice will be undermined. There is therefore not only Mr Jones' private interest that must be considered but the public interest in protecting 'the effective administration of justice by demonstrating that the court's orders will be enforced': *AMIEU v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 107.

His Honour concluded that a sentence of imprisonment, although a sentence of last resort, was required because of the seriousness of Dr Toben's conduct and his repeated refusal to recognise the authority of the court.<sup>562</sup>

555 [2009] FCA 354.

556 For a discussion of the decision of Branson J in *Jones v Toben* [2002] FCA 1150 see 3.4.6. It is noted that Justice Lander rejected Dr Toben's argument that the orders of Justice Branson should be read subject to the ongoing application of the exemptions in s 18D of the RDA. This was because the issue in contempt proceedings was whether Dr Toben complied with Justice Branson's orders. Justice Lander found the application of s18D was irrelevant to that inquiry and, in any event, no evidence was tendered to bring Dr Toben within the exemption in s 18D: *Jones v Toben* [2009] FCA 354 [93], [95], [97], [101].

557 [2009] FCA 354 [68].

558 [2009] FCA 354, [71] citing *Mudginberri Station* (1986) 161 CLR 98.

559 [2009] FCA 354, [298].

560 [2009] FCA 354, [300].

561 *Jones v Toben* (No.2) [2009] FCA 477, [75].

562 [2009] FCA 477, [84]-[89].

Justice Lander made orders that Dr Toben pay the applicant's costs on a party and party basis and be imprisoned for a period of three months.<sup>563</sup> Dr Toben appealed to the Full Federal Court against the orders of Justice Lander. At the time of writing, the outcome of this appeal had not been determined.

## 6.21 Miscellaneous Procedural and Evidentiary Matters

### 6.21.1 Request for copy of transcript

The FCC has, on a number of occasions, ordered that an applicant be provided with a free copy of the transcript of proceedings, even going so far as to say that it is the policy of the FMC to provide a copy of the transcript without charge, where an appellant can indicate that hardship would be suffered, if they are required to pay for the transcript.<sup>564</sup> In *Dranichnikov* Baumann FM dismissed an application for review of a refusal by a Registrar of the FMC to provide the applicant free of charge with a transcript of the original hearing of unlawful discrimination proceedings that he had appealed against. 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 section 102 of the Federal Magistrates Act.<sup>565</sup> As a result, his Honour found that the decision was not reviewable under the relevant review provisions.<sup>566</sup>

In *Bahonko v Sterjov*,<sup>567</sup> Gordon J made an order that the appellant be provided, at the expense of the court, with the transcript of the evidence given by certain witnesses in the proceedings at first instance because the Full Court would need the transcript of evidence to determine the appeal and it 'would therefore facilitate the conduct of the Appeal if all participants in the Appeal were provided with a copy of the transcript of the evidence'.<sup>568</sup>

### 6.21.2 Unrepresented litigants

It is well established that the courts are under a particular duty in relation to an unrepresented litigant to ensure fairness in the proceedings. In *Barghouthi v Transfield Pty Ltd*<sup>569</sup> ('*Barghouthi*'), 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 FMC. The FMC 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 unhelpful',<sup>570</sup> 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].<sup>571</sup>

563 [2009] FCA 477, [85], [90].

564 *Dranichnikov v Department of Immigration & Multicultural Affairs* [2002] FMCA 72.

565 [2002] FMCA 72, [8]-[11]. Section 102 lists all of the powers of the FMC which may be exercised by a Registrar. The provision of a transcript to a party does not form part of that list.

566 Section 104(2) of the Federal Magistrates Act provides that a party to proceedings in which a Registrar has exercised any of the powers under s 102 may apply to the FMC for review of that exercise of power.

567 [2007] FCA 1556.

568 [2007] FCA 1556, [5].

569 (2002) 122 FCR 19.

570 (2002) 122 FCR 19, 23 [9].

571 (2002) 122 FCR 19, 23 [9]-[10].

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'.<sup>572</sup> 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 of one week's salary.

The decision in *Barghouthi* and the two cases referred to in *Barghouthi - Awan v Minister for Immigration & Multicultural & Indigenous Affairs*<sup>573</sup> and *Minogue v Human Rights & Equal Opportunity Commission*<sup>574</sup> - were cited and considered by Justice Bell in *Tomasevic v Travaglini*.<sup>575</sup> In *Tomasevic* Justice Bell also reviewed a number of other criminal and civil cases that had considered the level of assistance that judges should provide to unrepresented litigants. After reviewing the relevant authorities his Honour summarised the principles governing the assistance to be provided to unrepresented litigants as follows:

Every judge in every trial, both criminal and civil, has an overriding duty to ensure the trial is fair. A fair trial is the only trial a judge can judicially conduct. The duty is inherent in the rule of law and the judicial process. Equality before the law and equal access to justice are fundamental human rights specified in the ICCPR. The proper performance of the duty to ensure a fair trial would also ensure those rights are promoted and respected.

Most self-represented persons lack two qualities that competent lawyers possess — legal skill and ability, and objectivity. Self-represented litigants therefore usually stand in a position of grave disadvantage in legal proceedings of all kinds. Consequently, a judge has a duty to ensure a fair trial by giving self-represented litigants due assistance. Doing so helps to ensure the litigant is treated equally before the law and has equal access to justice.

The matters regarding which the judge must assist a self-represented litigant are not limited, for the judge must give such assistance as is necessary to ensure a fair trial. The proper scope of the assistance depends on the particular litigant and the nature of the case. The touchstones are fairness and balance. The assistance may extend to issues concerning substantive legal rights as well as to issues concerning the procedure that will be followed. The Family Court of Australia has enunciated useful guidelines on the performance of the duty.

The judge cannot become the advocate of the self-represented litigant, for the role of the judge is fundamentally different to that of an advocate. Further, the judge must maintain the reality and appearance of judicial neutrality at all times and to all parties, represented and self-represented. The assistance must be proportionate in the circumstances — it must ensure a fair trial, not afford an advantage to the self-represented litigant.<sup>576</sup>

Although *Tomasevic* was a criminal matter, as Justice Bell's summary of the principles was, in part, based on decisions in unlawful discrimination matters and other civil matters in the Federal Court, the above principles are likely to be relevant to unlawful discrimination proceedings.

In *Bahonko v Sterjov*,<sup>577</sup> the Full Court of the Federal Court held that whilst courts should provide assistance to unrepresented litigants in an attempt to ensure that they are not disadvantaged this does not justify 'lack of proper attention to the interests of other parties'.<sup>578</sup> Further, the court said:

572 (2002) 122 FCR 19, 25 [16].

573 (2002) 120 FCR 1.

574 (1999) 84 FCR 438.

575 (2007) 17 VR 100.

576 [2007] VSC 337, [139]-[142].

577 (2008) 166 FCR 415.

578 (2008) 166 FCR 415, [6].

It provides no reason to permit procedural or other conduct outside the standards of behaviour reasonably expected when a litigant exercises a right of access to this Court and its processes...<sup>579</sup>

In deciding an application for summary dismissal, Judge Jones in *Christie v Woolworths Limited*<sup>580</sup> having considered the relevant authorities including those of the Full Court of the Federal Court in *SZRUR v Minister for Immigration and Border Protection* [2013] FCAFC 146, and the Full Court of the Supreme Courts of WA and NSW, levelled criticism at the respondent in relation to its stance regarding an unrepresented litigant's case and declined to apply the rules of the Federal Court in the circumstances. Judge Jones found as follows:

It is manifestly clear to me that, notwithstanding the effort the applicant has made in redrafting his original Statement of Claim, he does not have the capacity to prepare a Statement of Claim that conforms in all respects with the requirement of Rule 16.02 of the *Federal Court Rules 2011*. This is not intended to be a criticism of him but an acceptance of the applicant's particular circumstances.

The Amended Statement of Claim is not expressed clearly. I suspect the applicant has difficulty connecting the facts and circumstances that he relies on with the elements of the contraventions of the General Protection provisions of the Act that he alleges. I have no doubt that the issue the applicant wishes to identify are obfuscated by the density of his narrative and somewhat clumsy English expression. I observe that the applicant tends to become somewhat distracted by unnecessary and unrelated references when making submissions. I am satisfied that this is not deliberate but rather reflects his own idiosyncratic style.

I do not agree with the respondent's unfortunate view that the applicant's Amended Statement of Claim "is replete with nonsensical diatribe." It seems to me that the respondent has focused on the form and expression of the contents of the Amended Statement of Claim, largely based on its misconceived view that this is a Court of strict pleadings, rather than make the effort (and I accept this would require a deal of effort) to identify from the body of the Amended Statement of Claim, the issues the applicant wants the Court to resolve and the facts the applicant relies on to support his claim. I must say, having heard from the applicant and observed him during these proceedings, I am at a loss to understand why the applicant was ordered to file and serve a Statement of Claim.

Rule 1.03(3) provides that this Court should apply the rules in accordance with the objects of the Rules. Those objects (which reflect the objects of the FCCA Act) provide that the Court should operate as informally as possible with the purpose of providing just and economic resolution of issues in dispute.

No doubt where litigants are corporate bodies or legally represented, the application of the Federal Court Rules (including those rules relating to the content of the statement of claim and strike out) may well be appropriate where this Court's Rules are silent.

In the present circumstances, the applicant is self-represented and, in my view, is not capable unaided of drawing up a pleading that necessarily identifies with precision the elements of his cause of action (contraventions of the General Protections provisions of the Act). I am satisfied that to require the applicant to produce a Statement of Claim that is in conformity with the relevant rules of the *Federal Court Rules 2011*, may well deprive the applicant of the opportunity to have his claims determined in accordance with the law: *Wentworth v Rogers*.

Consequently, I find that, in accordance with s.43(2) of the FCCA Act, rule 16.21(1) *Federal Court Rules 2011*, can only be applied with significant modification so that the pleading in question must, on a fair reading, identify in general terms the issues that the party wants the Court to resolve, the material facts on which the applicant relies disclose a reasonable cause of action.<sup>581</sup>

In this regard, the principles to be applied to unrepresented litigants may differ between the Federal Court and the FCC.

579 (2008) 166 FCR 415, [6]. See also *Bahonko v Nurses Board of Victoria* [2008] FCAFC 29, [10].

580 [2015] FCCA 2211.

581 [2015] FCCA 2211, [35] - [41].

### 6.21.3 Representation by unqualified person

Section 44 of the FCC Act limits who may represent a party to a proceeding. It provides as follows:

A party to a proceeding before the FCC is not entitled to be represented by another person unless:

- (a) under the Judiciary Act 1903, the other person is entitled to practise as a barrister or solicitor, or both, in a federal court; or
- (b) under the regulations, the other person is taken to be an authorised representative; or (c) another law of the Commonwealth authorises the other person to represent the party.

However, section 46PQ of the AHRC Act, ‘another law of the Commonwealth’ for the purposes of section 44, allows unqualified people to represent a party to the proceedings in certain circumstances. It provides that:

- (1) A party in proceedings under this Division:
  - (a) may appear in person; or
  - (b) may be represented by a barrister or a solicitor; or
  - (c) may be represented by another person who is not a barrister or solicitor, unless the court is of the opinion that it is inappropriate in the circumstances for the other person to appear.

In *Groundwater v Territory Insurance Office*,<sup>582</sup> the applicant’s father made an application to appear in proceedings on behalf of the applicant. The applicant claimed to be unable to attend court by reason of ‘multiple chemical sensitivity’ (a matter disputed by the respondents). Brown FM noted that section 46PQ of what is now the AHRC Act allows for a person to be represented by a person who is not a barrister or solicitor ‘unless the Court is of the opinion that it is inappropriate in the circumstances for the other person to appear’. His Honour noted that as a matter of general principle, ‘the power to grant leave to an unqualified advocate is to be used sparingly’ and had regard to the following (citing with approval *P & R (No. 1)*<sup>583</sup> and *Damjanovic v Maley*<sup>584</sup>):

- the complexity of the case. With minor or straightforward matters there is less difficulty with a lay person appearing to argue a case. The present matter raised a number of complicated issues;<sup>585</sup>
- the genuine difficulties of an unrepresented party, such as language difficulties or the unexpected absence of a legal adviser. The complication in the present case was that the difficulties faced by the applicant were the subject of dispute between the parties;<sup>586</sup>
- the absence of a duty to the court and the unavailability of disciplinary measures in relation to lay advocates such that a lay advocate may not be able to provide balanced and informed submissions. Relevantly in this matter, the intended advocate ‘fervently’ believed his son’s case, creating a ‘real risk that he will not be able to provide balanced and informed submissions because of the fervour of his belief’;<sup>587</sup>
- the need to protect the applicant and respondent from the actions of an unqualified (and uninsured) person, which may lead to expense being incurred as a result of incompetent advice and inept representation;<sup>588</sup> and
- the interests of justice. The general public has an interest in the effective, efficient and expeditious disposal of litigation in the courts and the best way of achieving this is if both parties to an action have qualified lawyers.<sup>589</sup>

582 [2004] FMCA 381.

583 [2002] FMCAfam 65.

584 (2002) 55 NSWLR 149.

585 [2004] FMCA 381, [42].

586 [2004] FMCA 381, [43].

587 [2004] FMCA 381, [44].

588 [2004] FMCA 381, [45].

589 [2004] FMCA 381, [46].



In the circumstances, Brown FM granted a limited right of appearance to the applicant's father, for interlocutory matters to advise how the applicant proposed to conduct proceedings.<sup>590</sup>

In *Reynolds v Minister for Health & Anor*<sup>591</sup> the applicant sought leave under section 46PQ to be represented in the whole of the proceedings, including mediation, by an unqualified advocate. Lucev FM applied the principles set out in *Groundwater* and *Damjanovic* above as follows:

- the matter was a complex one, both factually and legally, which required a lawyer to adequately represent the applicant's interests;<sup>592</sup>
- there were no genuine difficulties demonstrated by the applicant that were unusual for self-represented litigants and no evidence led in this regard;<sup>593</sup>
- the applicant's advocate was not qualified in any relevant sense, was not insured in relation to the conduct of litigation, had no professional duty to the court and was subject to none of the usual professional disciplinary consequences in the event of any misconduct;<sup>594</sup>
- the FMC exercises concurrent jurisdiction with the Federal Court and ought to be "very chary at giving leave";<sup>595</sup>
- the effective litigation of matters as a general rule is best achieved by the parties employing lawyers, and given the complexity of this matter, it was not in the interests of justice to allow otherwise;<sup>596</sup> and
- the applicant's advocate was a potential witness in the case and could not be both advocate and witness.<sup>597</sup>

Accordingly, Lucev FM refused to grant leave.

However, in *Portuguese Cultural Welfare Centre Inc v AMCA*<sup>598</sup> Lucev FM granted leave to the applicant's President to appear in interlocutory proceedings on behalf of the applicant.

In that case, Lucev FM noted that although the legal claims were certain to be complex, this did not apply to this stage of proceedings. As to the genuine difficulties of an unrepresented party, the applicant was a voluntary association of limited means and faced difficulties in obtaining legal representation for these proceedings. Those difficulties were such that the applicant was best represented at this stage by its President. In this regard the court observed that the lack of legal representation of the applicant was somewhat ameliorated by the assistance provided by the legal representation of the respondent. As to the interests of justice, her Honour considered that to deny the President leave to appear would have left the applicant unrepresented and without anyone to put submissions on its behalf. Furthermore, from a case management perspective, allowing the President leave to appear avoided the risk of a significant adjournment of the proceedings. Lucev FM concluded that although the discretion in s 46PQ must be exercised with caution, in all of the circumstances it was appropriate to grant leave.

The Federal Court has recently found<sup>599</sup> that the husband, of an applicant, could not be permitted to represent her under section 46PQ(1)(c) in circumstances where they were both were admitted to the Supreme Court of NSW but not entitled to appear in the Federal Court. The court did however allow him to make submissions on her behalf.

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590 [2004] FMCA 381, [52].

591 [2010] FMCA 843.

592 [2010] FMCA 843, [45].

593 [2010] FMCA 843, [46]-[56].

594 [2010] FMCA 843, [96].

595 [2010] FMCA 843, [101] citing *Damjanovic*.

596 [2010] FMCA 843, [103]-[105].

597 [2010] FMCA 843, [106]-[107].

598 [2011] FMCA 144.

599 *Eliezer v University of Sydney* (2015) 239 FCR 381.

In *Ellis v FJM Property Pty Ltd*,<sup>600</sup> the FCC refused an application by a company to have a director appear on its behalf. The court considered the facts in *Damjanovic v Maley* and found that:

1. there was a 'not insignificant' degree of complexity weighing against the application;<sup>601</sup>
2. the fact that a non-lawyer had appeared for the company earlier in the proceedings neither weighs for nor against leave to be represented by a non-lawyer being granted;<sup>602</sup>
3. the fact that the FCC shares concurrent jurisdiction with the Federal Court in relation to matters under the AHRC Act, and the DDA, in the matter; and is not a court of specialist jurisdiction, weighs against the applicant;<sup>603</sup>
4. in the circumstances, noting that the failure to appoint a lawyer may have already resulted in inefficiencies in the running of this case and that a lawyer might have dealt with the issues in a different manner, and a manner more conducive to a possible earlier and positive outcome for the company, the interests of the company would be better represented by a lawyer;<sup>604</sup> and
5. 'the interests of justice might be better served by having a lawyer, who has ethical obligations as well as duties to the court, appear, as those obligations and duties will require the lawyer to not impede the interests of justice in the disposition of the matter'.<sup>605</sup>

In another matter in the Federal Magistrates Court, (as it was then named) the court also refused an application for a non-qualified person to represent the applicant on the basis of the complexity of the case and the fact that the representative who had been assisting the applicant had demonstrated a 'fundamental misunderstanding of part of the relevant legislation'.<sup>606</sup> The court found that:

Whilst it may be a detriment for Mr Reynolds to appear as a self-represented litigant, it is not a detriment which can be cured by allowing the appearance of a non-lawyer.<sup>607</sup>

In contrast, in *Portuguese Cultural & Welfare Centre Inc v AMCA*<sup>608</sup> Lucev FM allowed the President of the applicant to appear at the hearing of an application for summary dismissal, despite finding the matter was complex. The court found in this instance that:

Those difficulties are such that, at least at this stage, the applicant's interests are best represented by allowing Mr Moleirinho, in his capacity as President of the applicant, to appear before the Court. Notwithstanding that he is not a lawyer, evidently has little or no experience in appearing in Court, and has some difficulty comprehending the proceedings because English is not his first language, his appearance for the applicant is better than no appearance at all for the applicant.<sup>609</sup>

#### 6.21.4 Consideration of fresh evidence out of time

In *Hagan v Trustees of the Toowoomba Sports Ground Trust*,<sup>610</sup> the Federal Court on appeal declined to receive fresh evidence that the appellant sought to file in court on the first day of the hearing because it was not filed within the time prescribed by the Federal Court Rules.<sup>611</sup> No explanation was given

600 [2016] FCCA 808.

601 [2016] FCCA 808, [39].

602 [2016] FCCA 808, [40]-[42].

603 [2016] FCCA 808, [47].

604 [2016] FCCA 808, [50]-[55].

605 [2016] FCCA 808, [60].

606 *Reynolds v The Minister For Health & Anor* [2010] FMCA 843.

607 [2010] FMCA 843, [49].

608 [2011] FMCA 144.

609 [2011] FMCA 144, [135].

610 (2001) 105 FCR 56.

611 In *Hagan* the court refers to O 36, r 6 of the Federal Court Rules as being the rule prescribing a time limit, however, it appears that the court may have intended to refer to O 52 r 6 instead. Please consult the new Federal Court Rules in this regard.

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 section 46PR of the AHRC Act 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 situation.

### 6.21.5 Statements made at conciliation

Various provisions of the AHRC Act limit the extent to which information provided to the Commission can be disclosed to other people.<sup>612</sup> Further, conciliation before the Commission is treated as confidential. As such the President is prohibited from reporting to the court anything said in the course of conciliation proceedings, it would be ‘somewhat artificial and inconsistent’<sup>613</sup> to allow parties to refer to what may or may not have been said during a conciliation conference at a subsequent court hearing.

In *Bender v Bovis Lend Lease Pty Ltd*,<sup>614</sup> the court had to consider whether the applicant could rely upon affidavit evidence referring to statements made during a conciliation conducted by the Commission. 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’ (now known as the AHRC 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.<sup>615</sup>

Similarly, in *Treacy v Williams*,<sup>616</sup> Connolly FM ruled that those parts of the applicant’s affidavit evidence that raised matters discussed during a conciliation conference conducted by the Commission were inadmissible.<sup>617</sup>

### 6.21.6 Security for costs

In *Wyong-Gosford Progressive Community Radio Inc v Australian Communications & Media Authority*,<sup>618</sup> Cowdroy J reviewed the authorities in relation to security for costs (including decisions in relation to unlawful discrimination complaints) and summarised the matters considered by courts as follows:

- (1) the chances of success of the applicant and whether the claim is bona fide;
- (2) the risk that the applicant could not satisfy a costs order;
- (3) whether the application for security for costs has been promptly brought;
- (4) whether the application for security for costs is being used oppressively to deny an impecunious litigant access to the court;
- (5) whether the applicant’s impecuniosity arises out of the act in respect of which relief is sought;
- (6) whether there are third parties standing behind the applicant who are likely to benefit from the litigation and if so, whether they have proffered security for the costs of the litigation;
- (7) whether an order for security for costs would frustrate the litigation;
- (8) whether there are any public interest considerations to be taken into account; and
- (9) any matters relevant to the discretion which are distinctive to the circumstances of the case.<sup>619</sup>

<sup>612</sup> For example s 49 and s 46PS(2).

<sup>613</sup> [2003] FMCA 277, [33].

<sup>614</sup> [2003] FMCA 277.

<sup>615</sup> [2003] FMCA 277, [34].

<sup>616</sup> [2006] FMCA 1336.

<sup>617</sup> [2006] FMCA 1336, [14].

<sup>618</sup> [2006] FCA 625.

<sup>619</sup> [2006] FCA 625, [11].

Factors 1, 2, 5 and 7-9 were factors first identified by Hill J in *Equity Access Ltd v Westpac Banking Corporation*<sup>620</sup> ('*Equity Access*') and are factors that have been applied by courts in discrimination proceedings.

In *Croker v Sydney Institute of TAFE*<sup>621</sup> ('*Croker*'), Bennett J had regard to the factors identified by Hill J in *Equity Access* and granted an application for security for costs against an appellant to an appeal against a decision involving an unlawful discrimination complaint. Her Honour made the order for security for costs because she found that:

- the applicant had not established good prospects of succeeding in the appeal;
- there was no real prospect that a costs order against him in these proceedings would be satisfied, particularly given the appellant's history of failing to pay costs orders;
- the appellant's financial situation did not arise from any claim he had against the respondent;
- the appellant did not identify any matters of public interest arising from the proceedings;
- the amount sought for security for costs (\$5000) was reasonable; and
- the appellant had not provided an address for service that complied with former Order 7 rule 6(1) of the Federal Court Rules (now rule 11.01).<sup>622</sup>

In *Elshanawany v Greater Murray Health Service*<sup>623</sup> ('*Elshanawany*'), a matter under the RDA, the respondent sought an order for security for costs of \$96,000 under section 56 of the Federal Court Act. Jacobson J noted the well-established principle that ordinarily a natural person who has commenced litigation will not be required to provide security for the cost merely because that person is impecunious.<sup>624</sup> His Honour went on to reject the respondent's application for security for costs, applying *Equity Access*.<sup>625</sup> In doing so, his Honour did not identify any particular issues arising from the nature of discrimination proceedings that may require the court to depart from the approach taken in *Equity Access* when determining an application for security for costs in discrimination cases.

In *Drury v Andreco Hurll Refractory*,<sup>626</sup> Raphael FM declined to award security for costs against an applicant who had not paid costs to the respondent from earlier proceedings. His Honour followed the approach taken in *Elshanawany* and *Croker* and applied standard principles in determining the application.<sup>627</sup> Although dismissing the application for security for costs, his Honour stated, with reference to *Elshanawany* that there was no 'underlying legislative policy' or 'aspects of public interest' that 'weigh in the balance against the making of an order'.<sup>628</sup>

In *Paramasivam v New South Wales*<sup>629</sup> Smith FM made an order that the applicant in proceedings under the RDA provide security for the costs in the amount of \$10,000 because he found that based on the applicant's previous litigation history she had a hostility to meeting orders for the payment of costs.<sup>630</sup>

In *Ellis v Silver Vision Pty Ltd trading as Arirang Korean BBQ Restaurant & Café*,<sup>631</sup> Judge Lucev refused an application for security for costs. The respondents referred to previous applications by Mr Ellis

620 [1989] FCA 361 applied in *Mecrus Pty Ltd v Industrial Energy Pty Ltd* [2015] FCA 103.

621 [2003] FCA 942.

622 [2003] FCA 942, [32], [35], [39]-[43]. See also *Clack v Collins (No. 1)* [2010] FCA 513.

623 [2004] FCA 1272.

624 [2004] FCA 1272, [111]. His Honour referred in this regard to the decision of Hill J in *Fletcher v Federal Commissioner of Taxation* (1992) 110 ALR 233, 235-237 ((1992) 37 FCR 288).

625 [1989] FCA 361.

626 [2005] FMCA 186.

627 [2005] FMCA 186, [11].

628 [2005] FMCA 186, [20].

629 [2007] FMCA 1033.

630 [2007] FMCA 1033, [28]-[29].

631 [2016] FCCA 907.

under the DDA and submitted that Mr Ellis was a 'full time vexatious litigator'.<sup>632</sup> Contrary to submission that the previous actions by Mr Ellis supported its claim he was vexatious, the court found that the fact that he had received compensation in other proceedings brought under the DDA demonstrates:

... two things: firstly, that arguably some of Mr Ellis' cases brought in this Court have had sufficient merit to warrant settlement, and resulted in a payment to Mr Ellis, and, secondly, that those cases, by reason of their settlement, are not, at least on their face, vexatious litigation. It also demonstrates that there is some prospect that Mr Ellis might settle some of the other numerous cases referred to by Arirang Restaurant which Mr Ellis has brought in this Court, and if so be in funds to meet any costs order.<sup>633</sup>

The concluded that:

Taken together the fact that the Application is not without prospects of success, that it would be oppressive to stifle the Application by a security for costs order, both generally and because it is in the public interest that the Application proceed, the Court weighing all of the factors, and taking account of the fact that there is a risk that a costs order might not be satisfied if Arirang Restaurant were to be successful in defending the Application, considers that Arirang Restaurant has not made out its case for security for costs against Mr Ellis in relation to the Application, and therefore no security for costs order ought to be made. It follows that the Security for Costs Application must be dismissed.<sup>634</sup>

## 6.21.7 Restrictions on commencing proceedings without reasonable prospects of success

Clause 4 of Schedule 2 to the *Legal Profession Uniform Law Application Act 2014* (NSW) (Legal Profession Act 2014) provides:

Restrictions on commencing proceedings without reasonable prospects of success

- (1) The provision of legal services by a law practice without reasonable prospects of success does not constitute an offence but is capable of being unsatisfactory professional conduct or professional misconduct by a legal practitioner associate of the practice who is responsible for the provision of the service or by a principal of the practice.
- (2) A law practice cannot file court documentation on a claim or defence of a claim for damages unless a principal of the practice, or a legal practitioner associate responsible for the provision of the legal service concerned, certifies that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success.
- (3) Court documentation on a claim or defence of a claim for damages, which has been lodged for filing, is not to be filed in a court or court registry unless accompanied by the certification required by this clause. Rules of court may make provision for or with respect to the form of that certification.
- (4) In this clause:

court documentation means:

- (a) an originating process (including for example, a statement of claim, summons or cross-claim), defence or further pleading, or
- (b) an amended originating process, defence or further pleading, or
- (c) a document amending an originating process, defence or further pleading, or
- (d) any other document of a kind prescribed by the local regulations.

*cross-claim* includes counter-claim and cross-action.

632 [2016] FCCA 907, [9].

633 [2016] FCCA 907, [19].

634 [2016] FCCA 907, [30]

There are no reported decisions that have considered whether clause 4 applies to federal discrimination proceedings.

In *Fuller v Baptist Union of NSW*,<sup>635</sup> an application under section 46PO of the AHRC Act, Driver FM considered whether the now repealed section 198L of the *Legal Profession Act 1987* (NSW), which was replaced by section 347 of the *Legal Profession Act 2004* and now clause 4, required a certificate to be provided in relation to FMC proceedings commenced by way of application. The wording of section 198L was similar to the current clause 4 with the only significant difference being the definition of 'court documentation'. In contrast to cl 4(4)(a), 'court documentation' had been defined in section 198L(4)(a) as 'a statement of claim, summons, cross-claim, defence or further pleading'.

In *Fuller*, Driver FM held that section 198L did not require a certificate because an application filed with the court did not fall within the above definition of 'court documentation'.

His Honour noted that section 50 of the *Federal Magistrates Act* specifically provides that proceedings before the FMC 'may be initiated in the FMC by way of application without the need for pleadings'.<sup>636</sup> Driver FM held that an application was not a pleading and as such did not fall within the definition of 'court documentation' to which the requirement applied.

Given that subclause 4(4)(a) defines 'court documentation' to mean 'an originating process' it is unlikely that Driver FM would have reached the same conclusion had he been considering clause 4.

What may, however, be relevant when considering whether clause 4 applies to federal proceedings are the obiter views expressed by Driver FM in *Fuller* as to whether, had an application been 'court documentation' to which section 198L applied, it would otherwise have regulated the conduct of federal proceedings. Driver FM held that whilst it was beyond argument that the Parliament of NSW could not regulate the conduct of federal proceedings directly, it was apparent from the authorities that the Parliament of NSW could indirectly regulate the conduct of federal proceedings by virtue of the operation of section 79 of the *Judiciary Act*.<sup>637</sup> Section 79 provides:

79 State or Territory laws to govern where applicable

The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

His Honour held that it was his preliminary view that section 198L(2) (which is equivalent to clause 4(2)):

... is not a law relating to procedure for the purposes of s.79 of the *Judiciary Act*. In my view, it is a law relating to the conduct of practitioners. It is therefore not a procedural law applicable in proceedings in a federal court exercising federal jurisdiction.<sup>638</sup>

In relation to the applicability of section 198L(3) (which is equivalent to cl 4(3)) his Honour stated:

[S]ubsection (3) is clearly a law relating to procedure. The issue there is whether a registry of the Court would be prevented from accepting for filing a document required by the Court, pursuant to an order made by the Court, for the conduct of proceedings by pleadings.

It would seem to be a strange result if a New South Wales law could prevent the registry of a federal court exercising federal jurisdiction from accepting for filing a document specifically required by the Court pursuant

635 [2004] FMCA 789.

636 [2004] FMCA 789, [9].

637 [2004] FMCA 789, [6].

638 [2004] FMCA 789, [12].

to an order made by the Court. That result is theoretically possible to the extent that the State law is applied as a surrogate law of the Commonwealth law pursuant to s.79 of the Judiciary Act. Once again, although it is not necessary to decide the issue in these proceedings, my preliminary view is that the Commonwealth has ‘otherwise provided’ for the purposes of s 79 of the Judiciary Act through the enactment of the Federal Magistrates Act and the rules made under that Act by the Court.

Those rules deal comprehensively with the documents that are permitted or required to be filed in the Court for the purposes of proceedings in the court. In my view, it is likely that the Act and rules in combination cover the field to the extent of making ‘other provision’ sufficient to exclude the operation of s 198L. The final resolution of that issue can, however, wait for another day.<sup>639</sup>

Given there is no relevant difference between the wording of clause 4(2) and (3) and section 198L(2) and (3), Driver FM’s views are arguably equally applicable to those sub-sections.

### 6.21.8 Judicial immunity from suit under federal discrimination law

In *Re East; Ex parte Nguyen*,<sup>640</sup> the High Court affirmed that the ‘well established immunity from suit which protects judicial officers from actions arising out of acts done in the exercise of their judicial function or capacity’ applies to the actions of judicial officers under the RDA, saying that, ‘there is nothing in the RDA which suggests that it was the intention of the Parliament to override that immunity’.<sup>641</sup> This would also appear to be the case under the SDA, DDA and ADA, as those Acts similarly contain no provision to suggest Parliament intended to override that immunity.

In *Paramasivam v O’Shane*,<sup>642</sup> Barnes FM summarily dismissed proceedings commenced against a NSW Magistrate alleging discrimination contrary to the RDA. His Honour was satisfied that the conduct complained of on the part of the Magistrate was conduct that, if it occurred, occurred in the exercise of her judicial function or capacity. The Magistrate was accordingly protected from liability under the RDA by operation of the doctrine of judicial immunity.<sup>643</sup> Following *Re East; Ex parte Nguyen*,<sup>644</sup> Barnes FM held that judicial immunity applied not only to judges of superior courts but also to state magistrates.<sup>645</sup>

### 6.21.9 Adjournment pending decision of Legal Aid Commission

In *Tsoi v Savransky*,<sup>646</sup> the applicant had appealed a decision to refuse Legal Aid and sought an adjournment pending the outcome of that appeal. Section 57 of the *Legal Aid Commission Act 1979* (NSW) provides that a court shall, in such circumstances, adjourn the proceedings unless there are special circumstances that prevent it from doing so. Applying the decision in *Wilson v Alexander*,<sup>647</sup> Raphael FM held that he was bound by that piece of legislation.<sup>648</sup> His Honour noted, however, that it was for the court to determine the length of the adjournment and was only prepared to grant an adjournment for a limited time at which stage the case must proceed.<sup>649</sup>

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639 [2004] FMCA 789, [12]-[14].

640 (1998) 196 CLR 354.

641 (1998) 196 CLR 354, 365 [30]. Note that the immunity also extends to administrative functions performed by a judge that are ‘intimately associated’ with judicial functions: *Yeldham v Rajski* (1989) 18 NSWLR 48, 62-63 (Kirby P), 73 (Hope AJA).

642 [2005] FMCA 1686.

643 [2005] FMCA 1686, [49].

644 (1998) 196 CLR 354.

645 [2005] FMCA 1686, [44]. The immunity from suit of quasi-judicial bodies was considered in *X v South Australia (No 3)* (2007) 97 SASR 180.

646 [2004] FMCA 879.

647 (2003) 135 FCR 273.

648 [2004] FMCA 879, [13].

649 [2004] FMCA 879, [17].



### 6.21.10 Appointment of litigation guardians

Both the Federal Court Rules and FCC Rules require, respectively, that a person under a legal incapacity or who needs a litigation guardian, may only start or defend a proceeding by a litigation representative/guardian.<sup>650</sup>

“Legal incapacity” is defined in the FCC Rules as a minor or a “mentally disabled person”. A “minor” is defined as a person under the age of 18 years and a “mentally disabled person” is defined as a person who, because of a mental disability or illness, is not capable of managing the person’s own affairs in a proceeding.

Under the FCC Rules a person ‘needs’ a litigation guardian if the person does not understand the nature and possible consequences of the proceeding or is not capable of adequately conducting, or giving adequate instruction for the conduct of, the proceeding.<sup>651</sup> A person who ‘needs’ a litigation guardian may only start, continue, respond to or seek to be included as a party to a proceeding by his or her litigation guardian.<sup>652</sup> A litigation guardian may be appointed at the request of a party or on the court’s own motion.<sup>653</sup>

In *Harwood v State of New South Wales (Department of Education and Training)*<sup>654</sup> the applicants argued that Mr Anthony Harwood was the litigation representative for Mr Tyron Harwood because pursuant to section 42P(2)(c), he had lodged the complaint with the Commission. The court rejected this proposition and required Mr Harwood to apply to the court for an order appointing a person as a litigation representative, in accordance with the procedures set out in rule 9.63 of the FCC Rules.

The implications of the appointment of a litigation guardian were considered in *Maddison v Qualtime Association Inc*<sup>655</sup> where the complainants’ capacity to vote was in issue. The court found that:

The need for a litigation guardian should not be taken as an admission of a lack of legal capacity for a particular purpose (such as voting). The circumstances in which a litigation guardian can be appointed are much wider than that.<sup>656</sup>

In *L v HREOC*,<sup>657</sup> the Full Federal Court considered the appointment of litigation guardians in the FMC. The Full Court confirmed that litigants of full age are presumed to be competent to conduct or give adequate instructions for the conduct of proceedings unless and until the contrary is proved, and the onus is on the person who asserts lack of competency to do so.<sup>658</sup> The court also observed that:

... the fact that a litigant has put forward a case that reveals no reasonable cause of action may say nothing at all about the litigant’s capacity to present such a case. The presumption that an adult person is capable of managing their own affairs is hardly likely to be displaced merely because a case has been commenced that has no prospect of success.<sup>659</sup>

In relation to the issue of determining whether a person ‘needs’ a litigation guardian, the court stated that ‘[t]he means by which the court will determine whether a guardian should be appointed can vary

650 FCR, r 9.61 (see generally Div 9.6), FCCR, r 11.09 (see generally div 11.2)

651 FCCR, r 11.08(1).

652 FCCR, r 11.09(1).

653 FCCR, r 11.11(1).

654 [2012] FCA 264.

655 [2010] FMCA 25.

656 [2010] FMCA 25, [49]

657 [2010] FMCA 25.

658 [2010] FMCA 25, [26].

659 [2010] FMCA 25, [34].

from case to case'.<sup>660</sup> While medical evidence will ordinarily be required to be placed before the court, there may be cases where medical evidence is not available, as for example, when a person refuses to submit to a medical examination, or where the lack of capacity is so clear that the medical evidence is not called for. In those cases, 'and perhaps others, the court is entitled to rely on its own observation to make an assessment about the capacity of a party'.<sup>661</sup>

The FCC has refused the appointment of a litigation guardian in circumstances where the person's incapacity was episodic. In *Wood v Lee-Joe (No.3)*<sup>662</sup> Mr Wood made application to be appointed as litigation guardian to Ms Neilson. Following evidence that Ms Neilson's incapacity was not permanent and was episodic, the court found that:

The evidence does not satisfy me that Ms Neilson does not understand the nature of the proceedings she would be bringing, or its consequences, if she were permitted to be joined as an applicant in the proceedings Mr Wood commenced purportedly on her behalf as her career. The evidence also does not satisfy me, at least at this point in time, that she would be unable to give adequate instruction for the conduct of the proceedings. I am not so satisfied even though, as the evidence shows, Ms Neilson from time to time undergoes violent mood swings.

It may be that while she experiences periods of low mood Ms Neilson is unable to give adequate instruction for the conduct of the proceeding. But that by itself does not warrant the appointment of a litigation guardian. To do so would be to subject Ms Neilson to the control of a litigation guardian, not only while she is in a low mood, but also when she is in a happier mood during which, the evidence shows, Ms Neilson is able to comprehend her anti-discrimination claim and speak to lawyers about it. Further, if, during the life of the proceeding, Ms Neilson comes to suffer a low mood, and for that reason becomes unable to give adequate instruction for the conduct of the proceeding, steps could be taken at that time to deal with that eventuality. The required steps may be nothing more than granting a short extension of the time for the completion of a procedural step, or the granting of a short adjournment. On the other hand, the situation may call for the taking of more drastic steps, including the appointment of a litigation guardian. What steps would need to be taken, however, could only be assessed by reference to the severity of the mood swing, and the stage of the proceedings in which the mood swing occurs.<sup>663</sup>

### 6.21.11 Approval of settlements

A corollary of the appointment of a litigation representative, is that a matter cannot be compromised or settled without the litigation representative seeking approval of the agreement to settle, from the court.<sup>664</sup> While this rule only appears in the Federal Court Rules, the requirement also arises in the FCC as a result of the application of rule 1.05(2) of the FCC Rules. This was confirmed by Judge Lucev in *Harrington v Catholic Education Office of Western Australia & Anor*,<sup>665</sup> a matter arising from an application under section 46PO of the AHRC Act and in which the agreement was approved.

The principles for consideration of the court in determining if it should grant approval for the agreement were set out in *Butler v Djerriwarrh Employment & Education Services Inc*<sup>666</sup> where Mortimer J observed:

In determining whether or not to approve the settlement, for the purpose of rendering it binding on the applicant, the Court must be satisfied the settlement is in her best interests, or beneficial to her interests.

<sup>660</sup> [2010] FMCA 25, [27].

<sup>661</sup> [2010] FMCA 25, [27] citing *Murphy v Doman* (2003) 58 NSWLR 51, [37]; *AJI Services Pty Ltd v Manufacturers Mutual Insurance Ltd* [2005] NSWSC 709, [57].

<sup>662</sup> [2015] FCCA 354.

<sup>663</sup> [2015] FCCA 354, [47]-[48].

<sup>664</sup> FCR, r 9.70.

<sup>665</sup> [2014] FCCA 2260, [2].

<sup>666</sup> [2015] FCA 296.

That is not a requirement of the Rules themselves but stems from the nature of the jurisdiction exercised by the Court where a party is under a disability and unable to conduct a proceeding.

It is the Court's responsibility to determine, for itself, whether the settlement is beneficial to the interests of the person under a disability....

The Court is assisted in that determination by the provision of an opinion by an independent lawyer. It is likely (as was indeed the case in the present proceeding) that the lawyer can be briefed fully on the facts and relevant evidence, and will have access to more material than the Court. The evidence and instructions considered by the independent lawyer can then be placed before the Court in, at least, the written opinion of that lawyer.

The Court is not bound by the independent opinion, and indeed there have been situations where the Court has not approved a settlement despite the advice of an independent lawyer: see for example Rothman J's decision in *Fisher* disapproving settlement (under equivalent NSW legislation), albeit in circumstances where the plaintiff's litigation guardian had changed her mind and sought that the settlement not be approved.

On an examination of the pleadings, and the other evidence before it, including the independent opinion, the determination of whether the proposed settlement is in the best interests of, or beneficial to the interests of, a person under a disability requires the Court to weigh, at least as an important consideration, the prospects of the applicant if the proceeding were continue: see *Fisher* at [35]-[37].

What the Court is being asked to do is to approve a settlement so that it binds the party under the disability and brings the litigation to an end. Therefore, a primary consideration is, it seems to me, the advantages and disadvantages of the litigation continuing: not only in terms of whether the applicant might secure a more advantageous award from the Court at trial, but also issues such as the prospects of an appeal, the time it will take for the proceeding to reach a first instance judgment, and the pressures imposed on the applicant if the litigation were to continue. These pressures include the continuation of the applicant's current circumstances without the financial or material benefits flowing from the settlement as proposed, the emotional and psychological effects which attend the conduct of litigation and the strain of waiting to give, and then giving evidence (if that were to occur), or having evidence given about oneself. Anyone with experience of litigation knows these pressures are real, even if they cannot be quantified in financial or material terms.

The jurisdiction to approve a settlement for a person under a disability is inherently protective, and I take that to mean protective not only of the financial interests of the person under a disability, but also protective of her interests in being as well and as healthy as she can, of living as comfortably as she can, with a good quality of life.<sup>667</sup>

In that case, her Honour was satisfied the agreement was in the applicant's best interests. However, her Honour was not completely satisfied with the proposed agreement in *Scandolera v State of Victoria*,<sup>668</sup> having concerns about the preservation of the funds received by the children under the agreement. Ultimately, her Honour amended the agreement to have the funds paid into the Victorian Supreme Court under the administration of the Senior Master, pursuant to s 23 of the Federal Court Act.<sup>669</sup>

Further examples of agreements that have been approved can be found in *Jones (by his next friend Jones) v Victoria (Department of Education and Early Childhood Development)*<sup>670</sup> and *Goldsmith (by his next friend Goldsmith) v Yeshivah and Beth Rivkah Colleges Inc* both applications under the DDA.<sup>671</sup>

667 [2015] FCCA 354, [47]-[48] (references omitted).

668 [2015] FCA 1451. These principles were applied in *Butler v Djerrirwarrah Employment & Education Services Inc* [2015] FCA 296, and application under the *Disability Discrimination Act 1992*.

669 [2015] FCA 1451, [42].

670 [2014] FCA 1404.

671 [2014] FCA 996.

## 6.21.12 'No case' submission

At common law, a respondent may, after the applicant's evidence has closed, submit to the court that it has 'no case to answer' and seek orders to dismiss the application. The precise power of the Federal Court and FCC to make such an order and thereby dismiss the application is uncertain.<sup>672</sup> However, the existence of the power is not in doubt.<sup>673</sup>

In *Applicant N v Respondent C*,<sup>674</sup> McInnis FM considered the correct approach to a 'no case to answer' submission and when a party should be put to an election, as to whether to lead its own evidence or not. His Honour cited with approval the decision of the Full Court of the Supreme Court of Victoria in *Protean (Holdings) Ltd (Receivers and Managers Appointed) v American Home Assurance Co*<sup>675</sup> and held that the court should consider:

- the nature of the case.
- the stages reached in the hearing.
- the particular issues involved.
- the evidence that has been given.<sup>676</sup>

His Honour further held that the public interest is an additional relevant matter in human rights cases:

There is, in my view, a further public interest element, not addressed in the *Protean* decision, which applies to human rights cases, which, in my view, strengthens the decision in this instance not to put the Respondent to its election. It is relevant in considering the nature of the claim, in my view, that it is not in the public interest to discourage no-case submissions. ...

Respondents may well be exposed to considerable expense defending unmeritorious claims, and, given what are often serious and almost quasi-criminal allegations, it is not appropriate, in my view, to put the Respondent to an election. The no-case submission, if successful, may well benefit all parties, by reducing the cost burden significantly, and Respondents should not be discouraged in making a no-case submission in the same manner as normal civil or commercial disputes by putting a moving party to an election.<sup>677</sup>

On appeal, the decision of McInnis FM was upheld with Sundberg J holding that there was no doubt that Federal Magistrates had the power to entertain a no-case submission.<sup>678</sup> Sundberg J further held that there is 'no obligation on a judge determining a no-case submission to view an applicant's case "at its highest"'.<sup>679</sup>

## 6.21.13 Separate decision of questions

Pursuant to rule 30.01 of the Federal Court Rules (rule 17.02 in the FCC Rules), a party may apply to the court for an order that a question arising in the proceeding be heard separately from other questions.

In *Killeen v Combined Communications Network Pty Ltd*<sup>680</sup> relating to a complaint under the DDA, Edmonds J agreed to a separate decision of a question prior to the hearing pursuant to the Federal

672 *Compaq Computer Australia Pty Ltd v Howard Merry & Ors* (1998) 157 ALR 1; *Fortron Automotive Treatments Pty Ltd v Jones & Ors* [2008] FMCA 622 and *Fair Work Ombudsman v D'Adamo Nominees Pty Ltd (No. 2)* [2012] FMCA 1217.

673 *Compaq Computer Australia Pty Ltd v Howard Merry & Ors* [1998] FCA 968, 6, *Fortron Automotive Treatments Pty Ltd v Jones & Ors* [2008] FMCA 622 and *Fair Work Ombudsman v D'Adamo Nominees Pty Ltd (No. 2)* [2012] FMCA 1217.

674 [2006] FMCA 1936.

675 (1985) VR 198.

676 (1985) VR 198, [24].

677 (1985) VR 198, [35]–[36].

678 *Applicant N v Respondent C* [2007] FCA 1182, [35]–[37].

679 [2007] FCA 1182, [39]–[41].

680 (2011) 192 FCR 98.

Court Rules.<sup>681</sup> This was despite the contention that it could only give rise to a hypothetical answer as only very limited facts were agreed. His Honour stated that he was prepared to do so for two reasons. First, the making of such a decision had initially been consented to by the third respondent. Secondly, his Honour considered it to be an “exercise in case management” as a substantive answer might bring proceedings to a quicker conclusion.<sup>682</sup>

In *Harley v Commonwealth of Australia*<sup>683</sup> Lindsay FM was asked by the applicant to decide his claim of direct discrimination as a separate question from the claims of indirect discrimination prior to hearing.<sup>684</sup> His Honour refused the application. Lindsay FM had regard to the mechanism provided by the AHRC Act for bringing “a complaint” before the court. It was noted that a complaint may be comprised of one or more causes of action but it is “the one complaint” that is terminated and gets before the court via this route.<sup>685</sup> Here, the applicant’s complaint encompassed different discriminatory acts at different times. One of the concerns was the difficulty in then calculating damages in relation to the alleged direct discrimination separately from the other acts of alleged indirect discrimination.

However, his Honour expressed overall dissatisfaction with the use of a separate question procedure in these circumstances:

The cases that are set out in the decision of Young J in *AWB Ltd v Honourable Terence of Rhoderic Hudson Cole No 2* [2006] FCA 913 at [27] in dealing with a similar provision in the Federal Court Rules, make clear that the purpose of the use of the procedure is to attempt to quell the controversy between the parties by facilitating a conclusive or final judicial decision based on concrete facts. The facts can be agreed or they can be ascertained as part of a separate decision or separate question process but the purpose of embarking upon the process is to finally determine the rights of the parties in respect of the controversy before the Court.<sup>686</sup>

The use of the procedure in this case would only have that effect if successful. If unsuccessful, a separate hearing would still be required to consider indirect discrimination. His Honour held that there was no utility in isolating this aspect of the complaint now that it had reached the application stage.

### 6.21.14 Discovery in the Federal Circuit Court

Section 45 of the FCC Act provides that interrogatories and discovery are not allowed in proceedings in the Federal Circuit Court unless “in the interests of the administration of justice”.<sup>687</sup> In *Harley v Commonwealth of Australia*,<sup>688</sup> Lindsay FM agreed to discovery of a range of documents concerning the application and selection process for the appointment of officers in the Royal Australian Airforce Active Reserve. His Honour noted that the interests of justice are not the same as the interests of one party but rather must be ‘even-handed’ and ‘do equal justice’. The court must consider the management of justice, being the management of the proceedings before it. Further, the court must have regard to whether allowing discovery would be likely to contribute to the fair and expeditious conduct of those proceedings. Lindsay FM held that the documents sought were potentially relevant to the allegations of age discrimination and it would not be in the interests of the administration of justice for the documents to be kept from the applicant.

<sup>681</sup> Former FCR, O 29 r 2 (see now FCR, r 30.01).

<sup>682</sup> (2011) 192 FCR 98, 109, [60].

<sup>683</sup> [2010] FMCA 1029; [2011] FMCA 197.

<sup>684</sup> FCCR, r 17.

<sup>685</sup> [2010] FMCA 1029, [1-2].

<sup>686</sup> [2011] FMCA 197, [73].

<sup>687</sup> Federal Circuit Court Act 1999 (Cth), s 45(1); Federal Circuit Court Rules 2001 (Cth), r 14.02.

<sup>688</sup> [2011] FMCA 294.

# 7 Damages and Remedies

## Contents

<b>7.1</b>	<b>Section 46PO(4) of the Australian Human Rights Commission Act 1986 (Cth).....</b>	<b>370</b>
<b>7.2</b>	<b>Damages.....</b>	<b>370</b>
7.2.1	General approach to damages.....	370
(a)	Damages are compensatory .....	370
(b)	Torts principles are helpful by way of analogy .....	371
(c)	Multiple causes of injury/loss.....	372
(d)	General damages (hurt, humiliation and distress, pain and suffering and loss of enjoyment of life) .....	373
(e)	Aggravated and exemplary damages .....	375
(i)	Aggravated damages.....	375
(ii)	Exemplary damages .....	378
(f)	A finding of discrimination is necessary.....	380
(g)	Avoiding double recovery .....	380
7.2.2	Damages under the RDA generally .....	381
(a)	Carr v Boree Aboriginal Corporation .....	382
(b)	Baird v Queensland.....	382
(c)	Gama v Qantas Airways Ltd .....	382
(d)	House v Queanbeyan Community Radio Station .....	382
(e)	Trapman v Sydney Water Corporation & Ors .....	383
7.2.3	Damages in racial hatred cases .....	383
(a)	McMahon v Bowman .....	384
(b)	Horman v Distribution Group .....	384
(c)	San v Dirluck Pty Ltd.....	384
(d)	Silberberg v The Builders Collective of Australia Inc .....	384
(e)	Campbell v Kirstenfeldt .....	385
(f)	Clarke v Nationwide News .....	385
(g)	Sidhu v Raptis .....	385
(h)	Barnes v Northern Territory Police .....	386
(i)	Kanapathy v In De Braekt (No 4) .....	386
(j)	Haider v Hawaiian Punch Pty Ltd .....	386
7.2.4	Damages under the SDA generally.....	386
(a)	Font v Paspaley Pearls Pty Ltd .....	389
(b)	Grulke v KC Canvas Pty Ltd .....	389
(c)	Cooke v Plauen Holdings Pty Ltd .....	390
(d)	Song v Ainsworth Game Technology Pty Ltd .....	390
(e)	Escobar v Rainbow Printing Pty Ltd (No 2) .....	390
(f)	Mayer v Australian Nuclear Science & Technology Organisation .....	391
(g)	Evans v National Crime Authority.....	392
(h)	Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd .....	392
(i)	Kelly v TPG Internet Pty Ltd .....	393
(j)	Gardner v All Australia Netball Association Ltd .....	393
(k)	Ho v Regulator Australia Pty Ltd .....	393
(l)	Howe v Qantas Airways Ltd .....	393

(m) Dare v Hurley .....	394
(n) Fenton v Hair & Beauty Gallery Pty Ltd .....	394
(o) Rankilor v Jerome Pty Ltd .....	394
(p) Iliff v Sterling Commerce (Australia) Pty Ltd .....	394
(q) Poniatowska v Hickinbotham .....	395
(r) Maxworthy v Shaw .....	395
(s) Cincotta v Sunnyside Limited .....	395
(t) Burns v Media Options Group Pty Ltd .....	396
7.2.5 Damages in sexual harassment cases .....	396
(a) Gilroy v Angelov .....	400
(b) Elliott v Nanda .....	400
(c) Shiels v James .....	401
(d) Johanson v Blackledge .....	401
(e) Horman v Distribution Group .....	401
(f) Wattle v Kirkland .....	402
(g) Aleksovski v Australia Asia Aerospace Pty Ltd .....	402
(h) McAlister v SEQ Aboriginal Corporation .....	402
(i) Beamish v Zheng .....	403
(j) Bishop v Takla .....	403
(k) Hughes v Car Buyers Pty Ltd .....	404
(l) Trainor v South Pacific Resort Hotels Pty Ltd .....	404
(m) Phillis v Mandic .....	405
(n) Frith v The Exchange Hotel .....	405
(o) San v Dirluck Pty Ltd .....	405
(p) Cross v Hughes .....	405
(q) Hewett v Davies .....	406
(r) Lee v Smith .....	406
(s) Lee v Smith (No 2) .....	406
(t) Noble v Baldwin & Anor .....	406
(u) Kraus v Menzie .....	407
(v) Ewin v Vergara (No 3) .....	407
(w) Alexander v Cappello and Anor .....	408
(x) Richardson v Oracle Corporation Australia Pty Ltd .....	408
7.2.6 Damages under the DDA .....	409
(a) Barghouthi v Transfield Pty Ltd .....	412
(b) Haar v Maldon Nominees .....	412
(c) Travers v New South Wales .....	412
(d) McKenzie v Department of Urban Services .....	413
(e) Oberoi v Human Rights & Equal Opportunity Commission .....	413
(f) Sheehan v Tin Can Bay Country Club .....	414
(g) Randell v Consolidated Bearing Company (SA) Pty Ltd .....	414
(h) Forbes v Commonwealth .....	414
(i) McBride v Victoria (No 1) .....	415
(j) Bassanelli v QBE Insurance .....	415
(k) Darlington v CASCO Australia Pty Ltd .....	415
(l) Clarke v Catholic Education Office .....	415
(m) Power v Aboriginal Hostels Ltd .....	415
(n) Trindall v NSW Commissioner of Police .....	416
(o) Hurst and Devlin v Education Queensland .....	416



(p)	Drury v Andreco Hurl Refractory Services Pty Ltd (No 4)	417
(q)	Wiggins v Department of Defence – Navy	417
(r)	Vickers v The Ambulance Service of NSW	417
(s)	Hurst v Queensland	418
(t)	Rawcliffe v Northern Sydney Central Coast Area Health Service	418
(u)	Forest v Queensland Health	418
(v)	Gordon v Commonwealth	419
(w)	Maxworthy v Shaw	419
(x)	Burns v Media Options Group Pty Ltd	419
(y)	Innes v Rail Corporation of New South Wales	420
(z)	Watts v Australian Postal Corp	420
(aa)	Huntley v State of NSW, Department of Police and Justice (Corrective Services NSW)	420
(bb)	Burns v Director General of the Department of Education	421
(cc)	Mulligan v Virgin Australia Airlines Pty Ltd	421
(dd)	Pop v Taylor	421
<b>7.3</b>	<b>Apologies</b>	<b>422</b>
<b>7.4</b>	<b>Declarations</b>	<b>424</b>
<b>7.5</b>	<b>Orders Directing a Respondent Not to Repeat or Continue Conduct</b>	<b>426</b>
<b>7.6</b>	<b>Other Remedies</b>	<b>428</b>

# Damages and Remedies

## 7.1 Section 46PO(4) of the Australian Human Rights Commission Act 1986 (Cth)

Section 46PO(4) of the *Australian Human Rights Commission Act 1986* (Cth) ('AHRC Act') provides:

- (4) 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 that apply to the making of orders under this provision. It also provides an overview of the orders made by the Federal Court and the Federal Circuit Court ('FCC') (formerly the Federal Magistrates Court ('FMC')) under section 46PO(4) since the federal unlawful discrimination jurisdiction was transferred to those courts on 13 April 2000.

The tables at 7.2.2-6 set out damages awards in all federal discrimination cases decided since 13 April 2000.

## 7.2 Damages

Pursuant to section 46PO(4)(d) of the AHRC Act, if the court is satisfied that there has been unlawful discrimination by any respondent, the court may make an order requiring a respondent to pay damages 'by way of compensation' for any loss or damage suffered 'because of' the conduct of the respondent.

### 7.2.1 General approach to damages

#### (a) Damages are compensatory

In *Richardson v Oracle Corporation Pty Ltd* ('Oracle'),<sup>1</sup> Kenny J confirmed that damages under section 46PO(4)(d) of the AHRC Act are 'compensatory' only. For support for this proposition, Kenny J cited *Clarke v Catholic Education Office*<sup>2</sup> ('Clarke'), where Madgwick J said (at [83]):

It was faintly suggested, on the strength of remarks made in a case decided by the Human Rights and 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.<sup>3</sup>

Kenny J rejected the appellant's argument that a damages award of \$18,000 in a successful claim of sexual harassment (described below in 7.2.1(b)) was 'so minimal as to undermine this area of law and

<sup>1</sup> (2014) 223 FCR 334.

<sup>2</sup> [2003] FCA 1085.

<sup>3</sup> (2014) 223 FCR 334, [92].

the status of human rights in Australia'.<sup>4</sup> The terms of section 46PO(4)(d) of the AHRC Act make it such that the 'reasonable compensation' of the appellant for the loss and damage suffered because of the unlawful conduct is the 'critical issue'.<sup>5</sup>

This approach is consistent with the comments of French and Jacobson JJ in *Qantas Airways Ltd v Gama*,<sup>6</sup> ('*Qantas*') that the:

damages which can be awarded under s 46PO(4)...are damages "by way of compensation for any loss or damage suffered because of the conduct of the respondent". Such damages are entirely compensatory.<sup>7</sup>

The respondent in *Oracle* also submitted that the words 'the court may make such orders as it thinks fit, including any of the following orders' give the court a discretion as to the damages it awards and mean that the court could award something less than the full damages to which the applicant might otherwise be entitled. In making this submission, the respondent relied on the obiter comments of French and Jacobson JJ in *Qantas*, in which they said that 'in any case the discretionary character of the remedy allows an award of an amount "by way of compensation" which does not fully compensate for the loss suffered'.<sup>8</sup>

Kenny J in *Oracle* considered that the comment of French and Jacobson JJ in *Qantas* was not to be understood as 'detracting from the fundamentally compensatory nature and object of an award of damages under this provision'. Rather, Kenny J understood the comment to be referring to the inherently non-scientific and imprecise nature of an assessment of general damages.<sup>9</sup>

## **(b) Torts principles are helpful by way of analogy**

In *Oracle*,<sup>10</sup> Besanko and Perram JJ considered that, ultimately, the test under section 46PO(4)(d) of the AHRC Act is:

a question of determining what words such as "because of" or "by reason of" or "by" mean in their particular statutory context, including the objects and purposes of the statute or statutory provision... The issues of what loss and damage may be recovered may raise questions of cause and effect, and may also raise questions of remoteness of damage and mitigation.<sup>11</sup>

The case of *Hall v Sheiban*<sup>12</sup> 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.<sup>13</sup> Lockhart, Wilcox and French JJ delivered separate judgements in that case and there was no clear ratio on the issue of damages. Lockhart J considered that, generally speaking, the approach to the assessment of damages under the *Sex Discrimination Act 1984* (Cth) ('SDA') is to compare the position the complainant might have been in if the discriminatory conduct had not taken place, as against the situation in which the complainant was placed by reason of the conduct of the

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4 (2014) 223 FCR 334, [91].

5 (2014) 223 FCR 334, [93] (Kenny J).

6 (2008) 167 FCR 537.

7 (2008) 167 FCR 537, [94].

8 (2008) 167 FCR 537, [94].

9 (2014) 223 FCR 334, [94].

10 (2014) 223 FCR 334.

11 (2014) 223 FCR 334, [132].

12 (1989) 20 FCR 217.

13 See, for example, *Stephenson v Human Rights & Equal Opportunity Commission* (1995) 61 FCR 134, 142; *Ardeshirian v Robe River Iron Associates* (1993) 43 FCR 475. See also *Qantas Airways Ltd v Gama* [2008] FCAFC 69 where the Full Federal Court held that in many cases, 'the appropriate measure (of damages) will be analogous to the tortious': [94] (French and Jacobson, with whom Branson J generally agreed, [122]). The court did not, however, refer to the decision in *Hall v Sheiban* (1989) 20 FCR 217. See also: *Innes v Rail Corporation of New South Wales* (No. 2) [2013] FMCA 36, [158].

respondent.<sup>14</sup> This approach has been followed in a number of subsequent cases under the SDA, *Racial Discrimination Act 1975* (Cth) ('RDA') and *Disability Discrimination Act 1992* (Cth) ('DDA').<sup>15</sup>

In *Oracle*,<sup>16</sup> Besanko and Perram JJ considered that the approach of French J (as he then was) in *Hall v Sheiban*<sup>17</sup> was the preferable approach. In their Honours' view, common law (tort) principles may be helpful by way of analogy but are not 'the principles which are normally applied.'<sup>18</sup> Their Honours noted however, that in some cases, there may be no difference in the result. In *Oracle*, Besanko and Perram JJ summarised the approach to damages by French J (as his Honour then was) in *Hall v Sheiban*,<sup>19</sup> as follows:

[t]he measure of damages [under the SDA] was not to be found in the law of tort, but rather in the words of the statute. The rules applicable in tort were of no avail if they were in conflict with the statute. His Honour said that that did not mean that every adverse consequence, however remote, was to be the subject of compensation, because causation was to be understood as the man [or woman] in the street, not the scientist or metaphysician, would understand it.<sup>20</sup>

### (c) Multiple causes of injury/loss

In *Oracle*, Kenny J held that, to the extent that the trial judge rejected the applicant's claimed loss of sexual relationship with her then partner on the basis that it was, in his view, caused by a variety of factors (such as her work travel, distress from the litigation and her then partner's child), it was in error.<sup>21</sup> Referring to the comments of Hayne and Gaudron JJ in *Henville v Walker*<sup>22</sup> and Gaudron, Gummow and Hayne JJ in *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd*,<sup>23</sup> Kenny J stated:

In my view, even if the trial judge thought that these "other factors" might have loomed as possible influences on the relationship, this possibility could not contradict the clear evidence of [the appellant] and [her then partner] that [the harasser's] sexual harassment was a cause of [the appellant's] diminished sexual relationship with [her then partner].

... Further, quite apart from the appellant's suggested application of *Hall v A & A Sheiban*, there is likely error in an approach which concludes without further analysis that the presence of multiple factors giving rise to a specific form of loss or damage will bar a victim of sexual harassment from recouping compensation for

14 (1989) 20 FCR 217, 239.

15 *Johanson v Blackledge* [2001] FMCA 6, [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 (No 2)* [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 & 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]; *Wealthsure Pty Ltd v Selig* [2014] FCAFC 64, [27]; *Watts v Australian Postal Corp* [2014] FCA 370, [281]; *Philip v New South Wales* [2011] FMCA 308, [259].

16 (2014) 223 FCR 334.

17 (1989) 20 FCR 217.

18 (2014) 223 FCR 334, [131]. Kenny J, at [31], found that the general approach taken by the trial judge to the assessment of damages under s 46PO(4) of the AHRC Act disclosed no error of the kind alleged. At [30], Kenny J described the trial judge's approach as based 'firmly on the terms of s 46PO(4)(d)' and drawing on 'tortious principles only to inform (but not define) the manner in which the statutory task was to be accomplished, to the extent that such principles were capable of providing appropriate guidance in the particular case.'

19 (1989) 20 FCR 217, 281.

20 (2014) 223 FCR 334, [126]. See also: *Qantas Airways Ltd v Gama* (2008) 167 FCR 537, [94] (French and Jacobson JJ); and *Ewin v Vergara (No 3)* [2013] FCA 1311, [604] (Bromberg J). For a useful summary of the principles relating to damages awarded pursuant to s 46PO(4) of the AHRC Act, see also: *Watts v Australian Postal Corp* (2014) 222 FCR 220, [281] (Mortimer J).

21 (2014) 223 FCR 334, [71] (Kenny J).

22 *Henville v Walker* (2001) 206 CLR 459, 509, [163] (Hayne J) and 482-483 [68]-[72] (Gaudron J).

23 (2002) 210 CLR 109, [62].

the part which the contravening conduct played in that loss. That discriminatory conduct which contributed (but was not the sole contributor) to the onset of injury is a loss “suffered because of the conduct of the respondent” was accepted without question by French and Jacobson JJ in *Qantas Airways Ltd v Gama* at [99] in the course of applying section 46PO of the AHRC Act. Such an acceptance reflects the remedial nature of section 46PO(4)(d).<sup>24</sup>

In *Gama v Qantas Airways Ltd (No 2)*,<sup>25</sup> the applicant made various allegations of race and disability discrimination in employment. While most of the allegations failed, the court accepted that certain derogatory remarks amounted to discrimination on the basis of the applicant’s race and/or disability. In assessing damages, Raphael FM calculated damages by finding, firstly, that general damages for his depressive illness would have been assessed at \$200,000. His Honour then awarded 20% of that sum, on the basis that many of his allegations of discrimination — which had been said to have caused his depressive illness — had failed.<sup>26</sup>

On appeal,<sup>27</sup> the Full Court of the Federal Court held that Raphael FM’s approach to the assessment of damages disclosed no error, stating:

While the reasoning may be less than satisfactory, it reflects the difficulties of assessment of general damages where depressive illness is a serious element in the sequelae of a relatively few and isolated episodes of discriminatory conduct. ... [Section 46PO(4)(d)] does not require that a damages award must provide full compensation. It may be that a lesser compensatory award will be made according to the circumstances of the case. The fact that the discriminatory conduct was a contributor to the onset of a depressive illness but not its sole cause, may be taken into account when determining what is an appropriate sum ‘by way of compensation’.<sup>28</sup>

The Full Court overturned the finding of Raphael FM that some of the derogatory remarks constituted disability discrimination. Nevertheless, the court refused to disturb the overall award of damages, holding:

Given the substantial congruency of the events which gave rise to the two sets of findings there is little point in remitting the disability claim back to the Federal Magistrates Court for determination. The substance of the damages assessed does not turn upon any distinction between the findings in relation to racial discrimination and those in relation to disability discrimination.<sup>29</sup>

#### **(d) General damages (hurt, humiliation and distress, pain and suffering and loss of enjoyment of life)**

In *Oracle*, the Full Court of the Federal Court set a new benchmark for compensation awarded to victims of sexual harassment, holding that the previous range of general damages awards in sex discrimination and sexual harassment cases of \$12,000 - \$20,000<sup>30</sup> was ‘out of step’ with community standards.<sup>31</sup>

The Full Court of the Federal Court set aside the award of \$18,000 in damages for sexual harassment which was given at first instance and instead awarded \$130,000. This amount was made up of \$100,000 for general damages and \$30,000 in economic loss. The appellant’s claim of sexual harassment was based on allegations that she was subjected to multiple humiliating comments and sexual advances from the harasser during her employment with the respondent. The conduct included comments such

24 (2014) 223 FCR 334 [68]–[69]. See also: *Burns v Media Options Group Pty Ltd* [2013] FCCA 79 and *Huntley v State of NSW, Department of Police and Justice (Corrective Services NSW)* [2015] FCCA 1827, [470]–[474].

25 [2006] FMCA 1767.

26 [2006] FMCA 1767, [127].

27 *Qantas Airways Ltd v Gama* (2008) 167 FCR 537.

28 (2008) 167 FCR 537, [99] (French and Jacobson JJ, with whom Branson generally agreed, [122]).

29 (2008) 167 FCR 537, [121] (French and Jacobson JJ).

30 (2014) 223 FCR 334, [89].

31 (2014) 223 FCR 334, [118].

as: “Gosh, Rebecca, you and I fight so much, I think we must have been married in our last life”, and, “So, Rebecca, how do you think our marriage was? I bet the sex was hot”. The applicant had suffered a chronic adjustment disorder and mixed feelings of anxiety and depression. There was also evidence that the contravening conduct had adversely affected her sexual relationship with her then partner.

The leading judgment on the question of the level of general damages was that of Kenny J.<sup>32</sup> Kenny J found that, having regard to the nature and extent of the appellant’s injuries and prevailing community standards, the low level of damages awarded by the trial judge bespeaks error.<sup>33</sup> In particular, Kenny J considered that whether or not the award of damages in the sum of \$18,000 is manifestly inadequate is not to be determined by reference to some previously accepted range in sexual harassment cases.<sup>34</sup>

Kenny J noted that there is ‘no statutory restriction on the quantum of damages awards for sexual harassment’.<sup>35</sup> Kenny J observed that, as a result of initial uncertainty by judges hearing sexual discrimination cases (which includes sexual harassment), early awards of damages were fixed at a conservative level.<sup>36</sup> Kenny J also noted that academic commentators had surmised that the level of damages awards in previous cases:

runs counter to the beneficial intent of the SDA, impeding the deep social reform intent that expressly accompanied its introduction and informs the legislation as a whole: see section 3 of the SDA.<sup>37</sup>

Because it is impossible to precisely translate pain and suffering and the loss of enjoyment of life into money values, the Full Court of the Federal Court held that the assessment of damages should be made having regard to the general standards prevailing in the community.<sup>38</sup> To assist in determining what amount is reasonable compensation for the loss and damage suffered by a person having regard to those prevailing community standards, the Full Court held it is appropriate and necessary to have regard to the damages allowed for other kinds of analogous non-pecuniary injury in other cases, particularly personal injury cases.<sup>39</sup>

Kenny J made a comparison to damages awarded in personal injury cases and said that in those cases there is reason to believe that community standards now accord a higher value to compensation for pain and suffering and loss of enjoyment of life than before.<sup>40</sup> A comparison with damages awarded in workplace bullying cases also showed that damages historically awarded in cases involving sexual harassment in the workplace were significantly lower than cases involving bullying and harassment in the workplace without a sexual element. Her Honour concluded that:

Such disparity bespeaks the fact that today an award for sexual harassment, though within the accepted range for such cases, may be manifestly inadequate as compensation for the damage suffered by the victim, judged by reference to prevailing community standards.<sup>41</sup>

And that:

the general range of general damages in respect of pain and suffering and loss of enjoyment of life caused by sex discrimination has scarcely altered since 2000 and does not reflect the shift in the community’s

32 (2014) 223 FCR 334, [73]–[118] (Kenny J) with whom Besanko and Perram JJ agreed, [119].

33 (2014) 223 FCR 334, [73]–[118] (Kenny J) with whom Besanko and Perram JJ agreed, [119].

34 (2014) 223 FCR 334, [81] (Kenny J) with whom Besanko and Perram JJ agreed, [119].

35 (2014) 223 FCR 334, [115].

36 (2014) 223 FCR 334, [83]–[85].

37 (2014) 223 FCR 334, [87].

38 (2014) 223 FCR 334, [90] (Kenny J).

39 (2014) 223 FCR 334, [95] (Kenny J).

40 (2014) 223 FCR 334 at 360 [96] – [98], citing the judgment of the Court of Appeal of the Supreme Court of Victoria in *Amaca Pty Ltd v King* [2011] VSCA 447, [177].

41 (2014) 223 FCR 334, [109].

estimation of the value to be placed on these matters. The range has remained unchanged, notwithstanding that the community has generally gained a deeper appreciation of the experience of hurt and humiliation that victims of sexual harassment experience and the value of loss of enjoyment of life occasioned by mental illness or distress caused by such conduct.<sup>42</sup>

Kenny J considered that an amount of \$100,000 should be awarded for general damages which included compensation for the injury that the sexual harassment caused to the appellant's sexual relationship with her then partner.<sup>43</sup>

On the basis of the reasoning in *Oracle*, courts may be open to making higher awards for general damages for 'distress, hurt and humiliation' in other harassment and discrimination cases.<sup>44</sup>

In a number of cases preceding *Oracle* 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*,<sup>45</sup> Wilcox J cited with approval (in the context of damages for sexual harassment) the following statement of May LJ in *Alexander v Home Office*:<sup>46</sup>

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.<sup>47</sup>

For a summary of the case law preceding *Oracle* refer to the previous editions of Federal Discrimination Law, available through this link: <https://www.humanrights.gov.au/federal-discrimination-law-archive-older-versions>.

## **(e) Aggravated and exemplary damages**

### **(i) Aggravated damages**

Aggravated damages are considered to be compensatory in nature and there is therefore no question that it is within a court's power to award such damages under section 46PO(4)(d) of the AHRC Act.<sup>48</sup>

The first case where the Federal Court held that aggravated damages may be awarded in discrimination cases was *Hall v Sheiban*.<sup>49</sup> In that case, Lockhart J cited with approval the statement of May LJ in

<sup>42</sup> (2014) 223 FCR 334, [117] (Kenny J).

<sup>43</sup> (2014) 223 FCR 334, [118].

<sup>44</sup> *Collins v Smith (Human Rights)* [2015] VCAT 1992, [179]. But note *Pop v Taylor* [2015] FCCA 1720, [295]–[298] (Brown J).

<sup>45</sup> (1989) 20 FCR 217, 256. See also *Gilroy v Angelov* [2000] FCA 1775, [105]; *Johanson v Blackledge* [2001] FMCA 6, [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].

<sup>46</sup> [1988] 2 All ER 118.

<sup>47</sup> [1988] 2 All ER 118, 122. See also: *Pop v Taylor* [2015] FCCA 1720, [295]–[298] (Brown J).

<sup>48</sup> *Mulligan v Virgin Airways Pty Ltd* (2015) 234 FCR 207, [167]; *Ewin v Vergara (No 3)* [2013] FCA 1311, [676] (Bromberg J).

<sup>49</sup> (1989) 20 FCR 217.



*Alexander v Home Office*<sup>50</sup> that aggravated damages may be awarded where the defendant behaved 'high-handedly, maliciously, insultingly or oppressively in committing the act of discrimination'.<sup>51</sup> Further, his Honour noted that the circumstances in which the defendant's conduct took place may also give rise to an element of aggravation, such as where the relationship is one of employer and employee.<sup>52</sup> As to the nature of aggravated damages, Lockhart J went on to state:

It is fundamental that an award of a larger amount of damages by way of aggravated damages serves to compensate the victim for damage occasioned by the defendant's conduct where an element of aggravation is involved in that conduct, and not to punish the defendant.<sup>53</sup>

Aggravated damages have also been awarded on the basis of the manner in which a respondent conducts proceedings. In the case of *Elliott v Nanda* ('*Nanda*'),<sup>54</sup> 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.<sup>55</sup>

His Honour went on to note 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'.<sup>56</sup> Those circumstances might include, for example, the manner in which a party maintained its defence of a claim, or unjustifiably cross-examined an applicant thereby exacerbating the hurt and injury suffered from the primary discrimination.<sup>57</sup>

His Honour 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'.<sup>58</sup>

In *Nanda*, 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.<sup>59</sup>

In *Hughes v Car Buyers Pty Ltd*<sup>60</sup> ('*Hughes*'), the applicant sought and was awarded \$5,000 in aggravated damages for the additional mental distress, frustration, humiliation and anger caused by the conduct of the respondent in the course of the proceedings. The respondent had failed to respond to correspondence from the Human Rights and Equal Opportunity Commission about the complaint made by the applicant, and failed to involve themselves in the court proceedings. Walters FM found that the resolution of the applicant's complaint to the Commission was significantly delayed by the

50 [1988] 2 All ER 118.

51 (1989) 20 FCR 217, 239.

52 (1989) 20 FCR 217, 240.

53 (1989) 20 FCR 217, 240.

54 (2001) 111 FCR 240.

55 (2001) 111 FCR 240, [180].

56 (2001) 111 FCR 240, [181]. Cited with approval by Barker J in *Clarke v Nationwide News Pty Ltd t/as The Sunday Times* (2012) 201 FCR 389, [349].

57 (2001) 111 FCR 240, [182]. Cited with approval by Flick, Reeves and Griffiths JJ in *Mulligan v Virgin Australia Airlines Pty Ltd* (2015) 234 FCR 207, [167] and by Barker J in *Clarke v Nationwide News Pty Ltd t/as The Sunday Times* (2012) 201 FCR 389, [349].

58 (2001) 111 FCR 240, [182]. His Honour's decision was applied in *Oberoi v Human Rights & Equal Opportunity Commission* [2001] FMCA 34, [44].

59 *Elliott v Nanda* (2001) 111 FCR 240, [185]. The proceedings before Moore J were for enforcement of the decision by the Human Rights and Equal Opportunity Commission, the Commission 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 Commission hearing.

60 [2004] FMCA 526.

refusal of the respondents to involve themselves in the relevant processes in any way. His Honour held that the applicant had suffered additional mental distress because of the delay, and because of her perception that the respondents considered her complaint and the subsequent proceedings were not worthy of acknowledgement or response.

In *Ewin v Vergara (No 3)*,<sup>61</sup> Bromberg J declined to order aggravated damages to the successful applicant in a sexual harassment claim. The applicant had submitted that:

whatever award your Honour strikes for general damages, there is always going to be a component in a case like this that general damages in the discretion of your Honour won't sufficiently compensate the horror, the dislocation, the disruption of life, the smell of flashbacks, the suicide attempts, the change in lifestyle. There are present in this case, as in cases of similar sort, aspects that won't be covered within what is commonly compensated for by general damages.<sup>62</sup>

Bromberg J held that these considerations had already been taken into account in the award of general damages and could not justify a separate order for aggravated damages.<sup>63</sup> His Honour noted that the applicant had made no submission about the 'manner in which a party conducted its case and thereby exacerbated the hurt and injury suffered from the primary discrimination' which is a circumstance in discrimination cases which may give rise to an award of aggravated damages.<sup>64</sup>

In *Burns v Media Options Group Pty Ltd*,<sup>65</sup> Nicholls J awarded the successful applicant \$10,000 in aggravated damages. In making this award, Nicholls J noted Lockhart J's statement in *Hall v Shieban* (at [76]) that:

It is fundamental that an award of a larger amount of damages by way of aggravated damages serves to compensate the victim for damage occasioned by the defendant's conduct where an element of aggravation is involved in that conduct, and not to punish the defendant.<sup>66</sup>

In this case, the respondents were found to have acted 'high-handedly, maliciously, insultingly or oppressively in committing the act of discrimination'.<sup>67</sup> The applicant was dismissed from his employment at least in part because of his need to care for his partner who became ill with cancer and required intensive medical treatment over a relatively short period of time. Nicholls J found that the respondents had engaged in conduct including:

- telling the applicant he should leave or get rid of his partner;
- pressuring the applicant to come to work and not to leave until he had finished the tasks allocated to him;
- telling the applicant that he should not stay home to care for his partner;
- making derogatory comments about the applicant's partner;
- refusing to give the applicant time off to care for his partner;
- terminating the applicant's employment for reasons that were fabricated and with two police officers in attendance; and
- telling the applicant that 'he was stupid', that 'she was sick of his problems', that 'he had cost them money' because of his partner, that 'his work should come before [his partner]'; and questioning why the applicant would take care of his partner.<sup>68</sup>

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61 [2013] FCA 1311.

62 [2013] FCA 1311, [677].

63 [2013] FCA 1311, [678].

64 [2013] FCA 1311, [678].

65 [2013] FCCA 79.

66 [2013] FCCA 79, [1785].

67 [2013] FCCA 79, [1784].

68 [2013] FCCA 79, [1721]–[1722].

## (ii) Exemplary damages

In *Mulligan v Virgin Australia Airlines Pty Ltd*,<sup>69</sup> the Full Court of the Federal Court remarked that there is an ‘unresolved debate’ about whether exemplary damages may be awarded in discrimination cases.<sup>70</sup> It did not need to consider that question as it did not consider that the respondent’s conduct warranted an order for either aggravated or exemplary damages.

The debate revolves around the fact that damages awarded pursuant to section 46PO(4)(d) of the AHRC Act are to ‘compensate’ for any loss or damage suffered because of the conduct of the respondent (see the discussion at 7.2.1(a) above). Exemplary damages are punitive damages and are not compensatory in nature.<sup>71</sup>

In the case of *Font v Paspaley Pearls Pty Limited*<sup>72</sup> (*‘Font’*), Raphael FM 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.<sup>73</sup>

His Honour continued:

The importance of the distinction between compensatory and punitive damages is that an applicant must establish a loss in order to be awarded compensatory damages. Even where that loss is constituted by something as abstract as hurt or humiliation the Courts have striven to measure those feelings and give them a value.<sup>74</sup>

When considering the conduct of the respondents which took place during the course of the trial, Raphael FM suggested that it may be more appropriate to award exemplary, rather than aggravated damages:

Is the applicant expected to ask for an adjournment to produce further medical evidence of her distress occasioned by the unwarranted prosecution of the respondent’s case? I think not. I think it is safer to recognise... the punitive element in these damages.<sup>75</sup>

His Honour awarded \$7,500 in exemplary damages. The fact that the applicant had sought aggravated, rather than exemplary, damages was not, in his Honour’s view, a bar to recovery:

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’.<sup>76</sup>

However, in *Hughes*, Walters FM stated (in obiter) that he disagreed with Raphael FM’s conclusion in *Font* that the court has a power to award exemplary damages. Walters FM expressed the view that

69 (2015) 234 FCR 207.

70 (2015) 234 FCR 207, [167] (Flick, Reeves and Griffiths JJ).

71 *Ewin v Vergara (No 3)* [2013] FCA 1311, [680]-[681] (Bromberg J) citing *Gray v Motor Accident Commission* (1998) 196 CLR 1 at [15] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

72 [2002] FMCA 142.

73 [2002] FMCA 142, [162], citing *Hehir v Smith* [2002] QSC 92, [42].

74 [2002] FMCA 142, [165].

75 [2002] FMCA 142, [165].

76 [2002] FMCA 142, [166]. But note *Hehir v Smith* [2002] QSC 92; *Myer Stores Ltd 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.

under section 46PO(4) of what is now the AHRC Act, a respondent can only be ordered to pay to an applicant ‘damages by way of compensation for any loss or damage suffered because of the conduct of the respondent’ (section 46PO(4)(d)). His Honour went on to state that ‘[i]t follows, in my opinion, that although the court has power to award aggravated damages, it does not have power to award exemplary damages’.<sup>77</sup>

Walters FM cited<sup>78</sup> the following passage from the judgment of Windeyer J in *Uren v John Fairfax and Sons Pty Ltd*:<sup>79</sup>

aggravated damages are given to compensate the plaintiff where the harm done to him by a wrongful act was aggravated by the manner in which the act was done; exemplary damages, on the other hand, are intended to punish the defendant, and presumably to serve one or more of the objects of punishment – moral retribution or deterrence.<sup>80</sup>

Walters FM observed that compensatory damages must be approached by considering the effect of the wrongful act on the plaintiff, whereas exemplary damages (being punitive) are to be approached from a different perspective. In considering whether to award exemplary damages, the focus of the inquiry is on the wrongdoer, not upon the party who was wronged.<sup>81</sup>

Similarly, in *Frith v The Exchange Hotel*,<sup>82</sup> Rimmer FM held that the court does not have the power to award exemplary damages under section 46PO(4) of the AHRC Act.<sup>83</sup> Her Honour appears to have reached this view on the basis of the line of authorities that have held that an award of exemplary damages are not compensatory in nature but are intended to punish a respondent.<sup>84</sup> Her Honour further referred to the decision of *Harris v Digital Pulse*,<sup>85</sup> in which Spigelman CJ questioned the description of exemplary damages as ‘damages’.

It should be noted, however, that these decisions do not appear to have considered the apparently inclusive nature of the list of potential orders that a court may make upon a finding that there has been unlawful discrimination. As Carr J in *McGlade v Lightfoot*<sup>86</sup> observed, ‘the list of specified orders in section 46PO(4) is not exhaustive — see the use of the word “including”’.<sup>87</sup> This suggests that the court may, indeed, enjoy the power to make orders for exemplary damages in appropriate cases.

Further, Barker J noted (in obiter comments) in *Clarke v Nationwide News Pty Ltd*,<sup>88</sup> that the court’s broad power under section 46PO(4) of the AHRC Act to make such orders ‘as it thinks fit’ may provide a capacity for the court to award exemplary damages.

Also in obiter comments, Stone and Bennett JJ (with whom Dowsett J generally agreed) observed in *Employment Services Australia Pty Ltd v Poniatowska*,<sup>89</sup> that ‘while section 46PO(4) of the AHRC Act refers only to orders for damages of a compensatory nature, there is no exclusion of other orders that may be made’.

77 [2004] FMCA 526, [68], cited with approval in *Burns v Media Options Group Pty Ltd* [2013] FCCA 79, [1787]–[1788].

78 [2004] FMCA 526, [69].

79 (1966) 117 CLR 118, 149. Walters FM also observed that this passage was quoted with apparent approval in *Gray v Motor Accident Commission* (1998) 196 CLR 1, 4 [6]–[7] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

80 See *Lamb v Cotogno* 164 CLR 1, 8–13; *Gaykamangu v Northern Territory of Australia* [2016] NTSC 26, [10] (Luppino M); *Whitbread v Rail Corporation NSW* [2011] NSWCA 130, [214].

81 [2004] FMCA 526 [71], cited in *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389, [347] (Barker J).

82 [2005] FMCA 402.

83 [2005] FMCA 402, [99].

84 [2005] FMCA 402, [100]–[105].

85 (2003) 56 NSWLR 298.

86 (2002) 124 FCR 106.

87 (2002) 124 FCR 106, 123 [80].

88 (2012) 201 FCR 389, [340].

89 [2010] FCAFC 92, [133].

### (f) A finding of discrimination is necessary

In *Moskalev v NSW Department of Housing*,<sup>90</sup> Driver FM commented on the availability of remedies under what is now the AHRC Act. Driver FM held that, although the claim for discrimination had not been made out in that case, an order could be made directing the respondent to reassess the applicant's entitlement to priority housing. His Honour stated:

As I noted in *Tyler v Kesser Torah College* [2006] FMCA 1, at [108] s.46PO(4) of the HREOC Act is not an exhaustive statement of the orders that may be made by the Court in proceedings under that Act. In my view, even where unlawful discrimination is not established, the Court may, in appropriate circumstances (as here) use s.15 of the *Federal Magistrates Act 1999* (Cth) to correct administrative error.<sup>91</sup>

The Department of Housing ('Department') appealed Driver FM's order that it reassess the eligibility of the applicant and his family for priority housing. In *New South Wales Department of Housing v Moskalev*,<sup>92</sup> Cowdroy J upheld the appeal on the basis that there had been no finding of unlawful discrimination. As such, his Honour held that there was no power for the court to make the order it did against the Department. His Honour stated:

The order could have been justified under s 46PO (4) of the HREOC Act had a finding of unlawful discrimination been made. In the absence of any finding of unlawful conduct by the Department there was no jurisdiction under s 15 of the FMA<sup>93</sup> which could support the order and the request to be placed on the priority housing list does not constitute an 'associated matter' under s 18 of the FMA.<sup>94</sup> It follows that the order was made *ultra vires*.<sup>95</sup>

### (g) Avoiding double recovery

In *Ewin v Vergara (No 4)*,<sup>96</sup> Bromberg J reduced the amount of damages to be paid by the respondent from \$476,163 to \$210,563 in accordance with an earlier confidential settlement between the applicant's employer and the respondent's employer in order to prevent 'double recovery'.<sup>97</sup> In *Ewin v Vergara (No 3)*,<sup>98</sup> Bromberg J explained that:

It is well established that an applicant may not recover from one or more respondents an amount that is in excess of his or her loss: *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635. It does not matter that the claims against the various respondents arise under different causes of action. Where relief is sought in respect of the same loss, recovery will be limited by the extent of the applicant's loss...The principle is often referred to as the rule against double recovery.<sup>99</sup>

90 [2006] FMCA 876.

91 [2006] FMCA 876, [35].

92 (2007) 158 FCR 206.

93 Section 15 of the *Federal Magistrates Act 1999* (Cth) provided that the Federal Magistrates Court has power to make orders, including interlocutory orders, that it thinks appropriate, in relation to matters in which it has jurisdiction. The equivalent enabling provision for the FCC is s 15 of the *Federal Circuit Court of Australia Act 1999*.

94 Section 18 of the FMA provides that jurisdiction is conferred on the Federal Magistrates Court in relation to matters which are not otherwise in its jurisdiction but which are associated with matters in which the jurisdiction of the Federal Magistrates Court is invoked. The equivalent enabling provision for the FCC is s 15 of the *Federal Circuit Court of Australia Act 1999*.

95 (2007) 158 FCR 206, [34]. See also *Neate v Totally & Permanently Incapacitated Veterans Association of NSW Ltd* [2007] FMCA 488, [24].

96 [2013] FCA 1409.

97 [2013] FCA 1409, [6]–[8].

98 [2013] FCA 1311.

99 [2013] FCA 1311, [686].

Once a respondent shows that a payment has been made to a claimant in circumstances capable of attracting the rule against double recovery, it is for the claimant to show that the payment was not received in compensation for the same loss.<sup>100</sup>

## 7.2.2 Damages under the RDA generally

The following table gives an overview of damages awarded under the RDA since the transfer of the hearing function to the FMC (now the FCC) and the Federal Court on 13 April 2000. Note that complaints of racial hatred under Part IIA of the RDA are not dealt with in this section: they are considered separately in 7.2.3.

**Table 1: Overview of damages awarded under Part II of the RDA**

	Case	Damages awarded
(a)	<i>Carr v Boree Aboriginal Corporation</i> [2003] FMCA 408	Total Damages: \$21,266.50 \$11,848.61 (economic loss) \$1,917.89 (interest) \$7,500.00 (non-economic loss)
(b)	<i>Baird v Queensland (No 2)</i> [2006] FCAFC 198	Damages, including interest, awarded as follows: Baird: \$17,000 Creek: \$45,000 Tayley: \$37,000 Walker: \$45,000 Deeral: \$85,000 Gordon: \$19,800
(c)	<i>Gama v Qantas Airways Ltd (No 2)</i> [2006] FMCA 1767, upheld on appeal: <i>Qantas Airways Ltd v Gama</i> (2008) 167 FCR 537	Total Damages: \$71,692 \$40,000 (non-economic loss) \$31,692 (medical expenses and interest)
(d)	<i>House v Queanbeyan Community Radio Station</i> [2008] FMCA 897	Total damages: \$6000 for each applicant (non-economic loss)
(e)	<i>Trapman v Sydney Water Corporation &amp; Ors</i> [2011] FMCA 398	Total damages: \$5,000 (non-economic loss)

<sup>100</sup> [2013] FCA 1311, [687], citing *Boncrisiano v Lohmann* [1998] 4 VR 82 at 89-90 (Winneke P, with whom Charles and Batt JJA agreed) citing *Townsend v Stone Toms & Partners* (1984) 27 BLR 26; and also *SAS Trustee Corporation v Budd* [2005] NSWCA 366, [49] (Mason P, with whom Handley and McColll JJA agreed).

**(a) Carr v Boree Aboriginal Corporation**

In *Carr v Boree Aboriginal Corporation*<sup>101</sup> 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'.<sup>102</sup> In the absence of any evidence to the contrary, his Honour accepted the claimed amount for 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'<sup>103</sup> and the fact that no medical evidence had been adduced.

**(b) Baird v Queensland**

In *Baird v Queensland*,<sup>104</sup> the Full Court of the Federal Court awarded damages as agreed between the parties, having found that the underpayment of wages to the Aboriginal appellants was racially discriminatory. The amounts awarded to the individual plaintiffs ranged between \$17,000 and \$85,000.

**(c) Gama v Qantas Airways Ltd**

In *Gama v Qantas Airways Ltd (No 2)*,<sup>105</sup> Raphael FM awarded the applicant the sum of \$71,692 in damages, \$40,000 of which was for non-economic loss. His Honour accepted medical evidence that the applicant experienced a severe depressive illness and that the unlawful discrimination contributed to that illness. Raphael FM held that remarks had been made to Mr Gama which contravened the RDA and/or the DDA, including: 'You should be walking up the stairs like a monkey'. His Honour noted that the applicant had not been able to make out the more serious allegations in his claim and found that the discriminatory treatment contributed 20% to his injury.

On appeal,<sup>106</sup> the Full Court of the Federal Court upheld the award and calculation of damages, notwithstanding that it overturned the finding at first instance that certain of the remarks constituted disability discrimination.

**(d) House v Queanbeyan Community Radio Station**

In *House v Queanbeyan Community Radio Station*<sup>107</sup> Neville FM found that the decision of a community radio station to refuse the membership applications of two Aboriginal women was racially discriminatory. The court ordered the radio station to accept the membership applications. While Neville FM accepted that 'the failure to provide medical evidence is not fatal to any claim for general damages', his Honour said it militated against a large award.<sup>108</sup> There was also no evidence the actions of the radio station had impaired the employment of the applicants. Damages of \$6,000 were awarded to each applicant. Costs were also awarded against the radio station.

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101 [2003] FMCA 408.

102 [2003] FMCA 408, [9].

103 [2003] FMCA 408, [12].

104 [2006] FCAFC 198.

105 [2006] FMCA 1767.

106 *Qantas Airways Ltd v Gama* (2008) 167 FCR 537.

107 [2008] FMCA 897.

108 [2008] FMCA 897, [124].



### (e) *Trapman v Sydney Water Corporation & Ors*

In *Trapman v Sydney Water Corporation & Ors*,<sup>109</sup> Scarlett FM awarded the applicant \$5,000 general damages to compensate for the hurt and humiliation he suffered as a result of a racist joke told by his supervisor in his presence and in the presence of co-workers. There was no economic loss. Scarlett FM found that the injury from telling 'a weak and unfunny racist joke', whilst being a practice that should not be permitted in the workplace, was at the lower end of the scale. A restrained, but not minimal award was appropriate.

### 7.2.3 Damages in racial hatred cases

The following table gives an overview of damages awarded in racial hatred cases under Part IIA of the RDA since the transfer of the hearing function to the FMC (now the Federal Circuit Court) and the Federal Court on 13 April 2000. The reasoning underlying those awards is summarised below.

**Table 2: Overview of damages awarded under Part IIA of the RDA**

	Case	Damages awarded
(a)	<i>McMahon v Bowman</i> [2000] FMCA 3	\$1,500 (non-economic loss)
(b)	<i>Horman v Distribution Group</i> [2001] FMCA 52	\$12,500 (non-economic loss, including medication)
(c)	<i>San v Dirluck Pty Ltd</i> [2005] FMCA 750	\$2,000 (non-economic loss)
(d)	<i>Silberberg v The Builders Collective of Australia Inc</i> [2007] FCA 1512	No damages awarded
(e)	<i>Campbell v Kirstenfeldt</i> [2008] FMCA 1356	\$7,500 (non-economic loss)
(f)	<i>Clarke v Nationwide News Pty Ltd (t/as the Sunday Times)</i> (2012) 201 FCR 389	\$12,000 (non-economic loss)
(g)	<i>Sidhu v Raptis</i> [2012] FMCA 338	\$2,000 (non-economic loss)
(h)	<i>Barnes v Northern Territory Police</i> [2013] FCCA 30	\$3,500 (non-economic loss) plus interest
(i)	<i>Kanapathy v In De Braekt (No 4)</i> [2013] FCCA 1368	Total damages: \$12,500 \$10,500 (non-economic loss) \$2,000 (medical expenses)
(j)	<i>Haider v Hawaiian Punch Pty Ltd (t/as Honeypot Club)</i> [2015] FCA 37	\$9,000 (non-economic loss)

109 [2011] FMCA 398.

**(a) McMahon v Bowman**

In *McMahon v Bowman*,<sup>110</sup> 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 'as Mr McMahon should not be twice punished for his actions'<sup>111</sup> and the altercation was the subject of proceedings in the local court where Mr McMahon was defending a charge of assault. 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.

**(b) Horman v Distribution Group**

In *Horman v Distribution Group*<sup>112</sup> the applicant partially succeeded in her complaints under the RDA and the SDA. In relation to her claims under the SDA, Ms Horman alleged that she had been subjected to unacceptable and inappropriate comments from fellow workers, physical approaches such as texta writing on her body, as well as the pulling of bra straps and touching of buttocks. In addition, Raphael FM held that Ms Horman had been discriminated against on the grounds of her pregnancy when her employment was unlawfully terminated. The respondent was also found to have directed offensive and derogatory terms to the applicant contrary to section 18C of the RDA. 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 incidents to which the applicant was subjected. His Honour awarded \$12,500 including special damages for medication costs.<sup>113</sup>

**(c) San v Dirluck Pty Ltd**

In *San v Dirluck Pty Ltd*,<sup>114</sup> Raphael FM found that the applicant had been subject to acts of racial hatred and sexually harassed. With regard to the claim for racial hatred, the manager of the store owned by the respondent had made comments to the applicant such as 'That's right, fuck off ching chong go back home' and 'Good I haven't seen an Asian come before'.

Raphael FM also held that the manager sexually harassed the applicant by consistently and almost exclusively making remarks of a sexual nature directed at the applicant and asking her questions about her love life such as: 'How's your love life?', 'Oh, got your period?', 'Did you get any last night?'

Raphael FM awarded the applicant \$2,000 finding that whilst the comments were hurtful there was no evidence to suggest that the comments had caused the applicant to leave her job. Neither was there any expert evidence to suggest that the applicant suffered anything more than hurt.<sup>115</sup>

**(d) Silberberg v The Builders Collective of Australia Inc**

In *Silberberg v The Builders Collective of Australia Inc*,<sup>116</sup> Gyles J held that the second respondent had contravened section 18C of the RDA by posting messages on a forum maintained by the first

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<sup>110</sup> [2000] FMCA 3.

<sup>111</sup> [2000] FMCA 3, [30].

<sup>112</sup> [2001] FMCA 52.

<sup>113</sup> [2001] FMCA 52, [70].

<sup>114</sup> [2005] FMCA 750.

<sup>115</sup> [2005] FMCA 750, [46]–[47].

<sup>116</sup> (2007) 164 FCR 475.

respondent, the Builders Collective. Gyles J declared that the conduct of the second respondent contravened the RDA, and made further orders restraining the second respondent from publishing the messages the subject of the complaint, or any other similar material, either on the internet or elsewhere. His Honour did not, however, make an order for damages and it does not appear that any were sought by the applicant.

#### **(e) Campbell v Kirstenfeldt**

In *Campbell v Kirstenfeldt*,<sup>117</sup> Lucev FM held the applicant had been subject to six separate acts of racial hatred in breach of section 18C of the RDA. Mrs Campbell was awarded a total of \$7,500 in damages for hurt and humiliation. This was made up of separate damages awards for five of the six incidents. Damages were not awarded for an incident on Australia Day because a complaint made by Mrs Campbell about this incident had led to the respondent being convicted and fined and this outcome 'must have afforded [her] a level of "compensation" by reason of the outcome'.<sup>118</sup> Higher awards were made in respect of incidents that occurred after the respondent's conviction because the court was 'prepared to infer that greater hurt and humiliation might have been caused to Mrs Campbell in circumstances where she might expect that the conviction and fine would lead to the conduct coming to an end'.<sup>119</sup> The respondent was also ordered to make a written apology.

#### **(f) Clarke v Nationwide News**

In *Clarke v Nationwide News Pty Ltd trading as The Sunday Times*,<sup>120</sup> the applicant Ms Clarke was the mother of three boys aged 15, 11 and 10 who were killed in a motor vehicle accident. One of the boys' cousins aged 17 was also killed in the accident. A fifth teenage boy survived the accident. The respondent newspaper published six articles on its website in relation to the accident along with comments from readers. The reader comments were moderated by the respondent before publication. Barker J found that four comments by readers that were published contravened section 18C of the RDA, including that the families of the boys who were killed had a 'criminal history', that the boys were 'criminal trash', that the boys were 'scum' and should be used 'as land fill' in disused mineshafts near Kalgoorlie, and that the applicant (along with other mothers in the Aboriginal community) was 'hopeless at mothering' and should not 'breed'. Barker J awarded Ms Clarke \$12,000 to compensate her for the offence, insult and humiliation she suffered as a result of the publication of these comments.

#### **(g) Sidhu v Raptis**

In *Sidhu v Raptis*,<sup>121</sup> Smith FM found that Mr Raptis, the brother of Mr Sidhu's girlfriend, called Mr Sidhu 'coconut' and 'nigger' in public. His Honour found that repeated use of the second of these terms contravened section 18C of the RDA. Mr Sidhu was an Australian of Indian origin. While studying and working in Melbourne he was exposed to racial insults and feelings of isolation. At the time of the events in question, he was suffering symptoms of a diagnosed connective tissue disease, with depression arising from the disease and its medication. Smith FM considered that his medical condition probably left him susceptible to a significant degree of emotional upset and distress. His Honour awarded the applicant \$2,000 in damages for 'his emotional upset and injured feelings resulting from the incident'.

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117 [2008] FMCA 1356.

118 [2008] FMCA 1356, [44].

119 [2008] FMCA 1356, [44].

120 (2012) 201 FCR 389.

121 [2012] FMCA 338.

**(h) Barnes v Northern Territory Police**

In *Barnes v Northern Territory Police*,<sup>122</sup> Raphael J found that an off duty policeman drove slowly past the house of Mr Barnes, an Aboriginal man, and mouthed obscenities at him, while Mr Barnes was at the front of his house with his son. His Honour found that at least a part of the reason for this conduct was Mr Barnes' ethnicity. Mr Barnes was awarded \$3,500 in damages plus interest from the date of the incident.

**(i) Kanapathy v In De Braekt (No 4)**

In *Kanapathy v In De Braekt (No4)*,<sup>123</sup> Lucev J found that Ms in de Braekt, a legal practitioner, abused Mr Kanapathy, a security officer at the Central Law Courts in Perth, when Mr Kanapathy asked that she undergo a security search. Among other things, Ms in de Braekt called Mr Kanapathy a 'Singaporean prick', told him to 'go back to your country' and told him that 'we don't need people like you here'. Lucev J took into account that Mr Kanapathy was abused in a public place whilst carrying out duties designed to ensure public safety and the protection of a court building, and the occupants, invitees and users of that building, in circumstances where the abuse was levelled by a legal practitioner. His Honour made an award of \$10,500 in general damages and \$2,000 in compensation for medical expenses.

**(j) Haider v Hawaiian Punch Pty Ltd**

In *Haider v Hawaiian Punch Pty Ltd*,<sup>124</sup> Mansfield J found that Mr Haider was racially abused by a doorman at 2.00am outside a venue in Darwin known as The Honeypot Club operated by the respondent. Video of the incident provided to the court showed the doorman throwing some balloons into the street which Mr Haider picked up. The doorman then yelled at Mr Haider, who was described as being of Indian or Pakistani appearance, to go back to his own country, that Australia is a white peoples' country, and that he is not white. Mr Haider responded that Australia was his country and he was not going anywhere. The doorman continued to abuse Mr Haider and challenged him to produce his visa. He then approached Mr Haider and pushed him in the chest causing him to stumble backwards a few steps. Shortly after that, the police arrived. Mansfield J took into account the fact that the respondent failed to apologise for the conduct or acknowledge that the behaviour was racist in awarding damages of \$9,000.

**7.2.4 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 FMC (now the FCC) and the Federal Court on 13 April 2000. 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 7.2.5.

Note, however, the discussion of *Oracle* at 7.2.1(d) above. In that case, Kenny J (with whom Besanko and Perram JJ concurred at [119]) considered that continued adherence in sex discrimination cases to a 'range' of damages awards that had not absorbed the increases evident in awards in other fields of litigation had resulted in a manifestly inadequate award of damages in that case at first instance. On the basis of the reasoning in *Oracle*, courts may be open to making higher awards for general damages in sexual harassment and other discrimination cases.

<sup>122</sup> [2013] FCCA 30.

<sup>123</sup> [2013] FCCA 1368.

<sup>124</sup> [2015] FCA 37.

**Table 3: Overview of damages awarded under the SDA**

	Case	Damages awarded
(a)	<i>Font v Paspaley Pearls Pty Ltd</i> [2002] FMCA 142	Total Damages: \$17,500 \$7,500 (exemplary damages) \$10,000 (non-economic loss)
(b)	<i>Gulke v KC Canvas Pty Ltd</i> [2000] FCA 1415	Total Damages: \$10,000 \$7,000 (economic loss) \$3,000 (non-economic loss)
(c)	<i>Cooke v Plauen Holdings Pty Ltd</i> [2001] FMCA 91	\$750 (non-economic loss)
(d)	<i>Song v Ainsworth Game Technology Pty Ltd</i> [2002] FMCA 31	Total Damages: \$22,222 (approx) \$10,000 (non-economic loss) \$244.44 per week from 21 February 2001 until the date of judgment, less \$977.76 already paid (economic loss)
(e)	<i>Escobar v Rainbow Printing Pty Ltd (No 2)</i> [2002] FMCA 122	Total Damages: \$7,325.73 \$2,500 (non-economic loss) \$4,825.73 (economic loss)
(f)	<i>Mayer v Australian Nuclear Science &amp; Technology Organisation</i> [2003] FMCA 209	Total Damages: \$39,294 \$30,695 (economic loss: includes salary, motor vehicle benefits and superannuation) \$5,000 (non-economic loss) \$3,599 (interest) <i>(minus an amount due for income tax, to be paid to the Australian Taxation Office)</i>
(g)	<i>Evans v National Crime Authority</i> [2003] FMCA 375, partially overturned on appeal: <i>Commonwealth v Evans</i> [2004] FCA 654	Total Damages: \$41,488.57 \$12,000 (non-economic loss – reduced from \$25,000 on appeal) \$7,493.84 (interest – subject to recalculation after appeal) \$21,994.73 (economic loss – not challenged on appeal)

(Continued)

	<b>Case</b>	<b>Damages awarded</b>
(h)	<i>Rispoli v Merck Sharpe &amp; Dohme (Australia) Pty Ltd</i> [2003] FMCA 160	\$10,000 plus interest (non-economic loss)
(i)	<i>Kelly v TPG Internet Pty Ltd</i> [2003] FMCA 584	\$7,500 (non-economic loss)
(j)	<i>Gardner v All Australia Netball Association Ltd</i> [2003] FMCA 81	\$6,750 (non-economic loss)
(k)	<i>Ho v Regulator Australia Pty Ltd</i> [2004] FMCA 62	\$1,000 (non-economic loss)
(l)	<i>Howe v Qantas Airways Ltd</i> [2004] FMCA 242; <i>Howe v Qantas Airways Ltd (No 2)</i> [2004] FMCA 934	Total Damages: \$27,753.85 (plus interest) \$3,000 (non-economic loss) \$24,753.85 (economic loss) plus interest
(m)	<i>Dare v Hurley</i> [2005] FMCA 844	Total Damages: \$12,005.51 \$3,000 (non-economic loss) \$9,005.51 (economic loss)
(n)	<i>Fenton v Hair &amp; Beauty Gallery Pty Ltd</i> [2006] FMCA 3	Total Damages: \$1,338 \$500 (non-economic loss) \$838 (economic loss – including associated contractual claim)
(o)	<i>Rankilor v Jerome Pty Ltd</i> [2006] FMCA 922	\$2,000 (non-economic loss including out-of-pocket expenses)
(p)	<i>Iliff v Sterling Commerce (Australia) Pty Ltd</i> [2007] FMCA 1960, upheld on appeal: <i>Sterling Commerce (Australia) Pty Ltd</i> [2008] FCA 702	\$22,211.54 (economic loss - plus interest <sup>125</sup> and less tax)
(q)	<i>Poniatowska v Hickinbotham</i> [2009] FCA 680	Total Damages: \$463,000 \$90,000 (non-economic loss) \$340,000 (economic loss) \$3,000 (future medical expenses) \$30,000 (interest)

(Continued)

125 See *Iliff v Sterling Commerce (Australia) Pty Ltd (No 2)* [2008] FMCA 38.

	Case	Damages awarded
(r)	<i>Maxworthy v Shaw</i> [2010] FMCA 1014	Total Damages: \$63,394.50 \$20,000 (non-economic DDA) \$5,000 (non-economic SDA) \$33,394.50 (economic loss) \$5,000 (interest)
(s)	<i>Cincotta v Sunnyhaven Ltd</i> [2012] FMCA 110	Total Damages: \$44,701.65 \$34,340.65 (economic loss) \$9,000 (non-economic loss) plus \$1,361 interest
(t)	<i>Burns v Media Options Group Pty Ltd</i> [2013] FCCA 79	Total Damages: \$81,213.46 \$31,213.46 (economic loss) \$40,000 (non-economic loss) \$10,000 (aggravated damages)

#### (a) *Font v Paspaley Pearls Pty Ltd*

In *Font v Paspaley Pearls Pty Ltd*,<sup>126</sup> it was held that the applicant had been the victim of sexual harassment and discrimination in the course of her employment in the respondent's jewellery store. In addition to \$7,500 in exemplary damages awarded for the 'unjustifiable and inappropriate' manner in which the respondents had conducted aspects of the proceedings,<sup>127</sup> 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 the Commission had its hearing function and to decisions of the FMC. His Honour also noted that he had 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'.<sup>128</sup>

#### (b) *Gulke v KC Canvas Pty Ltd*

In *Gulke v KC Canvas Pty Ltd*,<sup>129</sup> the precise basis of the claim is unclear from the decision, although Ryan J noted that he was satisfied that section 14 of the SDA had been contravened. His Honour awarded \$7,000 for lost earnings and \$3,000 as compensation for 'psychological harm inflicted by the injury to the applicant's feelings which occurred during the course of employment'.<sup>130</sup> That injury was said to be 'substantially exacerbated by the termination of that employment in the circumstances that

<sup>126</sup> [2002] FMCA 142.

<sup>127</sup> See 7.2.1(e) above.

<sup>128</sup> [2002] FMCA 142, [155].

<sup>129</sup> [2000] FCA 1415.

<sup>130</sup> [2000] FCA 1415, [2].



she recounted<sup>131</sup> (the nature of those circumstances is unclear from the decision). 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.

### (c) **Cooke v Plauen Holdings Pty Ltd**

The applicant in *Cooke v Plauen Holdings Pty Ltd*<sup>132</sup> 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 section 14 of the SDA. His Honour held that although the applicant's manager had treated all staff badly at times, he was 'more intrusive in his management of female staff than in his management of male staff'.<sup>133</sup> Driver FM found the respondent employer vicariously liable for the conduct of the applicant's manager on account of the fact that the steps taken to respond to the discriminatory conduct were 'insufficient and ineffective'.<sup>134</sup> 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.<sup>135</sup>

### (d) **Song v Ainsworth Game Technology Pty Ltd**

In *Song v Ainsworth Game Technology Pty Ltd*,<sup>136</sup> 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 section 14(3A) of the SDA. The applicant had sought to vary her employment to enable her to pick up her child from kindergarten. As a consequence the respondent reduced her position from full-time to part-time. In addition to the damages for the discriminatory conduct, Raphael FM 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.

### (e) **Escobar v Rainbow Printing Pty Ltd (No 2)**

*Escobar v Rainbow Printing Pty Ltd (No 2)*<sup>137</sup> ('Escobar') also involved a successful claim of discrimination on the ground of family responsibilities. In calculating the 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 this relationship ended, 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.<sup>138</sup>

<sup>131</sup> [2000] FCA 1415, [2].

<sup>132</sup> [2001] FMCA 91.

<sup>133</sup> [2001] FMCA 91, [31].

<sup>134</sup> [2001] FMCA 91, [38].

<sup>135</sup> [2001] FMCA 91, [42].

<sup>136</sup> [2002] FMCA 31.

<sup>137</sup> [2002] FMCA 122.

<sup>138</sup> [2002] FMCA 122, [40].

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.<sup>139</sup>

#### (f) **Mayer v Australian Nuclear Science & Technology Organisation**

In *Mayer v Australian Nuclear Science & Technology Organisation*<sup>140</sup> ('Mayer') the applicant was awarded damages in the sum of \$39,294, including pre-judgment interest of \$3,599, following a successful claim of pregnancy and sex discrimination. As in *Escobar*, Driver FM assessed the damages for economic loss on the basis that the applicant was only able to work three 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, and therefore failed to mitigate any loss that she may have suffered after that date.

The respondent in *Mayer* also claimed that the applicant failed to mitigate her loss prior to that date 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.<sup>141</sup>

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* 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'.<sup>142</sup> The respondent was ordered to deduct from the damages awarded and remit to the Australian Tax Office ('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.<sup>143</sup>

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139 [2002] FMCA 122, [42].

140 [2003] FMCA 209.

141 [2003] FMCA 209, [95].

142 [2003] FMCA 209, [97].

143 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.

**(g) Evans v National Crime Authority**

At first instance in *Evans v National Crime Authority*<sup>144</sup> ('*Evans*'), general damages in the sum of \$25,000 plus \$7,493.84 in interest 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 has been 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 my view that the sum of \$25,000.00 is the appropriate award today for this applicant.<sup>145</sup>

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.

The National Crime Authority appealed against Raphael FM's award of \$25,000 for non-economic loss.<sup>146</sup> In upholding the appeal, Branson J held that the appropriate award for non-economic loss in the circumstances was \$12,000.<sup>147</sup>

**(h) Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd**

In *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd*,<sup>148</sup> 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:

[the applicant] 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 [the applicant]'s loss of status in March 2000 and given the need to enforce respect for the public policy behind the SDA.<sup>149</sup>

The sum awarded for non-economic loss was only awarded for the period until the applicant's voluntary resignation. Although the applicant was clearly distressed when she resigned from her employment, that was found to be 'a problem of her own making',<sup>150</sup> 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 the applicant's

<sup>144</sup> [2003] FMCA 375.

<sup>145</sup> [2003] FMCA 375, [111]–[112].

<sup>146</sup> *Commonwealth v Evans* [2004] FCA 654.

<sup>147</sup> [2004] FCA 654, [84].

<sup>148</sup> [2003] FMCA 160.

<sup>149</sup> [2003] FMCA 160, [92].

<sup>150</sup> [2003] FMCA 160, [91].

loss of income following her resignation was broken by her own action'.<sup>151</sup> Damages and personal apologies were also sought against the second and third respondents, who were natural persons employed by the first respondent. These proceedings were dismissed on an issue of jurisdiction.

#### **(i) Kelly v TPG Internet Pty Ltd**

The applicant in *Kelly v TPG Internet Pty Ltd*<sup>152</sup> was awarded \$7,500 in general damages on the grounds of pregnancy discrimination. No special damages for 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.

#### **(j) Gardner v All Australia Netball Association Ltd**

In *Gardner v All Australia Netball Association Ltd*,<sup>153</sup> the respondent was found to have 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 sections 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.

#### **(k) Ho v Regulator Australia Pty Ltd**

In *Ho v Regulator Australia Pty Ltd*,<sup>154</sup> Driver FM found that the respondent had discriminated against the applicant on the basis of her pregnancy in requiring her to attend a meeting with an independent witness to discuss her need for maternity leave. The applicant was awarded \$1,000 in general damages. This amount was a sum reduced to take into account the fact that the extreme and unforeseeable reaction which the applicant had in fact experienced was caused by a personality disorder which was not known to the respondent.

Note, however, that this decision predates that of the Full Court of the Federal Court in *South Pacific Resort Hotels Pty Ltd v Trainor*,<sup>155</sup> in which the court rejected a similar approach advocated by the respondents.

#### **(l) Howe v Qantas Airways Ltd**

The respondent in *Howe v Qantas Airways Ltd*<sup>156</sup> was found to have unlawfully discriminated against the applicant on the basis of her pregnancy by refusing her access to her accumulated sick leave when she was unable to continue to work as a 'long haul' flight attendant by reason of her pregnancy. This resulted in the applicant taking unpaid leave. The applicant was awarded \$3,000 in general damages for non-economic loss (distress)<sup>157</sup> and special damages of \$24,753.85 calculated on the basis of the applicant's salary for sick leave purposes for the period when she was entitled to be taking that leave.<sup>158</sup>

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151 [2003] FMCA 160, [89].

152 [2003] FMCA 584.

153 [2003] FMCA 81.

154 [2004] FMCA 62.

155 (2005) 144 FCR 402.

156 [2004] FMCA 242. See also *Howe v Qantas Airways Ltd (No 2)* [2004] FMCA 934 for further discussion of the calculation of damages.

157 [2004] FMCA 242, [133].

158 [2004] FMCA 934 [8].

In reaching the figure for special damages, his Honour took into account, and offset the award by, an amount equal to the applicant's salary for each day of sick leave accrued while on unpaid leave, stating that the applicant 'was not entitled to have the benefit of the sick leave she accrued during [the] period of unpaid maternity leave as she is receiving damages to compensate her for not being granted sick leave for that period'.<sup>159</sup>

#### (m) **Dare v Hurley**

In *Dare v Hurley*,<sup>160</sup> Driver FM held that the respondent had dismissed the applicant after she informed him of her pregnancy. His Honour considered that the applicant should receive damages for the distress caused to her by the dismissal and special damages for her economic loss. Driver FM therefore awarded \$3,000 in general damages and \$9,005.51 in special damages for the applicant's economic loss.

#### (n) **Fenton v Hair & Beauty Gallery Pty Ltd**

In *Fenton v Hair & Beauty Gallery Pty Ltd*,<sup>161</sup> Driver FM found that the applicant was discriminated against on the ground of pregnancy when she was sent home by her employer despite being 'fit, ready and able to work'. She was awarded \$838 for economic loss and \$500 for non-economic loss on the basis that she 'was annoyed by being sent home but suffered no real harm'.<sup>162</sup>

#### (o) **Rankilor v Jerome Pty Ltd**

In *Rankilor v Jerome Pty Ltd*,<sup>163</sup> Smith FM found that the applicant was discriminated against on the basis of her sex when an employee of the respondent employer had referred to the applicant's gender in derogatory and insulting terms. She was awarded total compensation of \$2,000 (inclusive of costs) on the basis that a significant part of her mental distress in attempting to resolve her complaint against the respondent could not be attributed to the employee's remarks about her gender.

#### (p) **Iliff v Sterling Commerce (Australia) Pty Ltd**

In *Iliff v Sterling Commerce (Australia) Pty Ltd*,<sup>164</sup> Burchardt FM held that the respondent company had discriminated against the applicant on the basis of her sex by withholding her redundancy payment subject to her signing a release. His Honour did not accept the additional claim of Ms Iliff that she had been dismissed from her position on the grounds of maternity leave or parenthood. Burchardt FM awarded Ms Iliff \$22,211.45 plus interest<sup>165</sup> and less tax, which was the amount already owing to her. His Honour also imposed a \$33,000 penalty on the respondent on account of the respondent's breach of the return to work provisions in the then *Workplace Relations Act 1996* (Cth) (now the *Fair Work Act 2009* (Cth)).

On appeal,<sup>166</sup> Gordon J dismissed the appeal and cross-appeal and left undisturbed the award of damages for unlawful discrimination and the penalty for breach of the then *Workplace Relations Act 1996* (Cth) (now the *Fair Work Act 2009* (Cth)).

<sup>159</sup> [2004] FMCA 242, [133].

<sup>160</sup> [2005] FMCA 844.

<sup>161</sup> [2006] FMCA 3.

<sup>162</sup> [2006] FMCA 3, [98].

<sup>163</sup> [2006] FMCA 922.

<sup>164</sup> [2007] FMCA 1960.

<sup>165</sup> *Iliff v Sterling Commerce (Australia) Pty Ltd (No 2)* [2008] FMCA 38.

<sup>166</sup> *Sterling Commerce (Australia) Pty Ltd v Iliff* [2008] FCA 702.

### **(q) Poniatowska v Hickinbotham**

In *Poniatowska v Hickinbotham*,<sup>167</sup> Mansfield J held that the applicant had been discriminated against on the basis of her sex and sexually harassed in the course of her employment. Mansfield J found that the applicant had developed a mental illness — namely an adjustment disorder with mixed anxiety and depression — as a result of the unlawful discrimination. Mansfield J considered that, although the applicant had been unable to work for a period of time and remained unable to work, her future was not a bleak one. She remained able to manage day to day life competently, she had continued to bring up her children and she had been able to study a law degree on a part time basis. The medical evidence suggested the applicant was likely to make a full recovery within a period of six months to two years. The applicant was awarded \$90,000 for past and future disadvantage for pain and suffering, \$200,000 for past loss of earning capacity, \$140,000 for future loss of earning capacity, \$3,000 for future medical expenses and \$30,000 in interest.

The orders as to damages were not disturbed on appeal.<sup>168</sup> The respondents unsuccessfully contended that the amount awarded for general damages was excessive. The applicant was unsuccessful in seeking a higher amount for economic loss and exemplary damages.

### **(r) Maxworthy v Shaw**

In *Maxworthy v Shaw*<sup>169</sup> the respondent was found to have discriminated against the applicant on the grounds of both her disability and her sex in the course of employment. The applicant sought damages for hurt and humiliation in respect of the findings under both the DDA and SDA. Nicholls J was of the view that the evidence clearly established that the hurt and humiliation suffered arose primarily from the conduct leading to disability discrimination and not the sex discrimination. However his Honour was satisfied that the issue of the applicant's family responsibilities had caused distress in having to balance work pressures and getting children off to school. An amount of \$5,000 general damages under the SDA was awarded<sup>170</sup>.

### **(s) Cincotta v Sunnyhaven Limited**

In *Cincotta v Sunnyhaven Limited*,<sup>171</sup> the applicant was constructively dismissed from her employment, at least in part, because of her childcare responsibilities. The applicant was awarded a total of \$44,701.65 in damages (including interest), plus post judgment interest at 10.25% per year. Of the total awarded, \$34,340.65 was for economic loss and pre-judgment interest on that loss. Part of that loss resulted from the respondent's discriminatory conduct in inducing the applicant to resign her permanent status. Part was loss of wages for 14 weeks from the termination of her employment until the commencement of her new employment. Part was the difference between her lower income at her new employment and what she would have earned if her employment had not been terminated, for a period of 13 months up until the commencement of the hearing. The applicant was awarded \$10,361 in general damages (comprising \$9,000 plus pre-judgment interest) as a result of her anxiety and distress.

In addition to awarding damages, Nicholls FM ordered that the Management Board of Sunnyhaven give Ms Cincotta a written apology.

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167 [2009] FCA 680.

168 *Employment Services Australia Pty Ltd v Poniatowska* [2010] FCAFC 92.

169 [2010] FMCA 1014.

170 [2010] FMCA 1014,[193]–[196].

171 [2012] FMCA 110.

### (t) Burns v Media Options Group Pty Ltd

In *Burns v Media Options Group Pty Ltd*,<sup>172</sup> the applicant was dismissed from his employment, at least in part, because of his need to care for his partner who became ill with cancer requiring intensive medical treatment over a relatively short period of time. The applicant was awarded a total of \$81,213.46 in damages. He did not claim, and was not awarded, interest on any of these sums.

Key to the award of economic loss was medical evidence that the conduct of the respondents exacerbated the applicant's pre-existing mental illness, which affected his ability to obtain alternative employment. Of the total amount awarded, \$31,213.46 was for economic loss. There were two relevant periods of time. The first period was a period of 13 months when the applicant was unemployed following the termination of his employment. Over this period, he was awarded 30% of the difference between his previous salary and the welfare payments he had received. The discount rate of 30% was applied as a result of medical evidence that the discriminatory treatment of the applicant 'contributed' 30% to his 'symptomology'.

The second period was a period of four years and three months which started when the applicant obtained a new job. This position (an assistant) paid a lower wage than his previous position (a printer). There was a factual dispute about when this period should end and little medical evidence to establish the point. Nicholls J fixed an end point six months after the date of the report of the medical expert who gave evidence in the case who found that the applicant 'will reach maximum medical improvement within four to six months of commencing specialist psychiatric treatment'. Over this period, the applicant was awarded 30% of the difference between his previous salary and his new salary.

The applicant was awarded \$40,000 in general damages. The applicant was awarded \$10,000 in aggravated damages. Nicholls J cited Lockhart J in *Hall v Shieban* and found that the respondents had acted 'high-handedly, maliciously, insultingly or oppressively in committing the act of discrimination'.

### 7.2.5 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 FMC (now the Federal Circuit Court) and the Federal Court on 13 April 2000. The reasoning underlying those awards is summarised below.

Note that in *Oracle* (see discussion at 7.2.1(d) above), the Full Court of the Federal Court set aside an award of \$18,000 in damages for sexual harassment and instead awarded \$130,000. This amount was made up of \$100,000 for general damages and \$30,000 in economic loss. The Court noted that although the award at first instance was within the previously accepted range for sexual harassment cases it was manifestly inadequate as compensation for the damage suffered by the victim, judged by reference to prevailing community standards.<sup>173</sup> On the basis of the reasoning in *Oracle*, courts may be open to making higher awards for general damages in sexual harassment and other discrimination cases.

<sup>172</sup> [2013] FCCA 79.

<sup>173</sup> (2014) 223 FCR 334, [109], [117]–[118]. See discussion above at 7.2.1(d)).



**Table 4: Overview of damages awarded in sexual harassment cases under the SDA**

	<b>Case</b>	<b>Damages awarded</b>
(a)	<i>Gilroy v Angelov</i> [2000] FCA 1775	Total Damages: \$24,000 \$20,000 (non-economic loss) \$4,000 (interest)
(b)	<i>Elliott v Nanda</i> (2001) 111 FCR 240	Total Damages: \$20,100 \$15,000 (non-economic loss) \$100 (economic loss – cost of counseling) \$5,000 (aggravated damages)
(c)	<i>Shiels v James</i> [2000] FMCA 2	Total Damages: \$17,000 \$13,000 (non-economic loss) \$4,000 (economic loss)
(d)	<i>Johanson v Blackledge</i> [2001] FMCA 6	Total Damages: \$6,500 \$6,000 (non-economic loss) \$500 (economic loss – cost of counseling)
(e)	<i>Horman v Distribution Group</i> [2001] FMCA 52	\$12,500 (non-economic loss - includes cost of medication)
(f)	<i>Wattle v Kirkland (No 2)</i> [2002] FMCA 135	Total Damages: \$28,035 \$7,600 (economic loss - reduced from \$9,100 on appeal) \$15,000 (non-economic loss) \$5,435 (interest)
(g)	<i>Aleksovski v Australia Asia Aerospace Pty Ltd</i> [2002] FMCA 81	\$7,500 (non-economic loss)
(h)	<i>McAlister v SEQ Aboriginal Corporation</i> [2002] FMCA 109	Total Damages: \$5,100 \$4,000 (non-economic loss) \$1,100 (economic loss)
(i)	<i>Beamish v Zheng</i> [2004] FMCA 60	\$1,000 (non-economic loss)

(Continued)

	Case	Damages awarded
(j)	<i>Bishop v Takla</i> [2004] FMCA 74	Total Damages: \$24,386.40 \$20,000 (non-economic loss) \$13,246.40 (economic loss: medical expenses and interest) Note that the award of damages was reduced by an amount received in settlement against other respondents.
(k)	<i>Hughes (formerly De Jager) v Car Buyers Pty Ltd</i> [2004] FMCA 526	Total damages: \$24,623.50 \$7,250 (non-economic loss – being \$11,250 less \$4,000 paid by a respondent against whom proceedings were discontinued) \$5,000 (aggravated damages) \$12,373.50 (economic loss – \$12,086 for loss of income and \$287.50 for expenses)
(l)	<i>Trainor v South Pacific Resort Hotels Pty Ltd</i> [2004] FMCA 374; upheld on appeal <i>South Pacific Resort Hotels Pty Ltd v Trainor</i> (2005) 144 FCR 402	Total Damages: \$17,536.80 \$6,564.65 (non-economic loss – being \$5,000 plus \$1,564.65 interest) \$1,907.50 (economic loss – medical expenses) \$6,564.65 (economic loss – being \$5,000 plus \$1,564.65 interest) \$2,500 (future loss of income)
(m)	<i>Phillis v Mandic</i> [2005] FMCA 330	\$4,000 (non-economic loss)
(n)	<i>Frith v The Exchange Hotel</i> [2005] FMCA 402	Total Damages: \$15,000 \$10,000 (non-economic loss) \$5,000 (economic loss)
(o)	<i>San v Dirluck Pty Ltd</i> [2005] FMCA 750	\$2,000 (non-economic loss)
(p)	<i>Cross v Hughes</i> [2006] FMCA 976	Total Damages: \$11,322 \$3,822 (economic loss) \$7,500 (non-economic loss - including aggravated damages)

(Continued)

	Case	Damages awarded
(q)	<i>Hewett v Davies</i> [2006] FMCA 1678	Total Damages: \$3,210 \$210 (economic loss) \$3,000 (non-economic loss - including aggravated damages)
(r)	<i>Lee v Smith</i> [2007] FMCA 59	\$100,000 (non-economic loss)
(s)	<i>Lee v Smith (No 2)</i> [2007] FMCA 1092	Total Damages: \$392,422.32 (approx) + interest Interest on the above figure of \$100,000 from 23 March 2007 at 10.25% \$232,163.22 (economic loss, plus interest on the amount of \$53,572.72 at the rate of 5.125% from 5 December 2001 to 14 June 2007 and thereafter at 10.25%). \$35,000 (future loss of income) \$20,259.10 (economic loss – past medical expenses) \$5,000 (future medical expenses)
(t)	<i>Noble v Baldwin &amp; Anor</i> [2011] FMCA 283	\$2,000 (non-economic loss)
(u)	<i>Kraus v Menzie</i> [2012] FCA 3	\$12,000 (non-economic loss)
(v)	<i>Ewin v Vergara (No 3)</i> [2013] FCA 1311* *Actual damages paid by respondent adjusted in accordance with settlements made elsewhere in order to prevent double recovery – see <i>Ewin v Vergara (No 4)</i> [2013] FCA 1409	Total damages: \$476, 173 \$293,000 (loss of past earning capacity) \$63,000 (loss of future earning capacity) \$110,000 (general damages) \$7,163 (past expenses) \$3,000 (future expenses)
(w)	<i>Alexander v Cappello</i> [2013] FCCA 860	Total Damages: \$99,300 \$40,000 (non-economic loss) \$53,000 (loss of past earnings) \$6,300 (medical expenses)
(x)	<i>Richardson v Oracle Corporation Australia Pty Ltd</i> (2014) 223 FCR 334	Total damages: \$130,000 \$100,000 (non-economic loss) \$30,000 (economic loss)

**(a) Gilroy v Angelov**

The applicant in *Gilroy v Angelov*<sup>174</sup> 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 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*<sup>175</sup> in relation to the calculation of general damages for discrimination and awarded the applicant \$20,000 plus interest under that head. Ms Gilroy had been unable to locate the fellow employee responsible for the sexual harassment, and was therefore unable to obtain a remedy directly against him.

**(b) Elliott v Nanda**

In *Elliott v Nanda*,<sup>176</sup> the first respondent, Dr Nanda, was found to have engaged in conduct which amounted to sexual harassment and discrimination on the basis of sex. The applicant had been employed by Dr Nanda as a receptionist at his medical practice. 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 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.<sup>177</sup>

The Commonwealth, as second respondent, was also found to be liable for the conduct of Dr Nanda under section 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.<sup>178</sup>

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 held:

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

174 [2000] FCA 1775.

175 (1989) 20 FCR 217.

176 (2001) 111 FCR 240.

177 (2001) 111 FCR 240, 298 [185]. See 17.2.1(e) above.

178 (2001) 111 FCR 240, 298 [186].

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.<sup>179</sup>

### (c) *Shiels v James*

In *Shiels v James*<sup>180</sup> ('*Shiels*'), Raphael FM awarded damages for economic and non-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'.<sup>181</sup> As to the second head, his Honour noted that the sexual harassment cases heard by the Commission and the Federal Court during the time that the Commission had its hearing function indicated a range for general damages of between \$7,500 and \$20,000.<sup>182</sup> His Honour further noted that the higher awards had been made in cases involving more physical action<sup>183</sup> or more substantial physical sequelae.<sup>184</sup> 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'.<sup>185</sup>

### (d) *Johanson v Blackledge*

In *Johanson v Blackledge*,<sup>186</sup> Driver FM compared the hurt and distress suffered by Ms Johanson to that suffered by the applicant in *Shiels*. His 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, \$6,000 was awarded 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).

### (e) *Horman v Distribution Group*

The applicant in *Horman v Distribution Group*<sup>187</sup> led medical evidence concerning the effect of the conduct which was found to constitute sexual harassment and discrimination in contravention of section 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'.<sup>188</sup> His Honour awarded the amount of

179 *Elliott v Nanda* [2001] FCA 550, [14].

180 [2000] FMCA 2.

181 [2000] FMCA 2, [62]–[64].

182 Note that Branson J in *Commonwealth v Evans* [2004] FCA 654, [82] suggested, without expressing a concluded view, that 'the range...identified [by Raphael FM in *Shiels*] may be higher than the authorities fairly support'.

183 *Harwin v Pateluch* [1995] HREOCA 23 (extract at (1995) EOC 92-770).

184 *Smith v Buvet* (1996) EOC 92-840.

185 [2000] FMCA 2, [79].

186 [2001] FMCA 6.

187 [2001] FMCA 52.

188 [2001] FMCA 52, [70].

\$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.

#### (f) **Wattle v Kirkland**

In *Wattle v Kirkland*<sup>189</sup> ('*Wattle*') \$15,000 was awarded to the applicant in damages for non-economic loss. 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. The applicant had been employed by the respondent as a taxi driver in Mudgee, during which time she was subjected to unwanted physical contact and remarks of a sexual nature. 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.<sup>190</sup> 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'.<sup>191</sup> The matter was remitted and heard by Driver FM, who awarded the same amount as Raphael FM for general damages.<sup>192</sup> However, the applicant claimed a lesser amount for economic loss than that awarded by Raphael FM, to take into account the payment of a disability support pension during the period for which she claimed lost income.<sup>193</sup>

#### (g) **Aleksovski v Australia Asia Aerospace Pty Ltd**

In *Aleksovski v Australia Asia Aerospace Pty Ltd*<sup>194</sup> Raphael FM 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'.<sup>195</sup> Ms Aleksovski had been subjected to repeated and forceful requests by a co-worker to spend some time alone together 'at his place'. Raphael FM 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.

#### (h) **McAlister v SEQ Aboriginal Corporation**

In *McAlister v SEQ Aboriginal Corporation*,<sup>196</sup> Rimmer FM referred to Raphael FM's discussion in *Shiels* 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

<sup>189</sup> [2001] FMCA 66.

<sup>190</sup> *Kirkland v Wattle* [2002] FCA 145.

<sup>191</sup> [2002] FCA 145, [3].

<sup>192</sup> *Wattle v Kirkland (No 2)* [2002] FMCA 135, [71].

<sup>193</sup> [2002] FMCA 135, [70].

<sup>194</sup> [2002] FMCA 81.

<sup>195</sup> [2002] FMCA 81, [102].

<sup>196</sup> [2002] FMCA 109.

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.<sup>197</sup>

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 12 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 goods and furniture which the applicant disposed of or gave away prior to moving.

### **(i) Beamish v Zheng**

In *Beamish v Zheng*,<sup>198</sup> the respondent was found to have engaged in a range of conduct towards the applicant, including sexual comments, attempting to touch the applicant's breasts and offering the applicant \$200 to have sex with him.

Driver FM noted the evidence of the applicant that the respondent's conduct had caused her upset, 'made her depressed and socially withdrawn and caused her physical illness, in particular vomiting'.<sup>199</sup> This was corroborated by the applicant's mother. However, there was no medical evidence of any condition suffered by the applicant and Driver FM was not persuaded that she had suffered any ongoing psychological trauma. His Honour noted that her bouts of vomiting might have had a physical cause, rather than resulting from the respondent's conduct. He awarded \$1,000 in general damages for hurt and upset.

### **(j) Bishop v Takla**

In *Bishop v Takla*,<sup>200</sup> the respondent was found to have engaged in a range of conduct which constituted sexual harassment, including sexual remarks and physical contact. Raphael FM found that the applicant was suffering from the effects of post-traumatic stress disorder which affected her employability for a period and required ongoing medical assistance (although it was clear that her condition had improved since her initial depression).<sup>201</sup>

Raphael FM determined that \$20,000 in damages for non-economic loss, as well as amounts for loss of income and medical expenses and interest, were appropriate — amounting to a nominal total of \$33,246.40. The applicant's complaint against the second and third respondents had been settled in mediation prior to the hearing. It was agreed between the parties that in the event of a finding against the first respondent, any award of damages should have deducted from it the amount the subject of the settlement, so that the applicant was not over compensated. Raphael FM had therefore been given a sealed envelope with the particulars of the settlement which he opened upon finding liability. His Honour accordingly deducted the sum of \$8,860 (being that amount of the settlement which represented damages — a further \$7,640 had also been paid by way of costs) from the total of the damages and interest, leaving an award of \$24,386.40.

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197 [2002] FMCA 109, [157].

198 [2004] FMCA 60.

199 [2004] FMCA 60, [20].

200 [2004] FMCA 74.

201 [2004] FMCA 74, [35].



**(k) Hughes v Car Buyers Pty Ltd**

The respondents in *Hughes v Car Buyers Pty Ltd*<sup>202</sup> were found to have engaged in a range of conduct which constituted sexual harassment, including sexual remarks and physical contact. The first respondent, the employer company, was also found to have unlawfully discriminated against the applicant on the ground of sex. Walters FM found that the conduct of the respondents had a significant and negative impact on the applicant and that this impact continued until trial. Walters FM commented that '[t]here appears to be no doubt that [the applicant] has suffered depression (or a form of depression), anxiety, loss of motivation and loss of enjoyment of life'.<sup>203</sup> Walters FM also found that the applicant's relationship with her partner had been adversely affected by the respondents' conduct.

Walters FM held that the amount of \$11,250 was the appropriate award for non-economic loss in the circumstances of the case. This amount was reduced by \$4,000, being the monies paid by the third respondent to the applicant pursuant to a settlement agreement. The applicant had discontinued the proceedings in so far as they related to the third respondent prior to trial. Walters FM also awarded the applicant the amount of \$12,373.50 for special damages, comprising \$12,086 for loss of income and \$287.50 for out of pocket expenses. The claim for loss of income arose as the applicant was unable to find employment for 12 weeks after she ceased working for the respondent company.

Walters FM also found that the prolongation of the proceedings and the additional mental distress caused to the applicant and the frustration, humiliation and anger that she felt as a result of her complaint being ignored warranted an award of aggravated damages in the sum of \$5,000.<sup>204</sup>

**(l) Trainor v South Pacific Resort Hotels Pty Ltd**

Coker FM in *Trainor v South Pacific Resort Hotels Pty Ltd*<sup>205</sup> awarded \$5,000 plus interest for non-economic loss after finding that the applicant had been subjected to unwelcome sexual advances and requests for sexual favours by a fellow employee. There were two incidents that took place within one week. On each occasion the perpetrator was present in the applicant's room at the staff accommodation quarters of the hotel. His attendance was not invited or solicited by the applicant. The respondent employer was held vicariously liable for the employee's acts of sexual harassment.

There was unchallenged medical evidence that the applicant suffered from a pre-existing psychiatric condition, albeit one that was exacerbated by the acts of sexual harassment. Coker FM found that the applicant experienced distress and difficulties as a result of the sexual harassment. However, his Honour found that the amount of compensation for general damages should not be at the high end of the range, in light of the fact that the incidents occurred within a short period of time and thereafter ceased upon the dismissal of the perpetrator and in light of the applicant's return to employment of a similar nature within a short period of time. Coker FM considered that the amount of \$5,000 reflected the seriousness of the incidents and the effect upon the applicant. The applicant was also awarded \$5,000 for past economic loss, \$2,500 for future economic loss and \$1907.50 for medical expenses.

The damages awarded by Coker FM were confirmed on appeal to the Full Federal Court in *South Pacific Resort Hotels Pty Ltd v Trainor*.<sup>206</sup>

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202 [2004] FMCA 526.

203 [2004] FMCA 526, [60].

204 See further 7.2.1(e) above.

205 [2004] FMCA 374.

206 (2005) 144 FCR 402.

### **(m) Phillis v Mandic**

In *Phillis v Mandic*,<sup>207</sup> Raphael FM found that the respondent had sexually harassed the applicant through a range of conduct that included repeatedly asking to see her navel ring, seeking to dance with her, repeatedly asking if he could eat a banana that she was eating, grabbing her arm and pushing a toolbox between her legs. The applicant was awarded \$4,000 for non-economic loss based on medical evidence as to the impact of the harassment on her, described by the court as being 'in the minimal range of depression'.<sup>208</sup>

### **(n) Frith v The Exchange Hotel**

In *Frith v The Exchange Hotel*,<sup>209</sup> Rimmer FM found that a director of the Exchange Hotel, Mr Brindley, had sexually harassed the applicant, a senior bar attendant, by a range of conduct that included stating words to the effect that if she did not have sex with him, she could not work for him. The applicant claimed both economic and non-economic loss.

Rimmer FM accepted that the applicant would have continued to work at the Exchange Hotel had it not been for the conduct of Mr Brindley. Her Honour awarded the applicant \$5,000 for economic loss, as the applicant was unable to secure employment for a period of time following her resignation from the Exchange Hotel. Rimmer FM also accepted that the conduct of Mr Brindley had a significant and negative impact on the applicant and that this impact continued until the trial. Her Honour awarded the applicant \$10,000 for non-economic loss, but declined to make an award for aggravated damages.

### **(o) San v Dirluck Pty Ltd**

In *San v Dirluck Pty Ltd*,<sup>210</sup> Raphael FM found that the second respondent had sexually harassed the applicant in breach of section 28B(2) of the SDA and also contravened section 18C(1) of the RDA. The first respondent accepted that it was vicariously liable under section 18A of the RDA and section 106 of the SDA. Although Raphael FM accepted that the derogatory remarks made by the second respondent were hurtful to the applicant, his Honour did not accept that the remarks contributed to the applicant's decision to leave her employment. In awarding the applicant \$2,000 for non-economic loss, Raphael FM noted:

It is perhaps unfortunate that neither the SDA nor the RDA have a provision for additional damages the type found in s.115 of the *Copyright Act 1968* that are intended to deter the type of conduct found to have occurred.<sup>211</sup>

### **(p) Cross v Hughes**

In *Cross v Hughes*,<sup>212</sup> Lindsay FM held that the first respondent had sexually harassed the applicant in contravention of sections 28A and 28B of the SDA. His Honour accepted that the first respondent had taken the applicant to Sydney for the weekend on the pretext of work for the purpose of seducing her, and made several unwelcome sexual advances over the course of the weekend. Lindsay FM awarded \$3,822 for economic loss, \$5,000 for non-economic loss and \$2,500 aggravated damages to compensate the applicant for the conduct of the respondent in prolonging the proceedings.

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207 [2005] FMCA 330.

208 [2005] FMCA 330, [28].

209 [2005] FMCA 402.

210 [2005] FMCA 750.

211 [2005] FMCA 750, [46].

212 [2006] FMCA 976.

**(q) Hewett v Davies**

In *Hewett v Davies*,<sup>213</sup> Raphael FM held that the first respondent had sexually harassed the applicant in breach of section 28B(1)(a) of the SDA by placing the applicant's pay packet in his unzipped fly and telling her to come and get it. Raphael FM awarded \$2,500 for non-economic loss and \$210 for the costs of obtaining treatment from a psychologist after the incident. In addition, his Honour awarded \$500 damages to compensate the applicant for the second respondent's conduct in undermining the applicant's chances of employment with a prospective employer by disclosing that the applicant had lodged a complaint with the Commission.

**(r) Lee v Smith**

In *Lee v Smith*,<sup>214</sup> Connolly FM found the Commonwealth (through the Department of Defence) vicariously liable for the rape, sexual discrimination, harassment and victimisation of Ms Lee, a civilian administration officer at a Cairns naval base. Over a period of several months, Ms Lee was sexually harassed by a fellow naval officer, Mr Smith, who repeatedly asked Ms Lee for sex, intimidated her with inappropriate and offensive comments, and made attempts to grope her. After Ms Lee demanded that these activities cease, the harassment stopped for approximately two weeks. Around this time, Ms Lee and Mr Smith attended an after-work dinner party at the home of two colleagues also employed by the Australian Defence Force. Ms Lee became intoxicated at the dinner and passed out. When she woke up the next day, she was in Smith's house and he was raping her. Connolly FM accepted that this matter involved very significant pain, suffering, hurt and humiliation for the applicant and accordingly awarded \$100,000 in unspecified damages to be paid jointly by the four listed respondents.

**(s) Lee v Smith (No 2)**

In *Lee v Smith (No 2)*,<sup>215</sup> Connolly FM made further orders regarding the damages to be awarded to the applicant. In relation to the sum of \$100,000, his Honour also awarded interest as from 23 March 2007 at the rate of 10.25%. With regards to past economic loss, Connolly FM awarded Ms Lee the sum of \$232,163.22 together with interest on the amount of \$53,572.72 at the rate of 5.125% from 5 December until the date Ms Lee finished work, and 10.25% thereafter. His Honour awarded \$20,259.10 for past medical expenses as well as the sum of \$5,000 for future medical expenses. For future loss of income, Connolly FM awarded the sum of \$30,000.

**(t) Noble v Baldwin & Anor**

In *Noble v Baldwin & Anor*,<sup>216</sup> it was held that the first respondent had sexually harassed the applicant in breach of section 28(2) of the SDA and that the second respondent was vicariously liable under section 106 of the SDA. The sexual harassment consisted of the respondent looking at the applicant's breasts, brushing past her breasts and remarking on the size of female employees' breasts. Barnes FM did not make an award for economic loss as the applicant did not establish that the unlawful conduct resulted in her resignation or any inability to be reemployed. An award of damages for \$2,000 for non-economic loss was made. Barnes FM noted that damages were not recoverable in relation to

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213 [2006] FMCA 1678.

214 [2007] FMCA 59.

215 [2007] FMCA 1092.

216 [2011] FMCA 283.

loss caused by matters other than the unlawful conduct. In this case much of the conduct affecting the applicant did not amount to unlawful conduct. The damages recoverable had to be appropriately quantified to reflect this. Further, the episodes of harassment were, except for the regular looking at the applicant's breasts, relatively few and isolated instances. The medical evidence did not establish any significant ongoing injury. Her Honour concluded that the case was at the lower end of the range of cases involving sexual harassment and that the award for non-economic loss should be modest.

#### **(u) Kraus v Menzie**

In *Kraus v Menzie*,<sup>217</sup> the applicant was a 20-year-old employee of The Truck Factory Pty Ltd, which was owned by the 36-year-old respondent. The applicant complained that, in the course of her employment with The Truck Factory, she was sexually harassed by the respondent's unwelcome advances and conduct. Mansfield J largely accepted the first respondent's evidence that, after an initial period, he and the applicant had a relationship which extended to consensual sexual intercourse such that the majority of the conduct the applicant complained of was not 'unwelcome'. The applicant did not succeed in her claim that her decision to bring her employment to an end by reason of the ongoing sexual harassment amounted to unlawful discrimination in employment.

The conduct that was found to constitute sexual harassment included:

- the purchase of Playboy underwear and pyjamas;
- the respondent's efforts in 'badgering' the applicant to remove some of her clothes and swim with him in her underwear while on a work trip;
- the respondent's attempts to share a small cabin bunk with the applicant while she was sleeping in it; and
- the sending of coarse and sexually explicit images.

Mansfield J found that the applicant had not suffered any economic loss as a result of the conduct. She did not lose her employment because of it; nor was her employability affected because of it. Mansfield J found that it played no role in the onset of her illness or the need for treatment in respect of that illness. His Honour awarded \$12,000 by way of non-economic damages. This was because 'seen in context, although it amounted to a contravention of the SDA, it barely had any adverse personal effect upon the applicant'.<sup>218</sup> His Honour did not award exemplary or aggravated damages.

#### **(v) Ewin v Vergara (No 3)**

At first instance, Bromberg J found that the applicant had been sexually harassed both verbally and physically by Mr Vergara. In relation to the physical harassment, she believed that she had been raped. As a result of the harassment, she suffered post-traumatic stress disorder and depression. She resigned from her job because of the impact of the harassment on her.

The applicant was initially awarded a total of \$476,163 in damages together with interest, subject to a determination as to whether this would involve any double recovery. This initial amount was made up of \$293,000 for loss of past earning capacity, \$63,000 for loss of future earning capacity, \$110,000 in general damages, \$7163 in past expenses and \$3,000 in future expenses.

In a subsequent judgment, Bromberg J considered material filed by the applicant dealing with the extent to which there had been any prior satisfaction of her loss or damage. The details of this prior satisfaction were confidential, but his Honour had previously noted that there had been an earlier

217 [2012] FCA 3. Upheld on appeal in *Kraus v Menzie* [2012] FCAFC 144.

218 [2012] FCA 3, [138].

settlement with the applicant's employer and the respondent's employer. Ultimately, the respondent was required to pay the applicant a total of \$210,563 by way of both compensation and interest.<sup>219</sup>

An appeal to the Full Court of the Federal Court against the assessment of damages was dismissed.<sup>220</sup>

### **(w) Alexander v Cappello and Anor**

In *Alexander v Cappello and Anor*,<sup>221</sup> the applicant was awarded a total of \$99,300 in damages, plus interest. The applicant was awarded \$40,000 in general damages for the pain, suffering, hurt and humiliation that flowed from the harassment and her termination from employment. This included the facts that the applicant was unable to work for an extended period; she was severely depressed which led to alcohol and drug use; she developed panic attacks, insomnia and severe incontinence; she was admitted into a psychiatric hospital on two occasions (once voluntarily and once involuntarily); she lost stable accommodation and at the time of the hearing was in housing commission accommodation; she was prescribed strong antipsychotic medication that left her feeling detached; her relationship with her partner deteriorated and ended; her relationship with her children was significantly damaged; and her current relationship continues to suffer.

There was medical evidence that the applicant's symptoms in the period since she left her workplace were attributable to the harassment and termination of employment and the sequelae of those events.

The applicant was also awarded \$53,000 as compensation for economic loss. This figure was calculated based on income at the relevant Award rate (\$16.50 per hour) and her part time hours prior to the termination of her employment (19 hours per week) plus the income she had previously earned prior to the harassment and termination. The relevant period of time for which she was to be compensated was from her dismissal in August 2008 up until December 2011 which, on the medical evidence, was the period of time that her impairment in obtaining work was caused by the harassment and dismissal. Periods of time when she was actually employed were deducted from this overall period.

The applicant was also awarded \$6,300 for 18 sessions of specialist psychiatric treatment (at a cost of \$350 per session).

Driver J did not compel the making of an apology to Ms Alexander on the basis that 'it would be unlikely to be sincere if it is compelled'.

### **(x) Richardson v Oracle Corporation Australia Pty Ltd**

In *Richardson v Oracle Corporation Australia Pty Ltd*,<sup>222</sup> the Full Court of the Federal Court set aside an award of \$18,000 in damages for sexual harassment given at first instance and instead awarded \$130,000. This amount was made up of \$100,000 for general damages and \$30,000 in economic loss.<sup>223</sup>

The Full Court found that the trial judge had erred in:

- the level of general damages awarded which, although within the range awarded in previous similar cases, was manifestly inadequate judged by reference to prevailing community standards; instead of
- not making an award for economic loss; and

<sup>219</sup> *Ewin v Vergara (No 4)* [2013] FCA 1409.

<sup>220</sup> *Vergara v Ewin* (2014) 223 FCR 151 [103]–[114] and [123].

<sup>221</sup> [2013] FCCA 860.

<sup>222</sup> (2014) 223 FCR 334.

<sup>223</sup> For further discussion of this case see 7.2.1(d) above.

- not finding that the contravening conduct affected Ms Richardson's sexual relationship with her then partner (which was relevant to the claim for general damages).

The leading judgment on the question of the level of general damages was that of Kenny J.<sup>224</sup>

As to the level of general damages, Kenny J said that, having regard to the nature and extent of Ms Richardson's injuries and prevailing community standards, the low level of damages awarded by the trial judge bespeaks error.<sup>225</sup> Kenny J considered that an amount of \$100,000 should be awarded for general damages which included compensation for the injury that the sexual harassment caused to the appellant's sexual relationship with her then partner.<sup>226</sup>

At first instance, the trial judge did not make any award for economic loss. His Honour said that the necessary causal link between the conduct and the economic loss that the appellant claimed was not established.<sup>227</sup> Part of his Honour's reasoning was that the appellant resigned voluntarily and was not constructively dismissed. The Full Court disagreed with this conclusion and found that there was a causal link between the harasser's unlawful conduct and the appellant's decision to leave the respondent and her resulting economic loss in taking up an alternative position with a lower base salary.<sup>228</sup>

## 7.2.6 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 FMC (now the FCC) and the Federal Court on 13 April 2000. The reasoning underlying those awards is summarised below.

**Table 5: Overview of damages awarded under the DDA**

	Case	Damages awarded
(a)	<i>Barghouthi v Transfield Pty Ltd</i> (2002) 122 FCR 19	One week's salary (economic loss)
(b)	<i>Haar v Maldon Nominees</i> [2000] FMCA 5	\$3,000 (non-economic loss)
(c)	<i>Travers v New South Wales</i> [2001] FMCA 18	\$6,250 (non-economic loss)
(d)	<i>McKenzie v Department of Urban Services</i> [2001] FMCA 20	Total Damages: \$39,000 \$15,000 (non-economic loss) \$24,000 (economic loss)
(e)	<i>Oberoi v Human Rights &amp; Equal Opportunity Commission</i> [2001] FMCA 34	Total Damages: \$20,000 \$18,500 (non-economic loss) \$1,500 (economic loss)

(Continued)

<sup>224</sup> (2014) 223 FCR 334, [73]–[118] (Kenny J) with whom Besanko and Perram JJ agreed at [119].

<sup>225</sup> (2014) 223 FCR 334, [81].

<sup>226</sup> (2014) 223 FCR 334, [118].

<sup>227</sup> *Richardson v Oracle Corporation Australia Pty Ltd* [2013] FCA 102 at [248].

<sup>228</sup> (2014) 223 FCR 334, [181] and [202]–[205].

	<b>Case</b>	<b>Damages awarded</b>
(f)	<i>Sheehan v Tin Can Bay Country Club</i> [2002] FMCA 95	\$1,500 (non-economic loss)
(g)	<i>Randell v Consolidated Bearing Company (SA) Pty Ltd</i> [2002] FMCA 44	Total Damages: \$14,701 \$10,000 (non-economic loss) \$4,701 (economic loss)
(h)	<i>Forbes v Commonwealth</i> [2003] FMCA 140	No damages awarded
(i)	<i>McBride v Victoria (No 1)</i> [2003] FMCA 285	\$5,000 (non-economic loss)
(j)	<i>Bassanelli v QBE Insurance</i> [2003] FMCA 412, upheld on appeal <i>QBE Travel Insurance v Bassanelli</i> (2004) 137 FCR 88	Total Damages: \$5,543.70 \$5,000 (non-economic loss) \$543.70 (interest)
(k)	<i>Darlington v CASCO Australia Pty Ltd</i> [2002] FMCA 176	\$1,140 (economic loss – plus interest to be calculated at 9.5%)
(l)	<i>Clarke v Catholic Education Office</i> [2003] FCA 1085, upheld on appeal <i>Catholic Education Office v Clarke</i> (2004) 138 FCR 121	Total Damages: \$26,000 \$20,000 (non-economic loss) \$6,000 (interest)
(m)	<i>Power v Aboriginal Hostels Ltd</i> [2004] FMCA 452	Total Damages: \$15,000 \$10,000 (non-economic loss) \$5,000 (economic loss)
(n)	<i>Trindall v NSW Commissioner of Police</i> [2005] FMCA 2	Total Damages: \$18,160 (approx) + interest \$10,000 (non-economic loss) \$480 per month during the period of discrimination (economic loss) + interest
(o)	<i>Hurst &amp; Devlin v Education Queensland</i> [2005] FCA 405	Total Damages: \$64,000 \$40,000 (economic loss) \$20,000 (non-economic loss) \$4,000 (interest)
(p)	<i>Drury v Andreco Hurll Refractory Services Pty Ltd (No 4)</i> [2005] FMCA 1226	\$5,000 (non-economic loss) Damages for economic loss to be agreed

(Continued)



	Case	Damages awarded
(q)	<i>Wiggins v Department of Defence – Navy</i> [2006] FMCA 800; modified in <i>Wiggins v Department of Defence – Navy (No 3)</i> [2006] FMCA 970	\$25,000 (non-economic loss)
(r)	<i>Vickers v The Ambulance Service of NSW</i> [2006] FMCA 1232	\$5,000 (non-economic loss) NB – This was the amount sought by the applicant, although the court indicated that it would have ordered a higher amount.
(s)	<i>Hurst v Queensland</i> (2006) 151 FCR 562	No damages awarded <sup>229</sup>
(t)	<i>Rawcliffe v Northern Sydney Central Coast Area Health Service</i> [2007] FMCA 931	\$15,000 (non-economic loss)
(u)	<i>Forest v Queensland Health</i> (2007) 161 FCR 152, overturned on appeal in <i>Queensland (Queensland Health) v Forest</i> (2008) 168 FCR 532	\$8,000 (non-economic loss – plus interest calculated at 5% per annum)
(v)	<i>Gordon v Commonwealth</i> [2008] FCA 603	Total damages: \$121,762 \$71,279 (economic loss) \$20,000 (non-economic loss) \$30,465 (interest)
(w)	<i>Maxworthy v Shaw</i> [2010] FMCA 1014	Total damages: \$63,394.50 \$20,000 (non-economic loss DDA) \$5,000 (non-economic loss SDA) \$33,394.50 (economic loss) \$5,000 (interest)
(x)	<i>Burns v Media Options Group Pty Ltd</i> [2013] FCCA 79	Total Damages: \$81,213.46 \$31,213.46 (economic loss) \$40,000 (non-economic loss) \$10,000 (aggravated damages)
(y)	<i>Innes v Rail Corporation of NSW (No 2)</i> [2013] FMCA 36	\$10,000 (non-economic loss) \$881.99 (interest)
(z)	<i>Watts v Australian Postal Corp</i> (2014) 222 FCR 220	\$10,000 (non-economic loss)

(Continued)

229 Affirmed in *Hurst v Queensland (No 2)* [2006] FCAFC 151.

	Case	Damages awarded
(aa)	<i>Huntley v State of NSW, Department of Police and Justice (Corrective Services NSW)</i> [2015] FCCA 1827	Total Damages: \$173,863.89 \$75,000 (non-economic loss) \$98,863.89 (economic loss)
(bb)	<i>Burns v Director General, Dept of Education</i> [2015] FCCA 1769	\$8,000 (non-economic loss)
(cc)	<i>Mulligan v Virgin Australia Airlines</i> (2015) 234 FCR 207	\$10,000 (non-economic loss)
(dd)	<i>Pop v Taylor</i> [2015] FCCA 1720	Total Damages: \$10,000 \$5,000 (economic loss) \$5,000 (non-economic loss)

### (a) **Barghouthi v Transfield Pty Ltd**

In *Barghouthi v Transfield Pty Ltd*,<sup>230</sup> 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 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.

### (b) **Haar v Maldon Nominees**

McInnis FM in *Haar v Maldon Nominees*<sup>231</sup> ('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.<sup>232</sup>

### (c) **Travers v New South Wales**

In *Travers v New South Wales*,<sup>233</sup> Raphael FM agreed with the views<sup>234</sup> 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:

<sup>230</sup> (2002) 122 FCR 19.

<sup>231</sup> [2000] FMCA 5.

<sup>232</sup> [2000] FMCA 5, [89].

<sup>233</sup> [2001] FMCA 20.

<sup>234</sup> [2001] FMCA 20, [73].

- 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.

#### **(d) McKenzie v Department of Urban Services**

Raphael FM in *McKenzie v Department of Urban Services*<sup>235</sup> found that the applicant had been discriminated against by her employers over a two year period. The discrimination arose out of the way in which the first respondent handled the provision to Ms McKenzie of suitable employment, in light of the fact that Ms McKenzie's disability prevented her from undertaking any work which involved counter duties where she was involved in face to face contact with members of the public or duties involving the collection of and accounting for moneys. 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.

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*,<sup>236</sup> and Tax Ruling IT2424, this award of damages was made on a gross basis.

His Honour rejected the applicant's submission that she was 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) (now the *Fair Work Act 2009* (Cth)) was six months. Raphael FM concluded:

In my view before a person can succeed in a claim for future economic loss under s.46PO of the 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.<sup>237</sup>

#### **(e) Oberoi v Human Rights & Equal Opportunity Commission**

In *Oberoi v Human Rights & Equal Opportunity Commission*,<sup>238</sup> Raphael FM held that a Hearing Commissioner had discriminated against the applicant by attributing less credibility to statements of the applicant where they conflicted with statements of a conciliation officer due to the applicant's depression. His Honour awarded the applicant compensation in the sum of \$18,500 for pain and suffering, hurt, humiliation and damage to employment prospects. His Honour also ordered that the respondent pay the applicant \$1,500 in 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 the Commission to apologise on behalf of the Commission.

<sup>235</sup> [2001] FMCA 20.

<sup>236</sup> (1995) EOC 92-714.

<sup>237</sup> [2001] FMCA 20, [94].

<sup>238</sup> [2001] FMCA 34.

**(f) Sheehan v Tin Can Bay Country Club**

The respondent club in *Sheehan v Tin Can Bay Country Club*<sup>239</sup> was found to have unlawfully discriminated against the applicant pursuant to section 9 of the DDA in refusing to permit the Mr Sheehan's assistance animal onto the premises. Raphael FM ordered the respondent to pay to the applicant \$1,500 in damages for hurt and distress caused by the acts of discrimination.

**(g) Randell v Consolidated Bearing Company (SA) Pty Ltd**

In *Randell v Consolidated Bearing Company (SA) Pty Ltd*<sup>240</sup> 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. His Honour followed his award for such loss in *Song v Ainsworth Game Technology Pty Ltd*<sup>241</sup> 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.<sup>242</sup>

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 amounted to the difference between his annual wage as a trainee and his wage in his new position of employment.

**(h) Forbes v Commonwealth**

In *Forbes v Commonwealth*,<sup>243</sup> 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 the 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'.<sup>244</sup>

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.<sup>245</sup>

239 [2002] FMCA 95.

240 [2002] FMCA 44.

241 [2002] FMCA 31.

242 [2002] FMCA 44, [55].

243 [2003] FMCA 140.

244 [2003] FMCA 140, [28].

245 [2003] FMCA 140, [33]. Note that the matter was appealed, and cross-appealed in *Forbes v Australian Federal Police (Commonwealth)* [2004] FCAFC 95 and Driver FM's finding of discrimination was overturned: [68]–[70].

### (i) **McBride v Victoria (No 1)**

The applicant in *McBride v Victoria (No 1)*<sup>246</sup> had complained to a supervisor regarding the fact that she had been rostered for duties which were inconsistent with her disabilities (resulting from work-related injuries). The supervisor was found to have responded: 'What the fuck can you do then?'<sup>247</sup> McInnis FM held that this constituted unlawful discrimination contrary to sections 15(2)(b) and (d) of the DDA. His Honour found that the incident caused 'significant upset and hurt' to the applicant and awarded \$5,000 in damages.

### (j) **Bassanelli v QBE Insurance**

Raphael FM in *Bassanelli v QBE Insurance*<sup>248</sup> 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'.<sup>249</sup> His Honour determined that an award for damages of \$5,000 plus interest was appropriate with regards to the facts of the case.

### (k) **Darlington v CASCO Australia Pty Ltd**

In *Darlington v CASCO Australia Pty Ltd*,<sup>250</sup> 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. Driver FM declined to make an award for non-economic loss as claimed by the applicant.

### (l) **Clarke v Catholic Education Office**

The respondent in *Clarke v Catholic Education Office*<sup>251</sup> was found to have indirectly discriminated against a student by requiring him to receive teaching at one of their schools without the assistance of an Auslan interpreter. Madgwick J awarded damages of \$20,000 (and interest of \$6,000) for the distress caused by the discrimination. This was upheld by the Full Court of the Federal Court in *Catholic Education Office v Clarke*,<sup>252</sup> Sackville and Stone JJ commenting that the damages awarded by the primary judge were 'relatively modest'.<sup>253</sup>

### (m) **Power v Aboriginal Hostels Ltd**

In *Power v Aboriginal Hostels Ltd*,<sup>254</sup> Brown FM found that the respondent unlawfully discriminated against the applicant when it dismissed him from his employment on the basis of an imputed

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246 [2003] FMCA 285.

247 [2003] FMCA 285, [48].

248 [2003] FMCA 412, affirmed on appeal: *QBE Travel Insurance v Bassanelli* (2004) 137 FCR 88.

249 [2003] FMCA 412, [56].

250 [2002] FMCA 176.

251 [2003] FCA 1085.

252 (2004) 138 FCR 121.

253 (2004) 138 FCR 121, 149-150 [134].

254 [2004] FMCA 452.

disability. Brown FM noted that it was conceded the applicant did not suffer a specific psychiatric or psychological illness following his dismissal.<sup>255</sup> His Honour was of the view that *Randell v Consolidated Bearing Company SA Pty Ltd*,<sup>256</sup> *Song v Ainsworth Game Technology Pty Ltd*<sup>257</sup> and *X v McHugh (Auditor-General for the State of Tasmania)*<sup>258</sup> were comparable cases to *Power*. He regarded that \$10,000, the amount awarded in each of those cases for injury to feelings, was the proper amount to award in this case.<sup>259</sup>

The applicant was also awarded \$5,000 for economic loss. In considering economic loss Brown FM noted that, according to the usual principles that apply in assessing damages in cases of tort, the applicant was under an obligation to mitigate his loss which followed from the unlawful dismissal. He noted that the applicant's employment prospects were not materially affected by his dismissal and that he did not attempt to find work after his dismissal but chose to pursue educational opportunities. Accordingly, it was not reasonable to make an award of damages on the basis of a period of 18 months as the applicant had sought. His Honour held instead that a period of six months which coincided with the time when the applicant was able to obtain employment (on a part-time basis as a drug and alcohol counsellor) was a more reasonable period.<sup>260</sup>

#### (n) *Trindall v NSW Commissioner of Police*

The applicant in *Trindall v NSW Commissioner of Police*<sup>261</sup> was found to have suffered 'a very significant injury to his feelings and emotional and psychological distress, hurt and humiliation' as a consequence of the unlawful discrimination.<sup>262</sup> This injury caused the applicant depression, anxiety and sleeplessness which required medication. Driver FM further held that it contributed to the applicant's failure to complete a development programme in which he enrolled. An award of \$10,000 for non-economic loss was ordered.

Driver FM found that the discrimination against the applicant by his employer had also resulted in him losing the opportunity to work overtime and perform some shift work. Damages for economic loss were awarded on that basis, with the amount of the loss to be calculated by the parties.<sup>263</sup> Interest was also awarded.<sup>264</sup>

#### (o) *Hurst and Devlin v Education Queensland*

In *Hurst and Devlin v Education Queensland*,<sup>265</sup> Lander J found that the respondent had discriminated against the second applicant (Devlin) by imposing a requirement or condition that he be educated in English without the assistance of an Auslan teacher or interpreter.<sup>266</sup> Lander J awarded the second applicant \$20,000 (plus \$4,000 in interest)<sup>267</sup> for the hurt, embarrassment and social dislocation which had been occasioned by his inability to communicate in any language.<sup>268</sup>

255 [2004] FMCA 452, [73].

256 [2002] FMCA 44.

257 [2002] FMCA 31.

258 (1994) 56 IR 248.

259 [2004] FMCA 452, [74]–[76].

260 [2004] FMCA 452, [81]–[82].

261 [2005] FMCA 2.

262 [2005] FMCA 2, [185].

263 [2005] FMCA 2, [187].

264 [2005] FMCA 2, [189].

265 [2005] FCA 405.

266 [2005] FCA 405, [797], [806].

267 [2005] FCA 405, [866].

268 [2005] FCA 405, [846].

Lander J also awarded the second applicant \$40,000 (without interest) for loss of earning capacity on the basis that he had lost two school years as a result of the discrimination and that, if he were to stay at school for an extra two years, he would lose two years of earnings some time between the ages of 17 and 19 years (if he does not complete tertiary education) or 22 and 24 years (if he does complete tertiary education).<sup>269</sup> Lander J rejected the submission that he assess the economic loss of the second applicant on the basis that the second applicant lost the opportunity of a tertiary education and employment commensurate with tertiary education on the basis that there was no evidence before him as to whether the second applicant had lost that opportunity and was therefore less likely to obtain employment.<sup>270</sup>

The first respondent (Hurst) appealed the decision of Lander J to the Full Federal Court,<sup>271</sup> see below.

### **(p) Drury v Andreco Hurll Refractory Services Pty Ltd (No 4)**

In *Drury v Andreco Hurll Refractory Services Pty Ltd (No 4)*,<sup>272</sup> the respondent was found to have victimised the applicant contrary to section 42 of the DDA by deciding that it would not consider employing him because of previous and threatened future applications under the *Human Rights and Equal Opportunity Commission Act 1986* (now the AHRC Act) alleging disability discrimination. The respondent was ordered to pay the applicant \$5,000 in general damages. Raphael FM also found that the applicant should be compensated for the fact that he would have been offered work on a particular job were it not for the victimisation and ordered the respondent to pay a sum to be agreed between the parties (or, failing agreement, as determined by a Registrar of the court). However, no damages were awarded for loss of future earnings as the court was not satisfied that the applicant had made any efforts to mitigate his loss.

### **(q) Wiggins v Department of Defence – Navy**

In *Wiggins v Department of Defence – Navy*,<sup>273</sup> the respondent was found to have directly discriminated against the applicant by demoting her whilst she was on sick leave, without her consent or any form of consultation. The applicant was awarded \$25,000 for the hurt, humiliation and upset this caused. McInnis FM stated that a significant amount of damages was appropriate because the respondent's policy operated to permit the unlawful discrimination and as a person suffering from depression is more vulnerable, the consequences of discrimination can be regarded as more significant. His Honour further held that the applicant continued to suffer for a significant period after her resignation from the Navy.<sup>274</sup>

### **(r) Vickers v The Ambulance Service of NSW**

In *Vickers v The Ambulance Service of NSW*,<sup>275</sup> the court accepted that the respondent had discriminated against the applicant in deciding not to offer him employment as a trainee ambulance officer due to him suffering from Type 1, insulin-dependent diabetes. The applicant had sought \$5,000 in compensation for the injury to his feelings and the delay in the processing of his application to become a trainee ambulance officer. Raphael FM agreed to the amount sought by the applicant, although he stated that he would have assessed damages at a higher level if assessment had been left at large.<sup>276</sup>

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269 [2005] FCA 405, [859]–[861].

270 [2005] FCA 405, [855]–[857].

271 *Hurst v State of Queensland* (2006) 151 FCR 562.

272 [2005] FMCA 1226.

273 [2006] FMCA 800.

274 [2006] FMCA 800, [202].

275 [2006] FMCA 1232.

276 [2006] FMCA 1232, [55].



**(s) Hurst v Queensland**

In *Hurst v Queensland*,<sup>277</sup> the Full Federal Court overturned the finding of Lander J that the appellant could ‘cope’, and therefore comply, with the requirement that she receive her education without the assistance of an Auslan teacher or interpreter. The court held that an ability to cope could not be equated with an ability to comply. The court further held that the requirement had resulted in serious disadvantage to the appellant as it prevented her from achieving her full educational potential.

The court ordered a declaration that the respondent had contravened section 6 of the DDA and awarded costs in the appellant’s favour. At first instance Lander J had held that even if his finding on ability to comply was incorrect, the appellant had suffered no loss due to her young age at the relevant time and the short period of time relevant to her complaint. Lander J’s findings on damages were not agitated on appeal, despite being drawn to the attention of the appellant’s counsel. The court held that it was therefore appropriate to maintain the finding of Lander J that there be no award of damages.<sup>278</sup>

The court left open the question of whether the appellant was also entitled to injunctive relief. Further submissions were subsequently made by the parties on that issue, at which time the appellant sought to re-open the question of compensation. In *Hurst v Queensland (No 2)*,<sup>279</sup> the Full Federal Court delivered its decision on the question of the appellant’s claim for injunctive relief and compensation. In relation to compensation, the court refused to disturb the findings of Lander J at first instance, noting simply that those findings had not been challenged on appeal.<sup>280</sup> The question of injunctive relief is discussed at 7.5 below.

**(t) Rawcliffe v Northern Sydney Central Coast Area Health Service**

In *Rawcliffe v Northern Sydney Central Coast Area Health Service*,<sup>281</sup> Smith FM upheld Mr Rawcliffe’s claim that the respondent had discriminated against him on the basis of his epilepsy. Despite requesting that he only be given afternoon shifts on account of the effect of his medication, Mr Rawcliffe was rostered to work ‘a ten hour day shift sandwiched in the middle of two ten hour night duties’. A request was made to swap the day shift and this was granted, however his supervisor subsequently disputed that such a request had been made and re-rostered Rawcliffe for the day shift. Smith FM held this to constitute indirect discrimination under the DDA. His Honour further held that there were features of the case which called for compensation at the upper level of appropriate awards. Taking into consideration the impact of the discrimination on Mr Rawcliffe, Smith FM awarded the applicant \$15,000.

**(u) Forest v Queensland Health**

In *Forest v Queensland Health*,<sup>282</sup> Collier J held that the respondent had discriminated against the appellant by not allowing Mr Forest’s assistance animal to accompany him onto the respondent’s premises. Collier J awarded Mr Forest damages totalling \$8,000, plus interest to be calculated at 5% per annum, for the hurt, humiliation and embarrassment suffered as a consequence of the discrimination. Collier J declined to make an order for an apology as sought by Mr Forest.

Justice Collier’s decision was overturned on appeal.<sup>283</sup>

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<sup>277</sup> (2006) 151 FCR 562.

<sup>278</sup> (2006) 151 FCR 562, [137].

<sup>279</sup> [2006] FCAFC 151.

<sup>280</sup> [2006] FCAFC 151, [26].

<sup>281</sup> [2007] FMCA 931.

<sup>282</sup> (2007) 161 FCR 152.

<sup>283</sup> *Queensland (Queensland Health) v Forest* [2008] FCAFC 96.

## **(v) Gordon v Commonwealth**

In *Gordon v Commonwealth*,<sup>284</sup> Heerey J held that the respondent had discriminated against Mr Gordon by dismissing him from his employment as a GST Field Officer, APS 4 level, at the ATO on the basis of his imputed (or actual) hypertension.<sup>285</sup> Heerey J awarded \$63,267 for past economic loss, being the difference between what Mr Gordon would have earned if he had continued working at the ATO and what he had actually earned.<sup>286</sup> An amount of \$8,030 was also awarded as representing the amount Mr Gordon would have to repay to Centrelink.<sup>287</sup> Heerey J was not satisfied that the applicant had made out a case for any loss or damage by way of loss of future salary or superannuation caused by the unlawful discrimination.<sup>288</sup> Nor was he persuaded that Mr Gordon should be compensated for losses he experienced after his home loan application was refused as such loss could not be attributed to the discriminatory conduct of the ATO.<sup>289</sup> His Honour was satisfied that Mr Gordon had suffered substantial mental anguish and awarded \$20,000 for non-economic loss.<sup>290</sup>

## **(w) Maxworthy v Shaw**

In *Maxworthy v Shaw*,<sup>291</sup> the respondent was found to have discriminated against the applicant on the grounds of her disability in the course of and in terminating her employment. Nicholls FM noted that the unlawful discrimination had had a significant effect on the applicant not only in relation to her health, but also employment capacity and social engagement. There was medical evidence that it had led to an exacerbation of pre-existing anxiety and depression. Nicholls FM considered an award of \$15,000 general damages to be appropriate.<sup>292</sup> Further, Nicholls FM considered that these damages should be increased on the basis of aggravated damages given the behaviour of the respondent in acting in an insulting manner when committing the unlawful discrimination.<sup>293</sup> An increase to \$20,000 general damages under the DDA was awarded. Compensation for lost wages was assessed at \$33,394.50. An amount of \$5,000 was included in lieu of interest up to the date of judgment and a further order made pursuant to section 77 of the FMC Act (equivalent of section 77(2) of the FCC Act) for interest from the date of judgment.

## **(x) Burns v Media Options Group Pty Ltd**

In *Burns v Media Options Group Pty Ltd*,<sup>294</sup> the applicant was dismissed from his employment at least in part because of his need to care for his partner who became ill with cancer which required intensive medical treatment over a relatively short period of time. The applicant was awarded a total of \$81,213.46 in damages. He did not claim, and was not awarded, interest on any of these sums.

Key to the award of economic loss was medical evidence that the conduct of the respondents exacerbated a pre-existing mental illness of Mr Burns which affected his ability to obtain alternative employment. Of the total amount awarded, \$31,213.46 was for economic loss. There were two relevant periods of time. The first period was a period of 13 months when Mr Burns was unemployed following the termination of his employment. Over this period, he was awarded 30% of the difference between

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284 [2008] FCA 603.

285 [2008] FCA 603, [58]–[62].

286 [2008] FCA 603, [102].

287 [2008] FCA 603, [103].

288 [2008] FCA 603, [113].

289 [2008] FCA 603, [98].

290 [2008] FCA 603, [121].

291 [2010] FMCA 1014. Note damages were also awarded.

292 [2010] FMCA 1014, [155]–[188].

293 [2010] FMCA 1014, [189]–[192].

294 [2013] FCCA 79.

his previous salary and the welfare payments he had received. The discount rate of 30% was applied as a result of medical evidence that the discriminatory treatment of Mr Burns ‘contributed’ 30% to his ‘symptomology’. The second period was a period of four years and three months which started when Mr Burns obtained a new job. This position (an assistant) paid a lower wage than his previous position (a printer). There was a factual dispute about when this period should end and little medical evidence to establish the point. Nicholls J fixed an end point six months after the date of the report of the medical expert who gave evidence in the case who found that Mr Burns ‘will reach maximum medical improvement within four to six months of commencing specialist psychiatric treatment’. Over this period, Mr Burns was awarded 30% of the difference between his previous salary and his new salary.

Mr Burns was awarded \$40,000 in general damages and \$10,000 in aggravated damages. Nicholls J cited Lockhart J in *Hall v Shieban*<sup>295</sup> and found that the respondents had acted ‘high-handedly, maliciously, insultingly or oppressively in committing the act of discrimination’.

### **(y) Innes v Rail Corporation of New South Wales**

In *Innes v Rail Corporation of New South Wales*,<sup>296</sup> the applicant was blind. Raphael FM held that the respondent’s failure to make any — or any audible — audio announcements on a number of train journeys undertaken by the applicant to let him know which stations he had arrived at amounted to indirect discrimination in the provision of a service. The respondent failed to make appropriate announcements on 36 occasions. Raphael FM also held that these failures together amounted to a single contravention of section 27.4 of the Transport Standards, and were therefore unlawful under section 32 of the DDA.

The applicant sought an award of damages with respect to each occasion on which an audible announcement was not made. Raphael FM declined to award damages on that basis. He ordered the respondent to pay a single sum of \$10,000 in general damages on account of stress and anxiety with respect to all incidents of unlawful discrimination.

### **(z) Watts v Australian Postal Corp**

In *Watts v Australian Postal Corp*,<sup>297</sup> Mortimer J found that the respondent discriminated against the applicant on the ground of disability by failing to make reasonable adjustments. Ms Watts had a psychological condition which constituted a disability. The effect of the respondent employer’s failure to make reasonable adjustments was that for a period of about ten months the applicant was required to absent herself from work and use her leave entitlements.

Mortimer J ordered that the respondent employer re-credit the applicant with leave taken as a result of the discrimination, including sick leave, annual leave, and any long service leave (with certain discounts to account for leave the applicant would have taken in any event). The applicant was also awarded \$10,000 for distress, hurt and humiliation.

### **(aa) Huntley v State of NSW, Department of Police and Justice (Corrective Services NSW)**

In *Huntley v State of NSW, Department of Police and Justice (Corrective Services NSW)*,<sup>298</sup> a judge of the Federal Circuit Court held that the respondent had discriminated against the applicant on the

<sup>295</sup> (1989) 20 FCR 217.

<sup>296</sup> [2013] FMCA 36.

<sup>297</sup> (2014) 222 FCR 220.

<sup>298</sup> [2015] FCCA 1827.

ground of disability in that it had failed to make reasonable adjustments following her developing Crohn's disease and idiopathic hypersomnolence. The court held that the respondent's conduct also amounted to a breach of express and implied terms of the applicant's contract of employment.

The applicant claimed damages for economic loss for lost wages, lost leave entitlements, and lost promotional opportunities. The respondent did not lead evidence or make submissions about the quantum of these damages. The court accepted the applicant's assessment of loss arising from these items and awarded damages for economic loss in the sum of \$98,863.89. The court accepted that the respondent's conduct had caused the applicant significant 'psychological trauma', and "pain and suffering" through emotional distress.' There was medical evidence before the court that the respondent's conduct had had a significant impact on a pre-existing depressive disorder. The court awarded general damages in the sum of \$75,000

### **(bb) Burns v Director General of the Department of Education**

In *Burns v Director General of the Department of Education*,<sup>299</sup> the applicant was a primary school student with multiple disabilities. The Federal Circuit Court held that the respondent had discriminated against the applicant at her school by:

- requiring her to use inadequate toilet facilities;
- not providing a sufficiently wide disabled parking bay; and
- requiring her at various times to use ramps which were too steep.

Various other claims were dismissed. The court noted that there was no medical evidence of any physical or mental injury suffered by the applicant as a result of the discrimination, that the applicant's young age meant any hurt, humiliation or distress would be 'relatively transient', and the respondent had not intended to discriminate against the applicant. In those circumstances, the court awarded general damages in the sum of \$8,000.

### **(cc) Mulligan v Virgin Australia Airlines Pty Ltd**

In *Mulligan v Virgin Australia Airlines Pty Ltd*,<sup>300</sup> the Full Court of the Federal Court (Flick, Reeves and Griffiths JJ) found that Virgin Australia Airlines Pty Ltd (Virgin) discriminated against the appellant on the ground of disability by refusing to allow him to book a ticket to travel on a flight while accompanied in the cabin of the aircraft by his assistance animal.

The court ordered that Virgin pay \$10,000 by way of damages for the stress he suffered as a consequence of Virgin's unlawful conduct.

### **(dd) Pop v Taylor**

In *Pop v Taylor*,<sup>301</sup> Brown J found that the applicant had been dismissed from employment as a book keeper because of a shoulder injury, and that this amounted to discrimination on the ground of disability. The applicant had provided a medical certificate to her employer indicating that she should work reduced hours for a week. The same day, her employment was terminated and the applicant was required to leave the employer's office. The applicant's contract was due to expire shortly after her dismissal. Brown J held that it was unlikely her contract would have been renewed. He found that the applicant had suffered distress and humiliation, but that she was a 'resilient and determined person,

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299 [2015] FCCA 1769.

300 [2015] 234 FCR 207.

301 [2015] FCCA 1720.

with the capacity to overcome such distress relatively quickly.’ He awarded damages for economic loss in the sum of \$5,000, being approximately one month’s wages, and general damages in the sum of \$5,000.

### 7.3 Apologies

Divergent views have been expressed by courts as to the appropriateness of ordering an apology.

In *Haider v Hawaiian Punch Pty Ltd*,<sup>302</sup> Mansfield J made an order for damages of \$9,000 in a successful claim of racial hatred under section 18C of the RDA. He explained that this award reflected the fact that the applicant had ‘not received an apology from the respondent’.<sup>303</sup> In making this finding, Mansfield J referred to the remarks of Kiefel J (as she then was) in *Creek v Cairns Post Pty Ltd*.<sup>304</sup> In that case, Kiefel J noted that a short apology would have been ordered had the discrimination complaint been made out, as 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 assessing the extent of the injury and corresponding compensation to redress it.<sup>305</sup>

In *Forbes v Commonwealth*,<sup>306</sup> 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.<sup>307</sup>

In *Cooke v Plauen Holdings Pty Ltd*,<sup>308</sup> 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.<sup>309</sup>

In *Escobar v Rainbow Printing Pty Ltd (No 2)*,<sup>310</sup> 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’,<sup>311</sup> and ordered that the respondent provide the applicant with a written apology in terms to be agreed between the parties.

A different approach was taken in *Jones v Toben*,<sup>312</sup> where 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

302 [2015] FCA 37.

303 [2015] FCA 37, [24].

304 (2001) 112 FCR 352.

305 (2001) 112 FCR 352, [35].

306 [2003] FMCA 140.

307 [2003] FMCA 140, [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 *Obero v Human Rights & Equal Opportunity Commission* [2001] FMCA 34 in which an apology was ordered.

308 [2001] FMCA 91.

309 [2001] FMCA 91, [43].

310 [2002] FMCA 122.

311 [2002] FMCA 122, [43].

312 [2002] FCA 1150, [106].

feel'. Her Honour cited with approval the view of Hely J in *Jones v Scully*<sup>313</sup> that 'prima facie, the idea of ordering someone to make an apology is a contradiction in terms'.

A similar view was expressed by Raphael FM in *Travers v New South Wales*:<sup>314</sup>

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 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.<sup>315</sup>

And again by his Honour in *Evans v National Crime Authority*:<sup>316</sup>

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.<sup>317</sup>

In *Grulke v KC Canvas*,<sup>318</sup> 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. His Honour 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.<sup>319</sup>

In *Lee v Smith (No 2)*,<sup>320</sup> Connolly FM held that it was not appropriate to order an apology in circumstances where a respondent has denied the conduct alleged against them.<sup>321</sup> His Honour stated:

Each of the First, Second and Third Respondents denied in their evidence that they sexually harassed, victimised or discriminated against the Applicant. I accept the submissions on their behalf that there is no utility in ordering individuals to apologise in circumstances where they have denied the conduct against them. So far as the Commonwealth is concerned, there seems some support for what the Respondent says, that in addition to the issues of utility, there is no basis upon which the Court can make such an order against the Commonwealth of Australia (see *Forbes v Australian Federal Police (Commonwealth of Australia)* [2004] FCAFC 95 (5 May 2004), 3 and 7). In all of the circumstances, I do not propose to make any order for an apology and in particular, as it requires the expression of a sentiment not genuinely felt (see Branson J in *Jones v Toben* [2002] FCA 1150 (17 September 2002), 106).

In *Eatock v Bolt (No 2)*,<sup>322</sup> Bromberg J determined not to compel an apology from the respondent if it was unwilling to give one and that, in the absence of an apology, he would order a corrective notice to be published twice in the *Herald Sun*.<sup>323</sup> Similarly, in *Alexander v Capello*,<sup>324</sup> Driver J did not compel

313 (2002) 120 FCR 243, 308 [245].

314 [2001] FMCA 18.

315 [2001] FMCA 18.

316 [2003] FMCA 375.

317 [2003] FMCA 375, [115]. See also *Carr v Boree Aboriginal Corporation* [2003] FMCA 408, [14].

318 [2000] FCA 1415.

319 [2000] FCA 1415, [4].

320 [2007] FMCA 1092.

321 [2007] FMCA 1092, [16].

322 [2011] FCA 1180.

323 [2011] FCA 1180, [50] (Bromberg J).

324 [2013] FCCA 860.

the making of an apology to the applicant on the basis that ‘it would be unlikely to be sincere if it is compelled’.

In *Burns v Director General of the Department of Education*,<sup>325</sup> the applicant was a primary school student with multiple disabilities. The Federal Circuit Court held that the respondent had discriminated against the applicant at her school by:

- requiring her to use inadequate toilet facilities;
- not providing a sufficiently wide disabled parking bay; and
- requiring her at various times to use ramps which were too steep.

Various other claims were dismissed. The court held that the respondent had demonstrated a ‘willingness ... to grapple with the issues,’ and to take steps to address the discrimination identified. In those circumstances, the court declined to make an order that the respondent apologise to the applicant.

## 7.4 Declarations

The power to make a declaration under section 46PO(4)(a) of the AHRC Act and the terms in which it is framed are in the court’s discretion. Any declaration made by the court should reflect the final outcome of the case with certainty and precision.<sup>326</sup> In *Ewin v Vergara (No 4)*,<sup>327</sup> a successful claim of sexual harassment, Bromberg J noted that there may be ‘utility in using a declaration to define and publicise the type of conduct that constitutes the contravention the subsection of the court’s declaration’.<sup>328</sup> In this case that utility included:

Providing a sufficient public record of the way in which the applicant’s application was resolved *Cruse* at [59]. There is also utility in assisting to redress the harm done by the contravening conduct: *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582 (Mason CJ, Dawson, Toohey and Gaudron JJ).<sup>329</sup>

In *Commonwealth v Evans*,<sup>330</sup> Branson J considered in detail the power to make declarations under section 46PO(4) of what is now the AHRC Act and found that it was appropriate to apply general law principles.<sup>331</sup> At general law it is established that a trial judge should not make a declaration which is not tied to proven facts.<sup>332</sup> Branson J also cited the following passage from *Warramunda Village Inc v Pryde*:<sup>333</sup>

The remedy of a declaration of right is ordinarily granted as a final relief in a proceeding. It is intended to state the rights of the parties with respect to a particular matter with precision, and in a binding way. The remedy of a declaration is not an appropriate way of recording in a summary form, conclusions reached by the Court in reasons for judgment.<sup>334</sup>

325 [2015] FCCA 1769.

326 *Ewin v Vergara (No 4)* [2013] FCA 1409, [4] citing *Stuart v Construction, Forestry, Mining and Energy Union* (2010) 185 FCR 308, [89] (Besanko and Gordon JJ, with whom Moore J agreed at [35]).

327 [2013] FCA 1409.

328 [2013] FCA 1409, [4], citing the observations made by Goldberg and Jessup JJ in *Cruse v Multiplex Ltd* (2008) 172 FCR 279, [59].

329 [2013] FCA 1409, [5].

330 [2004] FCA 654.

331 [2004] FCA 654, [57]–[60].

332 *Rural Press v Australian Competition and Consumer Commission* (2003) 216 CLR 53, [89]–[90] (Gummow, Hayne and Heydon JJ).

333 (2001) 105 FCR 437.

334 (2001) 105 FCR 437, [8], Cited with approval in *Australian Competition and Consumer Commission (ACCC) v MSY Technology Pty Ltd* (2012) 201 FCR 378, [35]; *Commissioner for Consumer Protection v Armstrong* [2012] WASC 206, [13]; *Queensland Mining Corp Ltd v Renshaw (No 2)* [2014] FCA 438, [9]; See also: *Smith v Bone (No 2)* (2015) 233 FCR 568, [6].



Her Honour appeared to reject the submission that section 46PO(4)(a) of the AHRC Act intended to authorise the making of a declaration in terms such as ‘the respondent has committed unlawful discrimination’, such a declaration being too general in its terms.<sup>335</sup> In the decision under appeal, Raphael FM had declared ‘that the respondent unlawfully discriminated against the applicant contrary to section 14(2) of the SDA by its actions in connection with the applicant’s taking of carer’s leave prior to 30 June 2000’. Branson J commented:

A declaration in such terms is open to objection on two grounds. First, the declaration does not identify the ‘actions in connection with the applicant’s taking of carer’s leave’ upon which it is based. In this case, the relevant uncertainty as to the action to which the declaration refers is exacerbated by the fact that his Honour’s reasons for judgment fail clearly to identify the actions intended to support the making of the declaration. Secondly, it may be assumed that amongst the actions taken within the NCA in connection with the applicant’s taking of carer’s leave would have been entirely lawful conduct such as the maintaining of leave records, the reallocation of duties etc. Yet the declaration is so widely drawn that actions of these kinds fall within its terms.<sup>336</sup>

Without deciding the issue, Branson J further noted that the power to make a declaration is discretionary and expressed doubt that a case for the grant of declaratory relief in addition to an award of damages had been demonstrated.<sup>337</sup>

In *McGlade v Lightfoot*,<sup>338</sup> the primary relief sought by the applicant was a declaration that the conduct of the respondent was unlawful by virtue of section 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.<sup>339</sup>

Similarly, the applicant in *Silberberg v The Builders Collective of Australia Inc*<sup>340</sup> sought a declaration that the conduct of the respondents contravened section 18C of the RDA. Upon finding the applicant’s claim to be substantiated, Gyles J made such an order.<sup>341</sup>

In *Eatock v Bolt (No.2)*<sup>342</sup> the applicant was granted a declaration that not only stated that the writing of certain newspaper articles contravened section 18C, but included that the conduct was not exempted from being unlawful under section 18D. Bromberg J stated that ‘to do so, served to properly record the way in which the court resolved the application before it’.<sup>343</sup>

In *Nojin v Commonwealth and Another*,<sup>344</sup> the Full Court of the Federal Court upheld an appeal from a single judge of that court. The court held that the use of the ‘Business Services Wage Assessment Tool’ (‘BSWAT’) to assess the wages of two applicants with intellectual disabilities amounted to indirect discrimination on the ground of disability in employment.

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335 [2004] FCA 654, [60].

336 [2004] FCA 654, [61].

337 [2004] FCA 654, [88].

338 (2002) 124 FCR 106.

339 (2002) 124 FCR 106, [78].

340 (2007) 164 FCR 475.

341 See also *Gordon v Commonwealth* [2008] FCA 603, [84]. In *Watts v Australian Postal Corp* [2014] FCA 370, Mortimer J made declarations that the respondent had contravened the DDA, in addition to ordering damages. In *Mulligan v Virgin Australia Airlines Pty Ltd* (2015) 234 FCR 207, the Full Court of the Federal Court made a declaration that the respondent’s conduct amounted to unlawful discrimination under s 24 of the DDA in addition to ordering damages.

342 [2011] FCA 1180.

343 [2011] FCA 1180, [7].

344 (2012) 208 FCR 1.

At first instance,<sup>345</sup> declarations and orders for compensation were sought. However, on appeal, only declaratory relief was sought. The court made a declaration in the terms sought by the applicants that:

The Second Respondent unlawfully discriminated against the Applicant in contravention of s 15 of the Disability Discrimination Act 1992 by imposing on the Applicant a requirement or condition that in order to secure a higher wage the Applicant undergo a wage assessment by the Business Services Wage Assessment Tool.<sup>346</sup>

In *Huntley v State of NSW, Department of Police and Justice (Corrective Services NSW)*,<sup>347</sup> in addition to awarding general damages, the court made declarations that:

- the respondent had unlawfully discriminated against the applicant;
- the applicant ‘met all the relevant requirements of her position such that s.21A of the DDA was not met by [the respondent]’; and
- the respondent breached the applicant’s contract of employment.

## 7.5 Orders Directing a Respondent Not to Repeat or Continue Conduct

Orders directing a respondent not to repeat or continue conduct have been made pursuant to section 46PO(4)(a) of the AHRC Act in a number of cases.

In *Jones v Scully*,<sup>348</sup> for example, the respondent was found to have breached the racial hatred provisions of the RDA by distributing material in letterboxes and at markets. Hely J made a declaration that specified the unlawful conduct found to have been engaged in by the respondent and ordered that the respondent be restrained from repeating or continuing such conduct.<sup>349</sup> His Honour also made an order that the respondent be ‘restrained from distributing, selling or offering to sell any leaflet or other publication which is to the same effect’ as the material listed in the declaration.<sup>350</sup>

In *Jones v Toben*,<sup>351</sup> the complainant sought a declaration that the respondent had engaged in unlawful conduct by publishing anti-Semitic material on a website, and orders requiring the removal of offending material from the internet and prohibiting its future publication.

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.<sup>352</sup> 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, her Honour found persuasive the approach of the Canadian Human Rights Tribunal in *Citron v Zündel (No 4)*<sup>353</sup> 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

345 [2011] FCA 1066.

346 (2012) 208 FCR 1.

347 [2015] FCCA 1827.

348 (2002) 120 FCR 243.

349 (2002) 120 FCR 243, [247].

350 (2002) 120 FCR 243, [247].

351 [2002] FCA 1150.

352 [2002] FCA 1150, [108]–[110].

353 (2002) 41 CHRR D/274, [299]–[300].

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.<sup>354</sup>

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 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.<sup>355</sup>

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.<sup>356</sup>

Note that it has been held in other contexts that it is necessary to ensure that orders made directing conduct are sufficiently precise. For example, in *World Series Cricket v Parish*,<sup>357</sup> a case concerning a contravention of the *Trade Practices Act 1974* (Cth) (now the *Competition and Consumer Act 2010* (Cth)), the Full Federal Court overturned an order that the appellant be restrained from engaging in 'any conduct that is misleading or likely to mislead or deceive' as being too wide and unqualified in its terms and not clearly and directly related to the impugned conduct.<sup>358</sup> Similarly, orders capable of restraining lawful as well as unlawful conduct have been criticised by the courts.<sup>359</sup>

In *Silberberg v The Builders Collective of Australia Inc*,<sup>360</sup> the applicant sought, and was granted, orders restraining the second respondent from further publishing website messages that Gyles J had found to contravene section 18C of the RDA. His Honour also ordered that the second respondent be restrained from publishing any similar such material in the future, either on the internet or elsewhere.

In *Hurst v Queensland (No 2)*,<sup>361</sup> the Full Court of the Federal Court considered submissions from the parties as to whether the appellant should be entitled to injunctive relief or compensation. The appellant sought an injunction restraining the respondent from continuing to deny her the services of a full-time Auslan interpreter.<sup>362</sup>

The court noted that what the appellant sought was a *quia timet* injunction, namely 'an injunction to prevent or restrain an apprehended or threatened wrong which would result in substantial damage if committed'.<sup>363</sup> The court held that, whilst there was 'no doubt' that the court is empowered to grant

354 [2002] FCA 1150, [111], cited in *Eatock v Bolt (No 2)* [2011] FCA 1180, [15]–[16].

355 [2002] FCA 1150, [107].

356 [2002] FCA 1150, [105], [113]. Her Honour's decision was upheld on appeal: *Toben v Jones* (2003) 129 FCR 515.

357 (1977) 16 ALR 181.

358 (1977) 16 ALR 181, 204–205 (Brennan J), 195–196 (Franki J).

359 *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1992) 38 FCR 1. The injunction in question would have restrained the use of particular words in contexts different from those in which a contravention had been established and at future periods (when what was said might, depending on scientific knowledge at that time, have ceased to be false); *World Series Cricket Pty Ltd v Parish* (1977) 16 ALR 181, 204–205 (Brennan J), 195–196 (Franki J).

360 (2007) 164 FCR 475.

361 [2006] FCAFC 151.

362 [2006] FCAFC 151, [4].

363 [2006] FCAFC 151, [20].

injunctive relief by section 46PO of what is now the AHRC Act as well as by sections 23 and 24(1) (a) of the *Federal Court of Australia Act 1976* (Cth),<sup>364</sup> there was not sufficient evidence of a likelihood of a future contravention of the appellant's rights.<sup>365</sup> The court also noted that there had been a significant passage of time since the relevant acts of discrimination and the circumstances had altered considerably.<sup>366</sup> In addition, the court noted that the proposed injunction would impose significantly more obligations on the respondent than the evidence before the primary judge would warrant:

An order requiring the respondent to provide 'full-time' Auslan interpreting services, for an indefinite period, at apparently any location, seems to us to be beyond the scope of any powers conferred by s 46PO(4) of the HREOC Act. It also goes well beyond what the evidence accepted by the primary judge would allow this Court to do.<sup>367</sup>

In light of the above matters, the court rejected the application for injunctive relief.

In *Haraksin v Murrays Australia Pty Ltd*,<sup>368</sup> the applicant, who as a result of a disability used a wheelchair, attempted to book a return journey on a coach service operated by the respondent. She requested a wheelchair accessible space on the coach. The respondent did not have any wheelchair accessible coaches. The court held that the respondent had failed to make reasonable adjustments and so had discriminated against the applicant under sections 5(2), 23 and 24 of the DDA.

When considering what relief to order, Nicholas J considered that the 'discretion conferred on the court under section 46PO(4) is a broad one'.<sup>369</sup> In his view, 'the relief to be granted to the applicant should be limited to that which is reasonably necessary to ensure the unlawful discrimination which the applicant has established took place is not repeated by the respondent'. Accordingly, Nicholas J made an order that for a period of two years, 55% of the respondent's coaches be fitted with a wheelchair lifter.<sup>370</sup> Nicholas J noted that the 'two year limitation period reflects the view that it may not be appropriate to make an order that operates indefinitely thereby putting the respondent at risk of being in contempt of court for any breach of the Standards that it may be guilty of any time into the future'.<sup>371</sup>

In *Eatock v Bolt (No 2)*,<sup>372</sup> Bromberg J ordered that the respondents were restrained from republishing two newspaper articles which the court had held had been published contrary to section 18C of the RDA. However, this order did not prevent the second respondent (Herald and Weekly Times Pty Ltd) from continuing to publish the articles on the Herald Sun website for historical or archival purposes, provided that such publication is accompanied by an immediately adjacent and prominent publication of a corrective notice referring to the declarations made by the court.

## 7.6 Other Remedies

A range of other forms of relief have been considered by the courts.

In *McGlade v Lightfoot*,<sup>373</sup> in addition to seeking a declaration that the conduct of the respondent was unlawful by virtue of section 18C of the RDA, the applicant sought an order that the respondent make a

<sup>364</sup> [2006] FCAFC 151, [3].

<sup>365</sup> [2006] FCAFC 151, [23].

<sup>366</sup> [2006] FCAFC 151, [24].

<sup>367</sup> [2006] FCAFC 151, [25].

<sup>368</sup> (2013) 211 FCR 1.

<sup>369</sup> (2013) 211 FCR 1, [103].

<sup>370</sup> Orders made on 12 April 2013.

<sup>371</sup> (2013) 211 FCR 1, [107].

<sup>372</sup> [2011] FCA 1180.

<sup>373</sup> (2002) 124 FCR 106.

donation to the Aboriginal Advancement Council. It was submitted that section 46PO(4)(b) of what is now the AHRC Act provided the source of the court's power to make such an order. Carr J rejected this submission 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'.<sup>374</sup> His Honour indicated, however, that the court was not limited to the orders specified in section 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'.<sup>375</sup>

In *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*,<sup>376</sup> Baumann FM found that the placement of wash basins on the outside of toilet blocks constituted indirect disability discrimination as some persons with disabilities reasonably required the use of wash basins out of public view as part of their toileting regime.<sup>377</sup> His Honour ordered that the respondent construct and install internal hand basins in those toilet blocks within nine months.<sup>378</sup>

Raphael FM in *Sheehan v Tin Can Bay Country Club*<sup>379</sup> 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*,<sup>380</sup> Raphael FM found that the applicant had been constructively dismissed when the respondent had changed her conditions of employment from full-time to part-time (and in doing so had discriminated against her by reason of her family responsibilities). His Honour ordered the applicant's reinstatement, noting that 'there does not appear to be any other criticism of her work nor are there present any factors which in an industrial law context would militate against an order for reinstatement'.<sup>381</sup> Raphael FM also 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 *Vickers v The Ambulance Service of NSW*,<sup>382</sup> the applicant passed the initial stages of the respondent's application process, including interview. However, he failed to pass the medical assessment stage of the application process due to him suffering from type 1, insulin-dependent diabetes. Raphael FM was satisfied that the medical evidence indicated that the applicant's diabetes did not prevent him from safely carrying out the inherent requirements of the position. In light of that evidence, his Honour ordered that the applicant should proceed immediately to the next stage in the respondent's application process. His Honour stopped short of making an order that if the applicant successfully completed the remaining stages in the application process that he be appointed as a trainee ambulance officer in the next intake. However, his Honour noted:

I would expect the respondent to put the applicant into training at the earliest opportunity after he has passed through all of the selection process. I would hope that the parties could agree on an intake between themselves, but in the event they are unable to do this, I would give liberty to apply for the purpose of making a more definitive injunctive order.<sup>383</sup>

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374 (2002) 124 FCR 106, [81].

375 (2002) 124 FCR 106, [80].

376 [2004] FMCA 915.

377 [2004] FMCA 915, [81].

378 [2004] FMCA 915, [94]. A similar order was made in *Cooper v Holiday Coast Cinema Centres Pty Ltd* [1997] HREOCA 51.

379 [2002] FMCA 95.

380 [2002] FMCA 31.

381 [2002] FMCA 31, [87].

382 [2006] FMCA 1232.

383 [2006] FMCA 1232, [55].

In *Gordon v Commonwealth*,<sup>384</sup> Heerey J decided not to make an order to retrospectively reinstate Mr Gordon in his former position within the ATO at APS 4 level because the particular employment from which Mr Gordon was dismissed no longer existed.<sup>385</sup>

In *Caves v Lewi Chan (No 2)*<sup>386</sup> Lucev FM made a declaration that the respondent had committed an act of unlawful discrimination under the RDA by advising the applicant that he was unable to make an application for membership of the Chinese Literary Association of Christmas Island Inc because he was not of Chinese descent. In addition, Lucev FM made an order that there be public notification in the local newsletter of that conduct and the steps that had been subsequently taken to allow applications, regardless of racial descent.

In *Eatock v Bolt (No.2)*<sup>387</sup> Bromberg J ordered that the publisher of a newspaper publish a corrective notice in its newspaper. The notice was ordered to state that the writing of various newspaper articles by its journalist, and the publication of them by the publisher contravened section 18C of the RDA and further, were not exempt under section 18D of the RDA. The notice was ordered to be in print and online and in a prominent position immediately adjacent to the journalist's regular column. The notice was required on two separate occasions over the course of two weeks. Bromberg J identified four purposes which such an order would serve to facilitate:

- redressing the hurt felt by those injured;
- restoring the esteem and social standing which has been lost as a consequence of the contravention;
- informing those influenced by the contravening conduct of the wrongdoing involved; and
- helping to negate the dissemination of racial prejudice.<sup>388</sup>

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384 [2008] FCA 603.

385 [2008] FCA 603, [93].

386 [2010] FMCA 817 [66]–[73].

387 [2011] FCA 1180.

388 [2011] FCA 1180, [15].

# 8 Costs Awards

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## Contents

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<b>8.1</b>	<b>Introduction .....</b>	<b>432</b>
8.1.1	General discretion applies.....	432
8.1.2	Power to limit and set costs .....	432
(a)	The rationale for the rule .....	434
(b)	Factors to consider when determining whether or not to make an order limiting costs .....	434
8.1.3	Limitation on amount of costs that can be awarded in the Federal Court .....	438
8.1.4	Scale of costs in Federal Circuit Court proceedings.....	439
<b>8.2</b>	<b>Usual Principles of Costs to Apply .....</b>	<b>440</b>
<b>8.3</b>	<b>Factors Considered .....</b>	<b>442</b>
8.3.1	Where there is a public interest element .....	442
(a)	What is a ‘public interest element’ .....	443
(b)	Cases in which the public interest element has been held to be sufficient to depart from the usual costs rule.....	444
(c)	Cases in which the public interest element has been held not to be sufficient to depart from the usual costs rule.....	446
8.3.2	Unrepresented applicants .....	448
8.3.3	The successful party should not lose the benefit of their victory .....	448
8.3.4	Courts should be slow to award costs at an early stage .....	450
8.3.5	Unmeritorious claims and conduct which unnecessarily prolongs proceedings.....	451
8.3.6	Applicant only partially successful .....	453
<b>8.4</b>	<b>Applications for Indemnity Costs .....</b>	<b>456</b>
8.4.1	General principles on indemnity costs .....	456
8.4.2	Offers of compromise .....	459
8.4.3	Calderbank offers in unlawful discrimination cases .....	462
<b>8.5</b>	<b>Application of Section 47 of the <i>Legal Aid Commission Act 1979</i> (NSW) to Human Rights Cases in the Federal Court and the Federal Circuit Court .....</b>	<b>467</b>



# Costs Awards

## 8.1 Introduction

### 8.1.1 General discretion applies

There are no specific provisions relating to costs in unlawful discrimination proceedings before the Federal Circuit Court ('FCC') and Federal Court. The courts have a general discretion to order costs under the provisions of the *Federal Court Act 1976* (Cth) ('the Federal Court Act') and the *Federal Circuit Court of Australia Act 1999* (Cth) ('the Federal Circuit Court Act').<sup>1</sup>

The Federal Court and FCC generally exercise those powers according to the principle that costs follow the event (see further 8.2 below).<sup>2</sup> Under that principle, an unsuccessful party to litigation is ordinarily ordered to pay the costs of the successful party. However, the FCC and Federal Court may depart from this approach in appropriate circumstances. For example, courts have exercised their discretion to deprive a successful party of costs where:

- the successful party has only succeeded in a portion of her or his claim;<sup>3</sup>
- the costs of the litigation have been increased significantly by reason of the need to determine issues upon which the successful party has failed;<sup>4</sup>
- the successful party has unreasonably or unnecessarily commenced, continued or encouraged the litigation or has acted improperly;<sup>5</sup> or
- the character and circumstances of the case make it inappropriate for costs to be ordered against the unsuccessful party.<sup>6</sup>

The manner in which the Federal Court and FCC have applied these and other principles in unlawful discrimination cases is considered below (see 8.3).

### 8.1.2 Power to limit and set costs

The *Federal Court Rules 2011* (Cth) ('Federal Court Rules') provide that the Federal Court has the power pursuant to rule 40.51 (formerly Order 62A), to specify the maximum costs that may be recovered on a party-party basis.<sup>7</sup>

1 See s 43 of the Federal Court Act and s 79 of the Federal Circuit Court Act.

2 *Dye v Commonwealth Securities (No. 2)* [2012] FCA 407; *Devers v Kindilan Society* [2010] FCAFC 72. 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 is now clear that this 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). See also: *Hockey v Fairfax Media Publications Pty Limited (No 2)* (2015) 237 FCR 127, [88]–[92]; *Hancock v Rinehart* [2016] NSWSC 11, [7]–[8]. In those circumstances, it may be reasonable for the successful party to bear the expense of litigating that portion upon which they have failed. See further 8.3.5 below.

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). See also *Cummings v Lewis* (1993) 41 FCR 559, 602-604; *Innes v Rail Corporation of NSW (No 2)* [2013] FMCA 36, [165]–[167]. See also *Hancock v Rinehart* [2016] NSWSC 11, [7]–[8]. 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.

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) 14 NSWLR 252, 271; *Hodgson v Amcor Ltd; Amcor Ltd v Barnes (No 10)* [2012] VSC 294; *Amcor Ltd v Barnes (No 5)* [2013] VSC 51, [30]–[33], [44]–[46], [62].

6 In *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 the majority of the Full Court of the 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. See *Marku v Republic of Albania (No 3)* [2012] FCA 1183; cf *Plaintiff B9/2014 v Minister for Immigration and Border Protection (No. 2)* [2015] FCAFC 27.

7 'Party-party' costs are those reasonable costs incurred in the conduct of litigation.

The FCC has a similar rule. Rule 21.03 of the *Federal Circuit Court Rules 2001* (Cth) ('FCC Rules') enables the FCC to specify the maximum costs that may be recovered on a 'party-party' basis by order at the first court date. Such an order may be made on application by a party or on the court's own motion. The court may subsequently vary the maximum costs specified if there are 'special reasons' and 'it is in the interests of justice to do so'.<sup>8</sup>

Some of the earlier authority on the exercise of the court's discretion to make a 'costs capping order' pursuant to Order 62A of the Federal Court Rules held that it must be 'reciprocal', that is it must apply in favour of both parties and cannot be made solely for the benefit of one party to the proceedings.<sup>9</sup> Courts have also made reciprocal (or 'bidirectional' and 'multidirectional') cost capping orders pursuant to rule 40.51 of the Federal Court Rules.<sup>10</sup> However, the terms of rule 40.51 of the Federal Court Rules do not mandate this.<sup>11</sup>

The order will not, however, necessarily apply to all of the costs in the proceedings.<sup>12</sup> Federal Court Rule 40.51(2) provides that any amount specified in such an order will not include costs that a party has been ordered to pay because they have:

- (a) failed to comply with an order or with these Rules; or
- (b) sought leave to amend pleadings or particulars; or
- (c) sought an extension of time for complying with an order or with any of these Rules; or
- (d) not conducted the proceeding in a manner to facilitate a just resolution as quickly, inexpensively and efficiently as possible, and another party has been caused to incur costs as a result.

Rule 21.03(2) of the FCC Rules is similar and provides:

- (2) ...an amount specified must not include an amount that a party is ordered to pay because the party:
  - (a) has failed to comply with, or has sought an extension of time for complying with, an order or with any of these Rules; or
  - (b) has sought leave to amend a document; or
  - (c) has otherwise caused another party to incur costs that were not necessary for the economic and efficient progress of the proceeding or hearing of the proceeding.

<sup>8</sup> r 21.03(3).

<sup>9</sup> *Maunchest Pty Ltd v Bickford* (Unreported, Queensland Supreme Court, Drummond J, 7 July 1993); *Roger Muller v HREOC* [1997] FCA 634; *Hanisch v Strive Pty Limited* (1997) 74 FCR 384, 389-390; *Sacks v Permanent Trustee Australia Ltd* (1993) 45 FCR 509, 513.

<sup>10</sup> *King v Jetstar Airways Pty Ltd* [2012] FCA 413; *Shurat Hadin-Israel Law Center v Lynch (No 2)* [2014] FCA 413, [10].

<sup>11</sup> There has been some judicial commentary that bidirectional or multidirectional costs capping orders may disadvantage public interest litigants. In *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister for Mineral Resources* (2009) 170 LGERA 22, Preston CJ at [30] posited in the context of r 42.4 of the *Uniform Civil Procedure Rules 2005* (NSW) that 'maximum costs orders that take the form of imposing bidirectional or multidirectional capping orders and requiring only modest legal representation, may disadvantage a public interest litigant *inter alia* because they may deprive the public interest litigant of the benefit of experienced and able senior counsel giving rise to an unjust disparity in the quality of legal representation and a successful public interest litigant will be prevented from full recovery of legal costs, causing either the litigant, their lawyers or experts to subsidise access to justice in an unsustainable way'. Also, in *Bare v Small* [2013] VSCA 204, [48], Hansen and Tate JJA questioned but did not decide whether a costs-capping order should invariably be made in reciprocal terms under s 65C(2)(d) of the *Civil Procedure Act 2010* (Vic). The judges asked 'putting aside whether or not the applicant's legal representatives act on a pro bono basis, why should not a successful impecunious party be entitled to recover his or her entire party and party costs? The judges noted that the Civil Procedure Act is not limited in the same way as O 62A of the Federal Court Rules may be, where the principal policy object was to enable the court to limit all parties' costs exposure when the issues raised are less complex and the amounts to be recovered are moderate. See also: Dal Pont, *Law of Costs* (3<sup>rd</sup> ed, 2013), 184-186.

<sup>12</sup> *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864, [58]-[61]; *Shurat Hadin-Israel Law Center v Lynch (No 2)* [2014] FCA 413.

### (a) The rationale for the rule

The policy reason behind the introduction of Order 62A (now rule 40.51) of the Federal Court Rules was concern ‘that within the wider community and the legal profession, how the cost of litigation, particularly for a person of ordinary means, places access to the civil courts beyond their reach and thus effectively denies them justice’.<sup>13</sup> In *Flew v Mirvac Parking Pty Ltd*<sup>14</sup> (*‘Flew’*), Barnes FM said that this concern did not apply with as much force to the then Federal Magistrates Court (*‘FMC’*) because the FMC handled less complex matters and it had provision for costs to be calculated in accordance with a pre-set scale.<sup>15</sup>

In *Hanisch v Strive Pty Ltd*,<sup>16</sup> Drummond J considered the primary purpose of the rule stating that the:

principal object of O 62A is to arm the Court with power to limit the exposure to costs of parties engaged in litigation in the Federal Court which involves less complex issues and is concerned with the recovery of moderate amounts of money, although it may be appropriate for an order to be made under O 62A in other cases, of which *Woodlands v Permanent Trustee Co Ltd* (1995) 58 FCR 139 is an example.

### (b) Factors to consider when determining whether or not to make an order limiting costs

In *King v Virgin Australia Airlines Pty Ltd*,<sup>17</sup> Foster J considered the authorities concerning the exercise of the discretion called for when rule 40.51 is invoked. Foster J referred principally to the judgment of Nicholas J in *Haraksin v Murrays Australia Ltd*<sup>18</sup> and to Bennett J’s judgment in *Corcoran v Virgin Blue Airlines Pty Ltd*<sup>19</sup> (*‘Corcoran’*) considering an application for an order pursuant to former Order 62A limiting the amount of costs that would be payable by applicants to unlawful discrimination proceedings.

In *Corcoran*, Bennett J held that when determining whether to make an Order 62A order the court had to consider whether there was anything about the particular proceedings to persuade it that it was appropriate to depart from the usual order that a successful party is entitled to their costs.<sup>20</sup>

Her Honour considered the following factors to be relevant to determining whether to make an order and what type of order to make:<sup>21</sup>

- (a) the timing of the application;
- (b) the complexity of the factual or legal issues raised in the proceedings;
- (c) the amount of damages that the applicant seeks to recover and the extent of any other remedies sought;
- (d) whether the applicant’s case is arguable and not frivolous and vexatious;
- (e) whether, in the absence of an order the applicant may discontinue or be inhibited from continuing;

<sup>13</sup> This concern was expressed in a letter dated 6 November 1991 from the then Chief Justice of the Federal Court to the then President of the Law Council of Australia, quoted by Beazley J in *Sacks v Permanent Trustee Australia Ltd* (1993) 45 FCR 509, 511.

<sup>14</sup> [2006] FMCA 1818.

<sup>15</sup> [2006] FMCA 1818, [43].

<sup>16</sup> (1997) 74 FCR 384.

<sup>17</sup> [2014] FCA 36.

<sup>18</sup> [2010] FCA 1133 at 521–522 [6]–[9].

<sup>19</sup> [2008] FCA 864, [6]–[7].

<sup>20</sup> [2008] FCA 864, [8], [56].

<sup>21</sup> [2008] FCA 864, [6], [15]–[41].

- (f) whether there is a public interest element to the case;
- (g) whether the respondent could continue with the proceedings if an order was made;
- (h) the financial position of the applicant; and
- (i) the likely costs to be incurred by the parties in the proceedings.

However, the discretion is a broad one and must be exercised judicially, having regard to all relevant circumstances.

In relation to point (e), her Honour rejected the argument made by Virgin Blue that the applicants needed to show they would be forced to abandon the proceedings.<sup>22</sup> Nonetheless, Her Honour expressed the view that 'mere concern as to the effect of an adverse costs order on a party's asset position, or a concern that a party may become bankrupt if unable to meet a costs order are not, by themselves, factors that sufficiently render the applicants' position different from other litigants faced with the usual costs order'.<sup>23</sup>

In relation to point (f), Her Honour expressed a similar view to that taken in other cases, namely, that whilst the existence of a public interest in proceedings is a factor of some importance when determining costs issues, it will not, even when accompanied by an arguable case, necessarily be sufficient to warrant a departure from the usual costs order.<sup>24</sup>

Her Honour held that the combination of the following factors warranted making an order fixing costs in this case:<sup>25</sup>

- the application for the order limiting costs was made reasonably early in the litigation;
- the applicants did not claim any personal financial reward;
- the applicants' case was arguable and not frivolous;
- there was a public interest in the subject matter of the proceedings – the questions raised in the case had not previously been considered and raised novel issues the determination of which will impact on the ability of disabled persons to fly with Virgin;
- if an order was not made the applicants may discontinue the litigation or at least be inhibited from continuing; and
- there was no suggestion that Virgin could not afford financially to continue with the proceedings if the proposed order was made.

In reaching the decision as to the amount at which to limit costs, Her Honour took into account the likely costs of the proceedings and the financial position of the parties. Taking these matters into account her Honour decided to make a different order in respect of the two applicants. In the case of Mr Ferguson, who was unemployed and in receipt of a disability support pension, Her Honour limited the costs payable by either party in those proceedings to \$15,000, an amount representing the legal aid indemnity. In the case of Mr Corcoran, whose income and asset position was considered to be 'reasonably substantial', her Honour did not consider it appropriate to limit costs to \$15,000 and fixed the costs payable by either party to \$40,000.<sup>26</sup>

Further, in accordance with Order 62A r 2, her Honour expressly provided in the orders that the maximum amount of costs excluded:

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22 [2008] FCA 864, [39]-[41].

23 [2008] FCA 864, [41].

24 [2008] FCA 864, [45].

25 [2008] FCA 864, [54]-[56].

26 The orders were made on 1 July 2008.

- all costs incurred prior to the dates on which the Notices of Motion seeking the Order 62A orders were filed;
- all costs associated with amendments to the Applicants' Points of Claim; and
- consequential amendments to the defence or the provision of particulars that make clear the Applicants' claims.

The approach taken by Bennett J is substantially the same as that taken by the FCC to the application of rule 21.03 of the FCC Rules<sup>27</sup> and to the Federal Court in other types of proceedings.<sup>28</sup>

In *Haraksin v Murrays Australia Ltd*,<sup>29</sup> the applicant was alleging direct and indirect discrimination in contravention of the *Disability Standards for Accessible Public Transport 2002* (Cth) ('the Transport Standards') in relation to the failure to provide wheelchair accessible coaches. The application was made promptly. Justice Nicholas found there was a public interest element in the case in seeking to enforce the relevant Transport Standards, the applicant was not seeking compensation and would likely not proceed with the litigation if no order was made. His Honour concluded:

I am satisfied that there is a public interest element to this case. And I am also satisfied that the case is brought by the applicant in good faith for the purpose of obtaining orders enforcing a legislative instrument which is expressly intended "as far as possible" to eliminate discrimination against people with disabilities in the field of public transport. The evidence shows that there are other people suffering from similar disabilities who are inconvenienced by the lack of wheelchair accessible coaches on Sydney/Canberra coach services.<sup>30</sup>

The material before Nicholas J established that the applicant had substantial assets and so an order was made limiting the recovery of costs to \$25,000 representing \$15,000 available under a grant of legal aid with a further amount of \$10,000 as the applicant's contribution to the payment of the respondent's party-party costs if required.

In *King v Jetstar Airways Pty Ltd*, Perram J considered the operation of rule 40.51 in appellate proceedings. Justice Perram stated:

[t]here is no reason to apprehend that different principles obtain in such proceedings, but the fact that a full trial has already taken place and its outcome is known are matters that are also relevant.<sup>31</sup>

The extent of the relevance will fluctuate from case to case. His Honour capped costs at \$10,000 on the basis of the applicant's weak financial position, that the litigation raised a matter of public interest and that the applicant stood to make no personal gain from the proceedings. The amount of \$10,000 bore a relativity to the costs-capping order made at first instance of \$20,000. Justice Perram stated that 'the point of this costs-capping order is to avoid the stifling of what is potentially an important appeal',<sup>32</sup> earlier noting that 'the grant of legal aid lends strength to the argument that the public interest aspects of the claim warrant some protection so that her appeal may be pursued'.<sup>33</sup>

27 *Flew v Mirvac Parking Pty Ltd* [2006] FMCA 1818; *Vickers v The Ambulance Service of NSW* [2006] FMCA 1232; *Briggs-Smith v Moree Plains Shire Council* [2012] FMCA 304; *Perkiss v Technical and Further Education Commission (NSW) (TAFE Illawarra)* [2016] FCCA 957; *Hudson v Australian Broadcasting Corporation* [2016] FCCA 917.

28 *Sacks v Permanent Trustee Australia Ltd* (1993) 45 FCR 509; *Dibb v Avco Financial Services Ltd* [2000] FCA 1785; *Woodlands v Permanent Trustee Co Ltd* (1995) 58 FCR 138; *Young v Wylie (No 2)* [2010] FCA 616. Also see Joanna Shulam, 'Order 62A of the Federal Court Rules – An untapped resource for unlawful discrimination cases' (2007) 32 *Alternative Law Journal* 75.

29 [2010] FCA 1133.

30 [2010] FCA 1133, [26].

31 [2012] FCA 413, [7]–[8].

32 [2012] FCA 413, [21].

33 [2012] FCA 413, [20].

In *King v Virgin Australia Airlines Pty Ltd*,<sup>34</sup> Foster J refused the applicant's application for a costs-capping order. An important factor peculiar to the case was the circumstance that the applicant had already had the benefit of two costs-capping orders in her (unsuccessful) litigation against Jetstar.<sup>35</sup> After close examination, Foster J determined that despite some of the provisions of the *Disability Discrimination Act 1992* (Cth) ('DDA') having been amended since the applicant's litigation against Jetstar, the considerations thrown up by the Jetstar litigation were essentially the same as those raised in the litigation against Virgin.<sup>36</sup> Accordingly, despite there being some public interest in the litigation and the fact that the applicant would probably go bankrupt if she was subject to a full-blown party-party costs order,<sup>37</sup> Foster J decided to refuse the application for a costs-capping order.<sup>38</sup> Justice Foster also noted that he was of the opinion that the applicant's case had been formulated too widely and incorporated contentions which were barely arguable. His Honour stated:

Her stubborn reluctance to narrow her case to its core elements is a factor operating against a costs-capping order. I think that it does so notwithstanding the terms of r 40.51(2)(d) FCR.<sup>39</sup>

In *Shurat Hadin-Israel Law Center v Lynch (No 2)*,<sup>40</sup> Robertson J stated that he took into account, but placed little weight on, any public interest element or complexity in the case because a maximum costs order should, in the circumstances of this case, focus on the position of the parties themselves. His Honour considered that the 'public interest provides an elusive principle to apply in matters of costs'.<sup>41</sup> He regarded a maximum costs order as in the interests of the parties so as to properly limit each of the parties' exposure to an unnecessarily larger costs order. In his opinion, a maximum costs order would have a tendency to limit the costs in a manner commensurate with the proper scope of the proceedings.<sup>42</sup> There was no persuasive evidence that a maximum costs order would force either side not to pursue the proceedings.<sup>43</sup>

An additional factor that is relevant to applications made in the FCC that is not relevant to applications for such orders made in Federal Court proceedings is the fact that the FCC, unlike the Federal Court, was established to handle less complex matters and makes provision for costs to be calculated in accordance with a pre-set scale. As such, in *Flew*, Barnes FM held that the concern about the costs of litigation were not as significant as they were in the case of Federal Court matters and this was a factor to be taken into account when determining applications pursuant to rule 21.03.<sup>44</sup>

In making an order for costs in a proceeding once it has been determined, the FCC may also set costs rather than, for example, referring the costs for taxation.<sup>45</sup> For example, in *Escobar v Rainbow Printing Pty Ltd (No 3)*,<sup>46</sup> Driver FM decided the application for costs by the successful applicant as follows:

34 [2014] FCA 36.

35 [2014] FCA 36, [17].

36 [2014] FCA 36, [65].

37 Justice Foster noted at [52], that this was more a case where the applicant was not prepared to risk her assets in pursuing litigation rather than one where she is simply not in a position to do so.

38 [2014] FCA 36, [95], [96].

39 [2014] FCA 36, [69].

40 [2014] FCA 413.

41 [2014] FCA 413, [14].

42 [2014] FCA 413, [15].

43 [2014] FCA 413, [16].

44 *Flew v Mirvac Parking Pty Ltd* [2006] FMCA 1818, [41]-[44]. See also: *Hudson v Australian Broadcasting Corporation* [2016] FCCA 917, [16]-[18], where the view was expressed that Rule 21.03 of the FCC Rules only applies to the specifying of costs that may be recovered on a party-party basis rather than those calculated in accordance with Pts 1 and 2 of Sch 1 to the FCC Rules.

45 See FCC Rules, r 21.02(2)(a) & (b): the court may refer costs for taxation under Part 40 of the *Federal Court Rules* (Cth).

46 [2002] FMCA 160. See also *Barghouthi v Transfield Services* [2001] FMCA 113; *Chung v University of Sydney* [2001] FMCA 94; *Miller v Wertheim* [2001] FMCA 103.



Generally in human rights proceedings before this Court a simple costs order would lead to the application of the fixed event based costs scale in schedule 1 to the Federal Magistrates Court Rules 2001 (Cth) ('the Federal Magistrates Court Rules'). The application of that scale in these proceedings would lead to an outcome of costs and disbursements in the order of \$18,000, including today's costs hearing.

It seems to me that in the context of these proceedings that would be an excessive amount to award in favour of the applicant and I have decided instead to fix the amount of costs payable pursuant to rule 21.02(2)(a) of the Federal Magistrates Court Rules. I have decided that I should make an award of costs and disbursements pursuant to that rule in the sum of \$12,000, which is approximately two-thirds of the amount which the applicant would have received by a strict application of the costs schedule.

I am satisfied that that is a reasonable outcome in terms of the costs that were likely to have been incurred on behalf of the applicant and in terms of the nature and conduct of the proceedings which, while involving a significant body of evidence, dealt with what was ultimately a relatively straight forward issue.<sup>47</sup>

### 8.1.3 Limitation on amount of costs that can be awarded in the Federal Court

Under Federal Court Rule 40.08 (formerly Order 62 rule 36A), a party may apply to the Federal Court for an order that an award of costs be reduced by an amount specified by the court if either:

- the applicant is awarded judgment for less than \$100,000 on a claim for a money sum or damages (rule 40.08(a)); or
- the proceeding could more suitably have been brought in another court or tribunal (rule 40.08(b)).

This rule is particularly relevant in discrimination cases where damages awards are often less than \$100,000.<sup>48</sup> It is also open to a Federal Court judge to find that a discrimination case could more suitably have proceeded in the FCC.

Former Order 62 rule 36A reduced a costs award by one third automatically if one of the circumstances set out above applied unless the court or judge 'ordered otherwise'. This prompted Tamberlin J in *LED Builders Pty Ltd v Hope*<sup>49</sup> to state that rule 36A should be 'applied with discretion and caution' as it could otherwise 'lead to harsh results in situations where there is no other more appropriate court'.<sup>50</sup>

The cases decided under former Order 62 rule 36A were therefore concerned with the circumstances in which the order would not apply. These cases are still of some value when considering when a court will grant a party's application under rule 40.08.

Matters that courts have taken into account when deciding not to order costs to be reduced under both rules include:

- the complexity and importance of the issues raised by the matter;<sup>51</sup>
- where the case involved a subject matter suitable for Federal Court consideration;<sup>52</sup>
- where there is little case authority on a point in issue;<sup>53</sup>

<sup>47</sup> [2002] FMCA 160, [7]-[9].

<sup>48</sup> See Chapter 7: Damages and Remedies.

<sup>49</sup> (1994) 53 FCR 10.

<sup>50</sup> (1994) 53 FCR 10, 12. See also *Axe Australasia Pty Ltd v Australume Pty Ltd (No 2)* [2006] FCA 844, [6]; *Nokia Corporation v Liu* [2009] FCA 20. Note that in *Universal Music Australia Pty Ltd v Miyamoto* [2004] FCA 982, Wilcox J considered at [43] that where less than \$100,000 is recovered, prima facie, the sub-rule should be applied.

<sup>51</sup> *Australasian Performing Right Association Ltd v Metro on George Pty Ltd* [2004] FCA 1371, [8]-[12]; *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA* [2003] FCA 747; *Tu v Pakway Australia Pty Ltd* (2006) 227 ALR 287, 293 [32].

<sup>52</sup> *Futuretronics.com.au Pty Ltd v Graphix Labels Pty Ltd [No 3]* [2008] FCA 896.

<sup>53</sup> *Kassem and Secatore v Commissioner of Taxation (No 2)* [2012] FCA 293, [21].



- whether relief, other than damages, such as injunctive relief was sought and granted;<sup>54</sup> and
- whether the proceedings could have been brought in any other court.<sup>55</sup>

### 8.1.4 Scale of costs in FCC proceedings

Rule 21.10 of the FCC Rules provides that, unless the court orders otherwise, where a costs order is made the amount of costs are to be determined in accordance with the scale of costs set out in Parts 1 and 2 of Schedule 1 to the FCC Rules. However, if costs are taxed then the relevant scale of costs is that set out in Schedule 3 (formerly Schedule 2) to the Federal Court Rules.<sup>56</sup>

In *Hinchliffe v University of Sydney (No 2)*,<sup>57</sup> Driver FM said the following about the application of the scale of costs to unlawful discrimination proceedings:

Ordinarily, in human rights proceedings, costs are assessed in accordance with the event based scale appearing in schedule 1 to the Federal Magistrates Court Rules. That scale was adopted by the Court in order to provide simplicity and certainty in determining issues of costs. In some cases, as is likely to be the case here, a successful party will incur significantly more in costs than is recoverable pursuant to the Court scale. It does not follow that that is an unjust result, where it occurs. The Court scale is publicly known and parties to litigation should be aware that the scale is likely to determine their maximum recoverable costs should they succeed. If parties wish to incur significantly more costs in litigation in this Court than they could ever recover, that is a matter for them.

In any event, it should not be assumed that because substantial legal costs have been incurred by a party, their money has been well and wisely spent. The scale of costs ordinarily applicable in human rights proceedings reflects the Court's assessment of what costs can be accepted as reasonable in ordinary proceedings. If proceedings are exceptionally long or complex there is the opportunity to ask for the proceedings to be transferred to the Federal Court, where a more appropriate scale of costs for long and complex proceedings would be available. That was not done in this case.

An additional factor is that there is commonly a disparity between an applicant and a respondent in human rights proceedings in their relative capacity to fund the legal proceedings. This applicant was legally aided but commonly applicants must depend upon their own limited financial resources. Commonly, a respondent will have access to significantly more funds than an applicant. This Court's event based costs scale establishes a level playing field. I see no reason to depart from it in these proceedings.<sup>58</sup>

In *Ingui v Ostara (No 2)*,<sup>59</sup> Brown FM reduced 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.

Similarly, in *Antic v Dimeo Holdings Pty Ltd*,<sup>60</sup> the matter was listed for a five day hearing. The applicant accepted an offer of compromise several months before the hearing date, in which the

54 *LED Builders Pty Ltd v Hope* (1994) 53 FCR 10, 12; *Australasian Performing Right Association Ltd v Metro on George Pty Ltd* (2004) FCA 1371, [8]-[12] (Bennett J); *Tu v Pakway Australia Pty Ltd* (2006) 227 ALR 287, [32] (Kenny J); *Nokia Corporation v Liu* [2009] FCA 20, [58]. Note the relevant rule has no application where the only substantive relief that is granted is declaratory and injunctive relief and any claim for monetary relief is not pursued: *Eat Media Pty Ltd v Mulready Media Pty Ltd* [2009] FCA 1058, [30] (Flick J).

55 *LED Builders Pty Ltd v Hope* (1994) 53 FCR 10, 12. Cf *Universal Music Australia Pty Ltd v Miyamoto* [2004] FCA 982.

56 FCC Rules, r 21.11(2)(b). Please note that the FCC Rules do not as yet appear to have been amended to refer to Sch 3 instead of the former Sch 2.

57 [2004] FMCA 640.

58 [2004] FMCA 640, [10]-[12]. See also: *Pierson's Pro-Health Pty Ltd v Silvex Nominees Pty Ltd (No 3)* [2010] FMCA 250.

59 [2003] FMCA 531.

60 [2009] FMCA 740.

respondent offered to pay the applicant's costs 'as agreed or assessed in accordance with Part 1 of Schedule 1 of the Federal Magistrates Court Rules 2001'. The parties were unable to reach agreement on the issue of costs. In Barnes FM's view, *Joyce v St George Bank Ltd*<sup>61</sup> supported the view that there is no 'automatic' entitlement to preparation costs calculated by reference to the number of days for which the hearing is listed.<sup>62</sup> Federal Magistrate Barnes decided to assess costs on the basis of preparation for a three day hearing, in light of the stage at which the matter had settled.

In *Burns v Media Options Group Pty Ltd (No 2)*,<sup>63</sup> Judge Nicholls concluded that the following factors argued against a costs order set or fixed in the amounts set in Schedule 1 (with reference to rule 21.10 of the FCC Rules):

- the undue protraction of the proceedings (in terms of hearing days in particular);
- that the respondent conducted their response in a fashion inimical to the informal method of operation in the FCC and made no application for transfer of the proceedings to the Federal Court; and
- that bearing in mind the amount of the applicant's award of damages (as opposed to the costs actually incurred), then this is a case where that difference would mean the award would, in effect, be extinguished.<sup>64</sup>

## 8.2 Usual Principles of Costs to Apply

In the first year following the transfer of the federal unlawful discrimination jurisdiction to the then FMC and Federal Court, there was an acceptance by some Federal Magistrates, as they were then known, that the nature of the jurisdiction may warrant a departure from the traditional 'costs follow the event' rule.<sup>65</sup> It would seem now, however, that the weight of authority in the Federal Court and FCC is to the effect that the usual principles relating to costs are to be applied.<sup>66</sup>

In *Minns v New South Wales (No 2)*,<sup>67</sup> Raphael FM reconsidered his decision in the earlier case of *Tadawan v South Australia*<sup>68</sup> and concluded:

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.<sup>69</sup>

61 [2005] FMCA 868.

62 [2009] FMCA 740, [30].

63 [2013] FCCA 2016.

64 *Burns v Media Options Group Pty Ltd (No 2)* [2013] FCCA 2016, [96] - [97].

65 *Tadawan v South Australia* [2001] FMCA 25, [62], [63]; *McKenzie v Department of Urban Services* (2001) 163 FLR 133, 156 [95]; *Ryan v The Presbytery of Wide Bay Sunshine Coast* [2001] FMCA 12, [20]; *Xiros v Fortis Life Assurance Ltd* (2001) 162 FLR 433, 440-441 [20]; *Paramsivam v Wheeler* [2000] FCA 1559, [9]-[10]; *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2001) 105 FCR 56, 61 [31].

66 Subject to any statutory provision that provides otherwise. For example, where claims under federal discrimination laws are made that 'relate to' matters arising under the *Fair Work Act 2009* (Cth) ('FWA'), the costs limitation set out in s 570 of the FWA will apply to the federal discrimination law claims too. Under s 570 of the FWA, the court may order a party to such proceedings to pay the costs of another party only if the court is satisfied (relevantly) that the party instituted the proceedings vexatiously or without reasonable cause, or that the party's unreasonable act or omission caused the other party to incur costs.

67 [2002] FMCA 197.

68 [2001] FMCA 25, [62], [63].

69 [2002] FMCA 197, [13].

In reaching this view, his Honour made reference to decisions in other unlawful discrimination matters and other cases that raised ‘public interest’ issues.<sup>70</sup>

In a range of other cases, the Federal Court and FCC have confirmed that the general rule that ‘costs follow the event’ will apply in unlawful discrimination matters.<sup>71</sup>

For example, in *Fetherston v Peninsula Health (No 2)*,<sup>72</sup> Heerey J explicitly rejected the argument that normal costs principles should not apply to cases brought under what is now the *Australian Human Rights Commission Act 1986* (Cth) (‘AHRC Act’) and affirmed the general rule that ‘a wholly successful defendant should receive his or her costs unless good reason is shown to the contrary’.<sup>73</sup> His Honour stated:

While the Disability Discrimination Act is without doubt beneficial legislation, its characterisation as such does not mean that this Court is to apply any different approach as to costs. In conferring jurisdiction under a particular statute Parliament may conclude that policy considerations warrant a special provision as to costs, for example that there be no order as to costs or that costs only be awarded in certain circumstances, such as, for example, where a proceeding has been instituted vexatiously or without reasonable cause: *Workplace Relations Act 1996* (Cth) s 347. The absence of any such provision applicable to the present case confirms that the usual principles as to costs are to apply.<sup>74</sup>

Similarly, in *Hollingdale v North Coast Area Health Service (No. 2)*, Driver FM commented that:

[G]enerally in human rights proceedings an applicant is pursuing a personal action for damages and that frequently there will be an insufficient public interest component in the proceedings to merit a departure from the general principle that costs will follow the event. That is the case here. Any case involving allegations of disability discrimination are likely to raise important and potentially sensitive issues. While one may be sympathetic to a disabled litigant seeking to pursue what they see as their rights in litigation, they are making a personal choice to pursue an action in a jurisdiction where they are exposed to a costs order. Respondents are often put to considerable expense in dealing with such actions. A departure from the general principle that costs follow the event should be based upon recognised exceptions, rather than general considerations of sympathy for a disabled party.<sup>75</sup>

70 The unlawful discrimination matters were: *Physical Disability Council of NSW v Sydney City Council* [1999] FCA 815; *Sluggett v Human Rights & Equal Opportunity Commission* [2002] FCA 1060 (but note that both matters were decided prior to the transfer of the hearing of matters in the unlawful discrimination jurisdiction to the FMC and Federal Court from the Commission). The ‘public interest’ matters to which his Honour referred were: *De Silva v Ruddock (in his capacity as Minister for Immigration & Multicultural Affairs)* [1998] FCA 311; *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229; *Oshlack v Richmond River Council* (1998) 193 CLR 72.

71 See, for example, *Tate v Rafin* [2000] FCA 1582, [71]; *Creek v Cairns Post Pty Ltd* [2001] FCA 1150, [1]; *Li v Minister for Immigration & Multicultural Affairs* [2001] FCA 1414, [57]; *Paramasivam v Wheeler* [2001] FCA 231, [24] (Hill, Tamberlin and Carr JJ); *Jacomb v Australian Municipal Administrative Clerical & Services Union* [2004] FCA 1600, [4]; *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd (No 2)* [2003] FMCA 516, [11]; *Ball v Morgan* [2001] FMCA 127, [93]; *Gluyas v Commonwealth (No 2)* [2004] FMCA 359, [5]; *Hollingdale v North Coast Area Health Service (No 2)* [2006] FMCA 585, [10]; *Clack v Command Recruitment Group Pty Ltd and Anor (No 2)* [2010] FMCA 198. See, however, *Ryan v Albutt (No 2)* [2005] FMCA 95 in which Rimmer FM cited *Tadawan v South Australia* [2001] FMCA 25 in support of the view that costs do not follow the event in unlawful discrimination matters: [7]. Her Honour’s decision would appear to be contrary to the weight of recent authority, to which no reference is made in the decision. See also: *Clack v Command Recruitment Group Pty Ltd (No 2)* [2010] FMCA 198; *Burns v Media Options Group Pty Ltd and Ors (No2)* [2013] FCCA 2016; *Ewin v Vergara (No 4)* [2013] FCA 1409, [11]; *Picos v Servcorp Ltd (No 2)* [2015] FCA 494.

72 [2004] FCA 594.

73 [2004] FCA 594, [8]. See: *Noble v Baldwin and anor (No 2)* [2011] FMCA 700, [13]; *David Yohan on behalf of the Class members of Providing Awareness with Education and Sport Incorporated (Pawes) v Basketball Queensland Inc and Anor* [2012] FCA 990, [14].

74 [2004] FCA 594, [9].

75 [2006] FMCA 585, [11].

### 8.3 Factors Considered

Some of the factors that have been identified in federal unlawful discrimination cases as being relevant to the discretion to order costs include:<sup>76</sup>

- where there is a public interest element to the complaint;
- where the applicant is unrepresented and not in a position to assess the risk of litigation;
- that the successful party should not lose the benefit of their victory because of the burden of their own legal costs;
- that litigants should not be discouraged from bringing meritorious claims and courts should be slow to award costs at an early stage;
- that unmeritorious claims and conduct which unnecessarily prolongs proceedings should be discouraged; and
- whether the applicant was only partially successful.

Each of these matters will be considered in turn.

In cases where interlocutory relief is sought, the court's general discretion to order costs is guided by rule 40.04 of the Federal Court Rules, which establishes the 'default position' as follows:

#### **Costs on interlocutory application or hearing**

If no order for costs is made on an interlocutory application or hearing, the costs of the application or hearing:

- (a) if an order is made in favour of any party — follow the event; or
- (b) if no order is made in favour of any party — are taken to be costs in the cause of the successful party to the proceeding.

Accordingly, a party who is successful on an interlocutory application or hearing can recover their costs of the interlocutory application or hearing even if they are not successful in the proceeding. Further, where no party succeeds on the interlocutory application or hearing, the costs of it will be recoverable by the party who is successful in the proceeding.<sup>77</sup> Pursuant to rule 1.35 of the Federal Court Rules, it remains open to the court to make an order which is inconsistent with the Rules.<sup>78</sup>

It is also noted that self-represented applicants are not entitled to any legal costs.<sup>79</sup>

#### 8.3.1 Where there is a public interest element

Ordinarily, courts are reluctant to subject public interest litigants to costs regimes any different to other litigants and have emphasised that litigants espousing the public interest are not thereby granted immunity from costs.<sup>80</sup> However, in rare and exceptional cases, a factor that may warrant a departure from the usual rule that costs will follow the event is where there is a significant public interest element.<sup>81</sup>

<sup>76</sup> *Wiggins v Department of Defence - Navy (No 3)* [2006] FMCA 970, [35].

<sup>77</sup> *James v Commonwealth Bank of Australia (No 2)* [2015] FCA 599, [20] (Katzmann J). See also; *Thompson v IGT (Australia) Pty Ltd* [2008] FCA 994, [63].

<sup>78</sup> *Binetter v Deputy Commissioner of Taxation (No 4)* [2012] FCA 776, [5] (Robertson J); *Vantage Holdings Pty Ltd v Huang (No 2)* (2015) 232 FCR 556, [12] (Collier J).

<sup>79</sup> See, for example, *Wattle v Kirkland* [2001] FMCA 66; *Matthews v Hargreaves (No 4)* [2013] FMCA 4, [208].

<sup>80</sup> *Oshlack v Richmond River Council* (1998) 193 CLR 72, 123 (Kirby J); *Hudson v Entsch* [2005] FCA 557, [6] (Dowsett J); *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts (No 2)* [2011] FCAFC 84 at [13] (Emmett, McKerracher and Foster JJ); *Walker v State of Victoria* [2012] FCAFC 38, [161] (per Flick J). See also: Dal Pont, *Law of Costs* (3rd ed, 2013), 257.

<sup>81</sup> *Xiros v Fortis Life Assurance Ltd* (2001) 162 FLR 433, 44 [24], [25]; *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*

## (a) What is a 'public interest element'

The term 'public interest' is not judicially defined. In determining whether a matter has a public interest element, a court may consider all the circumstances of the case to determine whether there is sufficient 'public interest' to influence the exercise of the court's discretion as to costs.<sup>82</sup> In *Ruddock v Vadarlis (No 2)*,<sup>83</sup> Black CJ and French J cautioned against advancing an argument against cost orders solely on the basis that the proceedings are 'public interest litigation' or are proceedings brought in the 'public interest'.<sup>84</sup> In this regard, their Honours referred to the cautionary comments of Gaudron and Gummow JJ in *Oshlack v Richmond River Council*,<sup>85</sup> that the term 'public interest litigation' is a 'nebulous concept unless given...further content of a legally normative nature'.<sup>86</sup> Their Honours went on to say:

To say of a proceeding that it is brought 'in the public interest' does not of itself expose the basis upon which the discretion to award or not award costs should be exercised.<sup>87</sup>

The 'public interest' can be distinguished from what the public may find interesting.<sup>88</sup> Further, there may be some cases that raise competing public interests. Courts generally consider it inappropriate to resolve which of the two 'public interests' should prevail in order to determine the appropriate exercise of the costs discretion.<sup>89</sup>

In *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*,<sup>90</sup> the Federal Court held that a human rights and/or discrimination case will not automatically be regarded as a proceeding in the public interest.

In *Vijayakumar v Qantas Airways Ltd (No 2)*,<sup>91</sup> Scarlett FM held that an application which challenged the principle established in *Brannigan v Commonwealth of Australia*,<sup>92</sup> that discrimination laws do not apply extra-territorially, did not have a significant public interest element.

When dismissing the state's submission that an appeal under the DDA had 'no public interest elements' in a security for costs application in *Kiefel v State of Victoria*,<sup>93</sup> Mortimer J of the Federal Court observed that:

Although this proceeding is brought to vindicate what are said to be the individual entitlements of James under the DDA to have been educated in Victorian public schools in a way which, it is contended, reasonably and properly accommodated and took account of his disabilities, in my opinion there is some substance

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*Loper* [2002] FMCA 310. In *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd (No 2)* [2003] FMCA 516, 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: [4]; *AB v New South Wales (No 2)* [2005] FMCA 1624.

82 *Ruddock v Vadarlis* (2001) 115 FCR 229, [18], [23]; cited with approval in *Jacomb v Australian Municipal Administrative Clerical & Services Union* [2004] FCA 1600, [8].

83 (2001) 115 FCR 229.

84 See also, *Walker v State of Victoria* [2012] FCAFC 38, [161] (per Flick J).

85 (1998) 193 CLR 72.

86 (1998) 193 CLR 72, 84, cited in *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd and Minister for Mineral Resources (No 3)* [2010] NSWLEC 59, [21] and *Botany Bay City Council v Minister for Local Government (No 2)* [2016] NSWCA 127.

87 (2001) 115 FCR 229, 238 [18].

88 *Wide Bay Conservation Council Inc v Burnett Water Pty Ltd (No 9)* (2011) 194 FCR 250, [9] (Logan J).

89 See, for example, *Shellharbour City Council v Minister for Planning (No 2)* [2012] NSWLEC 96, [22] (Craig J); See also Dal Pont, *Law of Costs* (3rd ed, 2013), 262.

90 [2007] FCA 974, [27].

91 [2009] FMCA 966 [47].

92 (2001) 110 FCR 566.

93 [2014] FCA 604, [60].

to the appellant's submissions that there are issues of public interest involved. That is in part because the respondent is the State, and the entity charged with delivering public education in Victoria: there is a public interest in the manner in which it does that, consistently with its obligations under the DDA. There is also a public interest in the way in which the legislative scheme established by the DDA, including the operation and application of the Disability Standards, should be construed and applied as between an individual school and the State, and in the day-to-day education of a child with disabilities ...<sup>94</sup>

**(b) Cases in which the public interest element has been held to be sufficient to depart from the usual costs rule**

While the public interest nature of litigation may be a relevant consideration on the question of costs, there must typically be some additional or special circumstance before the court departs from the usual order as to costs.<sup>95</sup> As the cases discussed below indicate, the following matters have been taken into account when deciding whether cases that have a public interest element warrant the usual costs order not being made against an unsuccessful applicant:

- that the outcome of the case will have implications for persons beyond the applicant, for example, because the decision will be of precedent value or because it concerns the operation of a policy or issues that affect persons other than the applicant;
- that the applicant's case was arguable; and
- that a legal practitioner has appeared pro bono for the applicant.

It is important to note, however, that the cases discussed under paragraph (c) below demonstrate that the presence of one or more of the above matters may not necessarily be sufficient to warrant a departure from the usual rule as to costs. Accordingly, the cases should only be used as a guide as to the types of matters that will and will not warrant a costs order.

In *Xiros v Fortis Life Assurance Ltd* ('Xiros'),<sup>96</sup> Driver FM dismissed the application but declined to award costs to the respondent on the basis of a 'significant public interest element'. His Honour stated:

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 s 46(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.<sup>97</sup>

94 [2014] FCA 604, [61]. See also *Ellis v Silver Vision Pty Ltd (t/a Arirang Korean BBQ Restaurant & Café)* [2016] FCCA 907, [22], [25], [29].

95 *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts (No 2)* [2011] FCAFC 84, [13] (Emmett, McKerracher and Foster JJ).

96 (2001) 162 FLR 433.

97 (2001) 162 FLR 433, 441 [24]–[25]. See similar views expressed in *Dranichnikov v Minister for Immigration & 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.



Wilcox J commented as follows in *Ferneley v The Boxing Authority of New South Wales*:<sup>98</sup>

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.<sup>99</sup>

In *Jacomb v Australian Municipal Administrative Clerical & Services Union*,<sup>100</sup> Crennan J accepted that there was an element of public interest in the matter, and ordered the unsuccessful applicant to pay 75% of the respondent's costs.<sup>101</sup> Her Honour stated as follows:

There is no set formula for determining whether a case is brought in the public interest. The decision made in the present proceedings may act as a useful guide for other unions, whose rules are affected by the operation of s 7 of the *Sex Discrimination Act* and, to this extent, there is a degree of public interest in having the dispute judicially determined. However, the applicant stood to benefit personally from the decision and, in this regard, I could not be satisfied that the applicant brought the proceeding entirely in the public interest. The public interest was subservient to, although coincided with, his own interests. However, it is important to note in this context, that in the absence of any judicial determination of the question of statutory construction, to which the facts gave rise, the applicant was not acting unreasonably in seeking a determination. While it remains undisturbed, the determination is one which will have the effect of governing the position of persons who find themselves in a similar position to the applicant. In that sense the case can be genuinely described as a test case with some element of public interest. It may be of assistance to the respondent in respect of future rules and may be of assistance to similar bodies in similar circumstances.<sup>102</sup>

In *AB v New South Wales (No 2)*,<sup>103</sup> Driver FM considered the issue of costs for an applicant who was unsuccessful in bringing a claim of indirect racial discrimination in the admission criteria for a NSW selective High School.<sup>104</sup> Driver FM ordered that there be no order for costs, stating:

The applicant was represented *pro bono publico* by Mr Robertson. It is appropriate that the Court should place on record its gratitude to counsel for his willingness to appear on that basis. Counsel only agrees to appear *pro bono publico* where an element of public interest is discerned. As I said in *Xiros v Fortis Life Assurance*, there is always an element of public interest in human right proceedings, given that the legislation is beneficial and seeking to redress the public mischief of discrimination.

However, ordinarily in human rights proceedings a claimant is exercising a private right to claim damages. There will frequently be an insufficient public interest element to outweigh the general principle that costs should follow the event in such proceedings [see *Physical Disability Council of NSW v Sydney City Council*]. I was also taken by Ms Barbaro to a decision of Federal Magistrate Raphael in *Minns v New South Wales (No 2)* where His Honour said, at paragraph 13, that something more than precedent value is required in order to establish an element of public interest sufficient to warrant a departure from the ordinary principle that costs follow the event.

In this case, in my view, a combination of the public interest inherent in a case which is relatively novel and which counsel recognised by appearing *pro bono publico*, the fact that there was no claim for damages but simply the seeking of a right of access to a public school (which raised an issue of public importance) and the fact that but for the issue of evidence the applicant would have succeeded, all lead me to the view that there should be no order as to costs.<sup>105</sup> (footnotes omitted)

98 (2001) 115 FCR 306.

99 (2001) 115 FCR 306, 326 [97].

100 [2004] FCA 1600.

101 [2004] FCA 1600, [12]. See further 8.4.2 below.

102 [2004] FCA 1600, [10].

103 [2005] FMCA 1624.

104 See *AB v New South Wales* (2005) 194 FLR 156.

105 [2005] FMCA 1624, [5]-[7].



Federal Magistrate Driver appears to accept in this passage the view of Raphael FM in *Minns v New South Wales (No 2)* ('*Minns*')<sup>106</sup> that something more than precedent value is necessary to establish a sufficient public interest.

In *Wiggins v Department of Defence – Navy (No 3)*,<sup>107</sup> McInnis FM held that the case had a significant public interest element relevant in determining costs.<sup>108</sup> His Honour identified the issues of public interest as being:

- the treatment of employees in the armed forces suffering from depression;<sup>109</sup>
- the manner in which the armed forces makes provision for the communication to relevant supervising officers of the nature of the condition suffered by an officer leading to the classification of fit for shore activities;<sup>110</sup> and
- ensuring that serving personnel of the armed forces are provided with the opportunity of rehabilitation and advancement of their career.<sup>111</sup>

After citing those factors, his Honour stated:

In my view, those factors are sufficient to constitute a significant degree of public interest above and beyond the benefit which the applicant obtains personally from the decision of the court. In that sense, although the public interest element in this case coincides with the personal interest of the applicant, it is still a public interest element of significance which I regard as relevant to take into account in the exercise of my discretion concerning costs.<sup>112</sup>

In *Aurukun Shire Council v Chief Executive Officer, Office of Liquor, Gaming and Racing in the Department of Treasury*,<sup>113</sup> the majority of the Queensland Court of Appeal departed from the usual order as to costs in the case of an unsuccessful appeal raising issues under section 10 of the *Racial Discrimination Act 1975* (Cth) ('RDA'). Justice McMurdo (with whom Phillipides J agreed) considered that the appeals were 'extraordinary', raising human rights legal issues 'of considerable public interest, and in a new and developing area of jurisprudence in Australia'.<sup>114</sup>

### (c) Cases in which the public interest element has been held not to be sufficient to depart from the usual costs rule

In *Xiros*, Driver FM observed that not every case that raises a significant issue and in which there is an arguable case will avoid the application of the principle that costs follow the event.<sup>115</sup>

Examples of the matters taken into account when deciding not to depart from the usual costs rule in public interest cases are:

- the strength of the applicant's case - in *Physical Disability Council of NSW v Sydney City Council*,<sup>116</sup> the unsuccessful applicant was ordered to pay the respondent's costs because

<sup>106</sup> [2002] FMCA 197.

<sup>107</sup> [2006] FMCA 970.

<sup>108</sup> [2006] FMCA 970, [42]. Applying *Physical Disability Council of NSW v Sydney City Council* [1999] FCA 815, [9]; *Jacomb v Australian Municipal Administrative Clerical & Services Union* [2004] FCA 1600, [10].

<sup>109</sup> [2006] FMCA 970, [39].

<sup>110</sup> [2006] FMCA 970, [40].

<sup>111</sup> [2006] FMCA 970, [41].

<sup>112</sup> [2006] FMCA 970, [42].

<sup>113</sup> [2012] 1 Qd R 1.

<sup>114</sup> [2012] 1 Qd R 1, [99]. Keane JA dissented on the order as to costs at [217] as he considered that the appellants did not have sufficient prospects of success and their immediate interest in the proceedings was to maintain a commercial entitlement.

<sup>115</sup> (2001) 162 FLR 433, [20]-[24].

<sup>116</sup> [1999] FCA 815, [9]; *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* [2007] FCA 974, [28].

even though the case raised important issues the overall prospects of the applicant's case were little better than speculative;

- whether an exclusively personal benefit is sought by the applicant in the proceedings - in *Minns*,<sup>117</sup> Raphael FM held that where proceedings seek an 'exclusively personal benefit' (such as damages), the public interest element of a matter is 'much diminished'.<sup>118</sup> His Honour also appeared to express views at odds with those expressed by Driver FM in *Xiros*, 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';<sup>119</sup>
- that there is no evidence that the applicant was discriminated against because of his disability<sup>120</sup> or the factual foundation upon which a more fundamental human rights case may have depended could not be established;<sup>121</sup> and
- whether legal proceedings are an appropriate medium for the purpose of examining the ambiguities in a policy - in *Hurst and Devlin v Education Queensland (No 2)*,<sup>122</sup> Lander J accepted that 'it would be in the interests of all parties if Education Queensland's Total Communication Policy could be understood by all persons affected in the same way'<sup>123</sup> but expressed the view that 'legal proceedings are not the appropriate medium for the purpose of examining the ambiguities in an education policy'.<sup>124</sup>

In *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*,<sup>125</sup> the Federal Court considered whether to make a costs order against a disability rights organisation that was held not to have standing to commence proceedings alleging a breach of the *Disability Standards for Accessible Public Transport 2002* (created under section 31 of the DDA). On the question of costs, the applicant argued that the proceedings raised issues of public interest, noting that the applicant had:

- sought to raise important issues relevant to the scope and operation of disability standards made under the DDA; and
- brought the proceedings to effect social change, rather than for personal or financial gain.

The court rejected these arguments, for the following reasons:<sup>126</sup>

- the weight of the case law was against the applicant having standing to be able to bring the proceedings;
- the question of standing of an organisation to bring proceedings in relation to a breach of disability standards is not of sufficient public interest to cause the court to depart from its usual orders;

117 [2002] FMCA 197.

118 [2002] FMCA 197, [13]. See also *De Silva v Ruddock (in his capacity as Minister for Immigration & Multicultural Affairs)* [1998] FCA 311; *Physical Disability Council of NSW v Sydney City Council* [1998] 311 FCA; *Sluggett v Human Rights & Equal Opportunity Commission* [2002] 123 FCR 561; *Howe v Qantas Airways Ltd (No 2)* [2004] FMCA 934, [15]; *Walker v State of Victoria* [2012] FCAFC 38, [160] – [163] (Flick J).

119 [2002] FMCA 197, [13]. Note, however, that his Honour did not expressly refer to Driver FM's decision in *Xiros*.

120 *Gluyas v Commonwealth (No 2)* [2004] FMCA 359, [8].

121 *Walker v State of Victoria* [2012] FCAFC 38, [162]–[163] (Flick J). Note that Gray J (at [112], with whom Reeves J at [168] agreed) did not disturb the primary judge's order on costs on the basis that there was no indication that his Honour made any error of a kind relevant according to the principles enunciated in *House v R* (1936) 55 CLR 499 at 504–505 (Dixon, Evatt and McTiernan JJ). Justice Gray noted that as the appellant had decided not to make any submission to the trial judge about costs, it was now extremely difficult, if not impossible, for the appellant to now suggest that his Honour's discretion had miscarried.

122 [2005] FCA 793, [33].

123 [2005] FCA 793, [33].

124 [2005] FCA 793, [33]. Note that the decision of Lander J was overturned on appeal and the consequent costs order set aside: *Hurst v Queensland* (2006) 151 FCR 562, 585 [136].

125 [2007] FCA 974.

126 [2007] FCA 974, [26]–[33].

- given that the applicant lacked standing to commence the proceedings, the court was never able to consider the merits of the case so the substantive issues that the applicant sought to raise were never resolved; and
- the case did not raise fundamental rights of individuals to take action on their own behalf to determine their rights.

### 8.3.2 Unrepresented applicants

Federal Magistrate Driver's discussion of the public interest element in *Xiros*<sup>127</sup> was considered in 8.3.1 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 [the Commission] 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.<sup>128</sup>

In *Hassan v Smith*,<sup>129</sup> 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 applicants'.<sup>130</sup> 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'.<sup>131</sup>

Similarly, in *Gluyas v Commonwealth (No 2)*,<sup>132</sup> Phipps FM was not persuaded that the fact that the unsuccessful applicant was unrepresented justified departing from the ordinary rule that costs follow the event.

In *Steed v Recruito*,<sup>133</sup> Lindsay FM did not think that the unrepresented status of the applicant nor his decision to discontinue at an early stage of the proceedings were, in combination, enough to justify departure from the ordinary rule. Accordingly, costs were awarded to the respondent.

### 8.3.3 The successful party should not lose the benefit of their victory

The relevance of this factor appears to have been closely associated with the suggestion in earlier cases<sup>134</sup> that the principle that costs follow the event should not be too readily applied to federal unlawful

<sup>127</sup> (2001) 162 FLR 433.

<sup>128</sup> (2001) 162 FLR 433, 441 [23].

<sup>129</sup> [2001] FMCA 58.

<sup>130</sup> [2001] FMCA 58, [25]. Note, however, that his Honour cited *Tadawan v South Australia* [2001] FMCA 25 in support of that proposition. See the discussion in 8.2 above.

<sup>131</sup> [2001] FMCA 58, [27].

<sup>132</sup> [2004] FMCA 359.

<sup>133</sup> [2011] FMCA 286.

<sup>134</sup> See *Tadawan v South Australia* [2001] FMCA 25, [62], [63]; *McKenzie v Department of Urban Services* (2001) 163 FLR 133, 156 [95]; *Ryan v The Presbytery of Wide Bay Sunshine Coast* [2001] FMCA 12, [20]; *Xiros v Fortis Life Assurance Ltd* (2001) 162 FLR 433, 440-441 [20]; *Paramasivam v Wheeler* [2000] FCA 1559, [9]-[10]; *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2000) 105 FCR 56, 61 [31].

discrimination matters. 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 ordering costs to be paid to a successful applicant.

In *Shiels v James*,<sup>135</sup> Raphael FM held that the amount of the award of damages to the applicant 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*,<sup>136</sup> 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.<sup>137</sup>

Similarly, in *McKenzie v Department of Urban Services*,<sup>138</sup> 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 have the benefit of his or her award of damages totally eliminated by the cost of the proceedings.<sup>139</sup>

In *Johanson v Blackledge*,<sup>140</sup> Driver FM ordered that costs should follow the event. His Honour agreed with the views expressed by Raphael FM in *Shiels v James*<sup>141</sup> 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.

His Honour made similar comments in *Escobar v Rainbow Printing Pty Ltd (No 3)*,<sup>142</sup> 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 Ltd* [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.<sup>143</sup>

With courts being more inclined to award costs following the event,<sup>144</sup> it may be that this factor becomes less relevant. Alternatively, it may have some residual relevance as a factor in supporting the proposition that the FCC should be reluctant to depart from the principle that costs follow the event in such cases.

135 [2000] FMCA 2. In *Frith v The Exchange Hotel (No 2)* [2005] FMCA 1284, [6] Rimmer FM expressed agreement with the approach taken by Raphael FM in *Shiels*.

136 (2001) 163 FLR 99.

137 (2001) 163 FLR 99, 117 [74].

138 (2001) 163 FLR 133.

139 (2001) 163 FLR 133, 156 [95].

140 (2001) 163 FLR 58.

141 [2000] FMCA 2.

142 [2002] FMCA 160.

143 [2002] FMCA 160, [5].

144 See discussion in 8.2 above.

### 8.3.4 Courts should be slow to award costs at an early stage

In *Low v Australian Tax Office*<sup>145</sup> ('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.<sup>146</sup>

In *Saddi v Active Employment*,<sup>147</sup> 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.

Federal Magistrate Driver has since reconsidered his decision in *Low*, suggesting that it reflected the relative novelty of the legislation at that time (a factor which no longer applies). In *Drury v Andrecos-Hurl Refractory Services Pty Ltd*,<sup>148</sup> his Honour awarded costs to the respondent following summary dismissal of the complaint, stating:

In the matter of *Low v Australian Taxation Office* [2000] FMCA 6, I declined to make a costs order noting that at that time I was dealing with relatively new legislation and that I considered that applicants should have a reasonable opportunity to take advice and assess their position before being subjected to a costs order. Conversely, in *Chung v University of Sydney* I did make a costs order in accordance with the scale of costs applicable generally to proceedings in this Court. Some three years have passed since I made the decisions in *Low* and *Chung*. We are no longer dealing with new legislation.<sup>149</sup>

Relevant to the matter before his Honour, the applicant was 'attempting to relitigate matters he was litigating in the [Australian Industrial Relations Commission]' and had been notified by the respondent of their intention to seek summary dismissal and the possible costs implications.<sup>150</sup>

However, Driver FM reaffirmed that parties should be given 'a reasonable opportunity to take advice as to their circumstances and to get their claim into a proper form' in *Hinchliffe v University of Sydney (No 2)*.<sup>151</sup> In that matter, his Honour cited his decision in *Low* in declining to order indemnity costs against an unsuccessful applicant who had withdrawn aspects of her case throughout the course of proceedings.<sup>152</sup>

In *Ingui v Ostara*,<sup>153</sup> 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

145 [2000] FMCA 6.

146 [2000] FMCA 6, [11]. His Honour made similar obiter comments in *Chau v Oreanda Pty Ltd* [2001] FMCA 114, [26].

147 [2001] FMCA 73.

148 [2004] FMCA 398.

149 [2004] FMCA 398, [13].

150 [2004] FMCA 398, [14].

151 [2004] FMCA 640, [8].

152 See further 8.4 below.

153 [2003] FMCA 132.

the respondents in the proceedings to date.<sup>154</sup> His Honour therefore ordered that each party have the opportunity to make submissions as to the quantum of costs to be allowed.<sup>155</sup>

Subsequently in *Ingui v Ostara (No 2)*,<sup>156</sup> the applicant argued that as a result of intimidation and harassment by the respondents she did not pursue her claim of sexual harassment. Federal Magistrate Brown 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 find no reason to change his view that the applicant should contribute towards the respondents' costs. Federal Magistrate Brown did, however, reduce the amount of costs that would be awarded under the scale of costs.

In *Finch v Heat Group Pty Ltd (No 6)*,<sup>157</sup> the applicant submitted that she should not pay the respondent's costs for its successful application to strike out some of her disability discrimination claim. Relying on *Low*, she submitted that the court should be slow to award costs at an early stage of human rights proceedings. Justice Jessup rejected this submission, finding that:

[i]t was not the applicant's human rights claims which provided the basis for the respondents' success. Indeed, it was, I would have to say, the applicant's own choice to load up what would have been a simple case under the DD Act with a raft of other allegations that was responsible for the respondents being obliged to incur the costs which are the subject of the present application. And secondly, it can, in the circumstances, scarcely be doubted that, by the time she served the Further Amended Statement of Claim, the applicant had had "a reasonable opportunity to get [her] case in order, to take advice and to assess [her] position".<sup>158</sup>

### 8.3.5 Unmeritorious claims and conduct which unnecessarily prolongs proceedings

Courts have declined to order costs to successful parties, or reduced the amount of a costs award, where aspects of their claims have been unsuccessful or where their behaviour has prolonged the trial. On the issue of indemnity costs being awarded against unsuccessful parties, see 8.4 below.

In *Xiros v Fortis Life Assurance Ltd*,<sup>159</sup> 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.<sup>160</sup>

His Honour nevertheless declined to award costs to the respondent for other reasons.<sup>161</sup>

In *Vijayakumar v Qantas Airways Ltd (No 2)*<sup>162</sup> the applicant claimed that the parties should pay their own costs of an adjourned hearing because counsel for the respondent took too long to make submissions. Scarlett FM held:

That, with respect, is an overly optimistic submission. It does occur from time to time that matters take longer to dispose of than the time the Court originally allocates for that purpose. Clearly, if the Court forms a view that one party is unnecessarily prolonging proceedings, that is a matter that may well sound in costs.

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154 [2003] FMCA 132, [36].

155 [2003] FMCA 132, [41].

156 [2003] FMCA 531.

157 [2016] FCA 390.

158 [2016] FCA 390, [9].

159 (2001) 162 FLR 433.

160 (2001) 162 FLR 433, 441 [22].

161 See discussion in 8.3.2 above.

162 [2009] FMCA 966.

This is not such a case. There was a considerable amount of material to be covered and I did not find it necessary to warn counsel that the submissions were unnecessarily lengthy.<sup>163</sup>

In *Horman v Distribution Group Ltd*,<sup>164</sup> 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 despite the fact that the applicant had been successful in the proceedings. His Honour therefore ordered that each party pay their own costs. On appeal, Raphael FM's approach to costs was affirmed by Emmett J.<sup>165</sup>

In *Bruch v Commonwealth*,<sup>166</sup> 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'.<sup>167</sup> 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 eighty per cent of the respondent's costs.

In *Creek v Cairns Post Pty Ltd*,<sup>168</sup> Kiefel J took into account the fact that the proceedings were lengthened by the respondent in raising a defence which was found not to be available to it:

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 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.<sup>169</sup>

In *Tate v Rafin*,<sup>170</sup> Wilcox J found the behaviour of the respondent prior to the commencement of proceedings was relevant in declining to order costs upon the dismissal of the application. His Honour 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].<sup>171</sup>

However, in *Ho v Regulator Australia Pty Ltd (No 2)*,<sup>172</sup> Driver FM rejected an argument by the applicant that the conduct of the respondent during the investigation and attempted conciliation of the matter by the Human Rights and Equal Opportunity Commission ('HREOC'), now the Australian Human Rights Commission ('Commission'), was relevant to the question of costs:

<sup>163</sup> [2009] FMCA 966, [55]-[56].

<sup>164</sup> [2001] FMCA 52.

<sup>165</sup> See *Horman v Distribution Group Ltd* [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].

<sup>166</sup> [2002] FMCA 29.

<sup>167</sup> [2002] FMCA 29, [64].

<sup>168</sup> [2001] FCA 1150.

<sup>169</sup> [2001] FCA 1150, [2].

<sup>170</sup> [2000] FCA 1582.

<sup>171</sup> [2000] FCA 1582, [71]. See also *Ingui v Ostara (No 2)* [2003] FMCA 531; *Flanagan v Murdoch Community Services Inc* [2010] FCA 647.

<sup>172</sup> [2004] FMCA 402.



I do not regard the conduct of the parties to a complaint to HREOC as relevant to a consideration of a costs order in proceedings before the Court consequent upon the termination of a complaint by HREOC. In the first place, the proceedings before HREOC are in the nature of private alternative dispute resolution proceedings. The Court only has jurisdiction to deal with a matter where conciliation fails before HREOC. It is entirely inappropriate for the Court to take into account what may or may not have occurred in the attempts at conciliation before HREOC for the purposes of costs in the court proceedings. No costs apply to conciliation proceedings before HREOC and there should be no costs implication arising subsequently in respect of those conciliation proceedings.<sup>173</sup>

Although the grounds of direct and indirect discrimination have been held to be mutually exclusive,<sup>174</sup> an incident of alleged discrimination may nonetheless be pursued by an applicant as a claim of direct or indirect discrimination, pleaded as alternatives.<sup>175</sup> It has been suggested, however, that doing so may give rise to an adverse costs order as only one element of the claim can succeed. In *Hollingdale v Northern Rivers Area Health Service*,<sup>176</sup> Driver FM commented as follows:

There is, in my view, no obligation upon an applicant to make an election between mutually exclusive direct and indirect disability claims. If both claims are arguably open upon the facts, they may be pleaded in the alternative. The fact that they are mutually exclusive would almost inevitably lead to a disadvantageous costs outcome for an applicant, but that is the applicant's choice.<sup>177</sup>

In *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*,<sup>178</sup> the unsuccessful party in that case had also alleged that the Council had unreasonably prolonged the proceedings. This argument was primarily based on the fact that the Council's application for summary dismissal had also sought to raise constitutional questions, however those questions could not be heard because of the Council's failure to comply with the requirements of section 78B of the *Judiciary Act 1903* (Cth). The court did not accept that this was a sufficient basis to warrant departure from the usual rules as to costs.<sup>179</sup>

### 8.3.6 Applicant only partially successful

In cases in which an applicant has only been partially successful courts have taken varying approaches to the award of costs. In some cases they have ordered the respondent to pay all of the applicant's costs<sup>180</sup> and in other cases they have only awarded the applicant a proportion of their costs.<sup>181</sup>

There is no set rule for determining in what circumstances a partially successful applicant will be awarded part or all of their costs. However, what the cases do suggest is that whilst the court should consider the outcome in the proceedings, it should not attempt to engage in a precise mathematical

173 [2004] FMCA 402, [6].

174 *Australian Medical Council v Wilson* (1996) 68 FCR 46, 55 (Sackville J); *Waters v Public Transport Corporation* (1991) 173 CLR 349, 393 (McHugh J); *Mayer v Australian Nuclear Science & Technology Organisation* [2003] FMCA 209; *Abela v Victoria* [2013] FCA 832, [83]–[84]; *Haraksin v Murrays Australia Ltd (No 2)* [2013] FCA 217, [58]; *Jin v University of Queensland* [2015] FCCA 2982, [32]–[33].

175 See *Minns v New South Wales* [2001] FCA 704; *Hollingdale v Northern Rivers Area Health Service* [2004] FMCA 721; *Tate v Rafin* [2000] FCA 1582, [51], [66]–[69]; *Kiefel v Victoria* [2013] FCA 1398 [51]–[53]; *Matthews v Hargreaves (No 4)* [2013] FMCA 4, [85].

176 [2004] FMCA 721.

177 [2004] FMCA 721, [19].

178 [2007] FCA 974.

179 [2007] FCA 974, [34]–[39].

180 *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91; *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd (No 2)* [2003] FMCA 516; *Howe v Qantas Airways Ltd (No 2)* [2004] FMCA 934; *Kelly v TPG Internet Pty Ltd (No 2)* [2005] FMCA 291; *Clarke v Nationwide News Pty Ltd trading as The Sunday Times (No 2)* [2012] FCA 990.

181 *McBride v Victoria (No 2)* [2003] FMCA 313; *Ho v Regulator Australia Pty Ltd (No 2)* [2004] FMCA 402; *Trapman v Sydney Water Corporation & Ors (No.2)* [2011] FMCA 533; *Noble v Baldwin & Anor (No.2)* [2011] FMCA 700; *Kraus v Menzie (No 2)* [2012] FCA 84; *Burns v Director General of Dept of Education (No. 2)* [2015] FCCA 2293.

determination of the extent to which an applicant was successful.<sup>182</sup> Further, it appears that apportionment is favoured where there are clearly distinct and severable issues or inquiries that were lost by the applicant.<sup>183</sup>

In *Innes v Railcorp of NSW (No 2)*,<sup>184</sup> Raphael FM (as he then was) commented that:

Generally, costs in these matters follow the event. There has grown up, in recent years, a distressing move by unsuccessful parties to what I have previously described as the “filleting” of costs orders.<sup>185</sup>

In *McBride v State of Victoria (No 2)*,<sup>186</sup> the applicant had been successful in only one of seven separate and discrete episodes of discrimination. Federal Magistrate McInnis rejected the respondent’s submission that the applicant should only be entitled to one-seventh of her costs saying:

I do not accept that in characterising what may be the event, one should look narrowly at the issue in human rights claims of there being discrete episodes in the one proceeding.

...Although analysed and presented as discrete events [of discrimination], 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.<sup>187</sup>

In *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*,<sup>188</sup> the Federal Court held that a party should not be regarded as having succeeded in relation to only part of its claim simply because some of its arguments had not been accepted:

While clearly some arguments put before the Court by the respondent in its application for summary dismissal were not accepted, nonetheless it is not unusual for a successful party to advance a number of alternative arguments to the Court and be ultimately successful on only some of them. I agree with the respondent that this result does not mean that the respondent was ‘successful only in part’ in this case.<sup>189</sup>

In *Clarke v Nationwide News Pty Ltd trading as The Sunday Times (No 2)*,<sup>190</sup> Barker J held that the successful applicant should have all of her costs despite the fact that some of the comments alleged to be in contravention of section 18C of the RDA did not succeed and the fact that the case had been narrowed when it came to trial.<sup>191</sup> Barker J considered that:

There are some cases that lend themselves to a discrete analysis of points won and lost or a broader apportionment of costs. And there are other cases, like the present, where the points really are all in the “melting pot” and while the successful party may lose some and win others, the reality is that it was the entirety of the matter that was in dispute. In a case such as this, if a party makes out the discrimination alleged in respect of a number of important matters, it is difficult to unbundle the points won from any of

182 *McBride v Victoria (No 2)* [2003] FMCA 31, [7]-[8]; *Ho v Regulator Australia Pty Ltd (No 2)* [2004] FMCA 402, [17]; *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* [2007] FCA 974, [18]; *Trapman v Sydney Water Corporation & Ors (No.2)* [2011] FMCA 533.

183 *Billiton Iron Ore Pty Ltd v National Competition Council (No 2)* [2007] FCA 557, [27] (Middleton J); *Bowen v Alsanto Nominees Pty Ltd* [2011] WASCA 39 (S), [6] (McLure, Newnes and Murphy JJA); *Burns v Director General of Dept of Education (No.2)* [2015] FCCA 2293, [23].

184 [2013] FMCA 36.

185 [2013] FMCA 36, [165] (Raphael FM), cited with approval by Judge Nicholls in *Burns v Media Options Group Pty Ltd (No 2)* [2013] FCCA 2016, [50].

186 [2003] FMCA 313.

187 [2003] FMCA 313, [7]-[8]. This approach was accepted as correct by Driver FM in *Ho v Regulator Australia Pty Ltd (No 2)* [2004] FMCA 402, [16] and by McInnis FM in *Wiggins v Department of Defence – Navy (No 3)* [2006] FMCA 970, [50]. The approach was also applied by Scarlett FM in *Trapman v Sydney Water Corporation & Ors (No.2)* [2011] FMCA 533.

188 [2007] FCA 974.

189 [2007] FCA 974, [18]. See also [22].

190 [2012] FCA 990.

191 [2012] FCA 990, [11].

those which did not succeed. In the result, I consider the applicant should have its costs for this reason, but not for the amendments made to the pleadings raising points which were not pursued.<sup>192</sup>

In *Noble v Baldwin and Anor (No 2)*,<sup>193</sup> Barnes FM ordered the respondent to pay 50 percent of a partially successful applicant's costs as agreed or failing agreement as taxed.<sup>194</sup> In making this order, Barnes FM noted that the applicant had failed in a significant number of claims (although these claims were not totally groundless), some of the claims were separate and distinct from those she was successful in, the applicant had made inflated offers and the case in relation to the unsuccessful claims could not be said to have raised significant issues as to the interpretation and future administration of the *Sex Discrimination Act 1984* (Cth) ('SDA') and the RDA.<sup>195</sup> The costs of the hearing had increased because of the need for a hearing on these issues.

In *Kraus v Menzie (No 2)*,<sup>196</sup> Mansfield J ordered the successful applicant 20% of her costs to be taxed, if not agreed on the basis that she only succeeded in establishing sexual harassment in five respects and did not succeed on her claim that her decision to bring her employment to an end by reason of ongoing sexual harassment amounted to unlawful discrimination in employment. Mansfield J noted that the hearing would have been considerably shorter had she narrowed her claim to those matters in which she succeeded. His Honour also rejected the applicant's submissions that unless she receives an order for costs her judgement would be rendered nugatory and that to do otherwise would tend to defeat the objects of the SDA. He considered that it was her decision to pursue the (unsuccessful) claim of sexual discrimination in employment and that while the court should have regard to the objects of the SDA, that does not mean that an applicant who made extensive allegations of breaches of the SDA and succeeded only in some of them, should recover costs for the whole of the hearing.<sup>197</sup>

In *Burns v Media Options Group Pty Ltd (No 2)*,<sup>198</sup> Judge Nicholls found that the successful applicant in a SDA and DDA claim should not be deprived of his costs although the respondent submitted he was only partially successful. Judge Nicholls stated that it was important to note that the 'issue in these proceedings', was whether the respondents conducted themselves in a discriminatory fashion towards the applicant. The applicant was successful (wholly) on that 'core' issue.<sup>199</sup> His Honour noted that:

The respondents' attempt to dissect this issue in the proceedings into its minute, and multitudinous, constituent parts, is, in the circumstances of this case, an example of what Raphael FM (as he then was) has described in *Innes* as the "filleting" of costs.<sup>200</sup>

In *Burns v Director General of Dept of Education (No. 2)*,<sup>201</sup> the court ordered that the respondent pay 25 percent of the applicant's costs. This was due to the applicant only being successful in approximately one-third of the totality of issues raised in the litigation.<sup>202</sup> The majority, if not the vast majority, of the evidence of both the applicant and the respondent, and much of the reasons for judgment were focused on issues in relation to which the applicant was unsuccessful, and in relation to which there was not a significant evidentiary overlap with the issues on which the applicant was successful.<sup>203</sup>

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192 [2012] FCA 990, [14].

193 [2011] FMCA 700.

194 [2011] FMCA 700, [2].

195 [2011] FMCA 700, [48], [51], [55].

196 [2012] FCA 84.

197 [2012] FCA 84, [5]-[8].

198 [2013] FCCA 2016.

199 [2013] FCCA 2016, [67].

200 [2013] FCCA 2016, [68].

201 [2015] FCCA 2293.

202 [2015] FCCA 2293, [28].

203 [2015] FCCA 2293, [27].

In cases in which courts have awarded full costs to a partially successful applicant, the court appears to have been influenced by the following factors:

- the general desirability in human rights proceedings that an award of damages not be swallowed up by the costs of litigation;<sup>204</sup>
- that the court accepted the veracity of the applicant's evidence;<sup>205</sup>
- if costs were awarded the applicant would achieve a better outcome than what the respondent had offered, although not as good as the amount the applicant had sought;<sup>206</sup>
- the applicant's claim in respect of which they were unsuccessful was reasonably arguable;<sup>207</sup>
- that an applicant has incurred significant costs in dealing with a very detailed and complex response made by the respondent and is 'largely successful on the law';<sup>208</sup>
- where it is difficult to 'unbundle' the points won from any of those which did not succeed;<sup>209</sup> and
- where the unsuccessful claim was a minor part of an applicant's case and the evidence led in support of it was relevant to other successful claims and submissions on the unsuccessful claim took up no additional hearing time of any significance.<sup>210</sup>

## 8.4 Applications for Indemnity Costs

### 8.4.1 General principles on indemnity costs

Indemnity costs have been sought in a number of cases litigated in the federal unlawful discrimination jurisdiction. By way of example, in *Hughes v Car Buyers Pty Ltd*,<sup>211</sup> the respondents ignored the Commission's conciliation process and did not enter appearances in the proceedings in the then FMC. Federal Magistrate Walters awarded the applicant \$5,000 aggravated damages for the additional mental distress caused by the respondents' conduct. The applicant also sought costs on an indemnity basis on the basis of the respondents' behaviour. Federal Magistrate Walters noted<sup>212</sup> the following examples set out by Sheppard J in *Colgate-Palmolive v Cussons*<sup>213</sup> in which a court may make an indemnity costs order (the list not being exclusive):

- the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud;
- misconduct that causes loss of time to the court and to other parties;
- the fact that the proceedings were commenced or continued for some ulterior motive or in wilful disregard of known facts or clearly established law;

204 *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91, [44]. Note in *Ho v Regulator Australia Pty Ltd (No 2)* [2004] Driver FM reconsidered his decision in *Cooke* in light of the decision of McInnis FM in *McBride v Victoria (No 2)* [2003] FMCA 313 and expressed a preference for the approach taken by McInnis FM; *Burns v Media Options Group Pty Ltd (No 2)* [2013] FCCA 2016, [51].

205 *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd (No 2)* [2003] FMCA 516, [7]; *Kelly v TPG Internet Pty Ltd (No 2)* [2005] FMCA 291, [7]. Cf *Ho v Regulator Australia Pty Ltd (No 2)* [2004] FMCA 402, [16].

206 *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd (No 2)* [2003] FMCA 516, [7].

207 [2003] FMCA 516, [9], [11].

208 *Howe v Qantas Airways Ltd (No 2)* [2004] FMCA 934, [14]; *Burns v Media Options Group Pty Ltd (No 2)* [2013] FCCA 2016 [52].

209 *Clarke v Nationwide News Pty Ltd trading as The Sunday Times (No 2)* [2012] FCA 990.

210 *Ewin v Vergara (No 4)* [2013] FCA 1409, [20].

211 [2004] FMCA 526.

212 [2004] FMCA 526, [92].

213 (1993) 46 FCR 225, 231-234. See also the factors referred to by Judge Antoni Lucev in *Sims v Jooste* [2016] FCCA 1343, [144]-[145].

- the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions;
- an imprudent refusal of an offer to compromise; and
- where one party has been in contempt of court.

In the circumstances, Walters FM declined to order indemnity costs, stating:

In my opinion, to award costs on an indemnity basis in the present circumstances would be to inappropriately punish the respondents. It seems to me that the attitude that they adopted to the HREOC complaint is irrelevant insofar as costs in this court are concerned — although I recognise that the application in this court may not have had to be filed at all if the respondents had responded to the HREOC complaint. Whilst the respondents' refusal to participate in the proceedings in this Court has obviously upset and frustrated Ms Hughes, the fact of the matter is that the respondents have not sought to justify their actions or made inappropriate or unfounded allegations against Ms Hughes. They did not prolong the proceedings by making groundless contentions or filing unmeritorious applications. They simply let the proceedings run their course.<sup>214</sup>

In *Hassan v Smith*,<sup>215</sup> Raphael FM held that the applicant should pay party-party costs because although he was told by the Commission upon termination of his complaint of the difficulties he faced in establishing his claim, and by Raphael FM at two directions hearings, he nevertheless 'wanted his day in court'.<sup>216</sup> 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)*,<sup>217</sup> 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'.<sup>218</sup>

In contrast, indemnity costs were awarded against the unsuccessful applicant by Driver FM in *Wong v Su*,<sup>219</sup> 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.<sup>220</sup>

In *Hinchliffe v University of Sydney (No 2)*,<sup>221</sup> Driver FM considered an application by the successful respondent for indemnity costs in relation to:

- costs of and incidental to the proceedings from the time at which an offer of compromise lapsed;
- costs thrown away by the respondent occasioned by the applicant's late withdrawal of a significant part of her claim; and
- costs of complying with an onerous request for documents.

214 [2004] FMCA 526, [96]. In relation to the behaviour of a respondent in proceedings before the Commission, see *Ho v Regulator Australia Pty Ltd (No 2)* [2004] FMCA 402, discussed at 8.3.5 above.

215 [2001] FMCA 58.

216 [2001] FMCA 58, [27].

217 [2003] FMCA 210.

218 [2003] FMCA 210, [8].

219 [2001] FMCA 108.

220 [2001] FMCA 108, [19].

221 [2004] FMCA 640.

Federal Magistrate Driver rejected the application for indemnity costs and awarded costs on a party-party basis. On the first issue, his Honour noted that an offer of compromise had been made in relation to an issue that was severed from the claim, and never litigated to judgment. No offer was made in relation to the matters that were litigated to judgment.

On the second point, Driver FM stated:

[A]s I pointed out at an early stage in the life of the human rights jurisdiction of this Court (*Low v Australian Taxation Office* [200] FMCA 6) applicants should be given a reasonable opportunity to take advice as to their circumstances and to get their claim into a proper form. The respondent adopted a legalistic approach to the conduct of the litigation. To some extent, that was a legitimate attempt to clearly identify what the applicant was claiming. However, as I pointed out in my principal judgment, the respondent was unduly legalistic in relation to the issue of pleadings. It certainly took a considerable period for the applicant, through her legal advisers, to finally settle upon the way in which her claim would be pursued. However, the factual and legal issues were by no means simple, as is reflected in the length of the written submissions received in the principal proceedings and the length of my judgment. There was nothing improper in the conduct of the applicant or her legal advisers and she was not so tardy in the refinement of her claim as to expose herself to an indemnity costs order.<sup>222</sup>

As to the costs sought in relation to the request for documents, his Honour noted that if the respondent considered the request to be oppressive, 'it could have sought interlocutory relief from the court'.<sup>223</sup> Federal Magistrate Driver noted that the FMC Rules make specific provision for photocopying and that disbursements should be agreed between the parties under that scale.<sup>224</sup>

In *Piper v Choice Property Group Pty Ltd*,<sup>225</sup> McInnis FM summarily dismissed an unlawful discrimination application and awarded the respondent indemnity costs at a fixed sum of \$3,500. His Honour did so because it was clear to him, although he accepted it may not have been as clear to the applicant, that at all material times the respondent could not have been the appropriate party for the applicant to pursue.<sup>226</sup>

In *David Yohan on behalf of the class members of Providing Awareness With Education and Sport Incorporated (Pawes) v Basketball Queensland Inc and Anor*,<sup>227</sup> Jarrett FM considered an order for indemnity costs was appropriate where the applicant failed to appear at the first court date and failed to properly re-plead his application when given an opportunity to do so. Federal Magistrate Jarrett accepted that the applicant was advised the respondents were going to prepare and file an application to have his claim dismissed. The evidence revealed that the applicant did not advise the respondents that he was going to discontinue his claim and, without notice to the respondents he discontinued it by filing a notice of discontinuance at approximately 4:00pm on the day before the matter was next due in court.<sup>228</sup> Federal Magistrate Jarrett was satisfied there was no public interest element to the applicant's claim. The applicant was aware that his claim was unsustainable (because it was barred by virtue of section 6A of the RDA) but pursued it anyway.<sup>229</sup>

In *Burns v Media Options Group Pty Ltd (No 2)*,<sup>230</sup> Judge Nicholls made an order for indemnity costs in favour of the successful applicant in a DDA and SDA claim on the basis of two counts of 'delinquency'

<sup>222</sup> [2004] FMCA 640, [8].

<sup>223</sup> [2004] FMCA 640, [9].

<sup>224</sup> [2004] FMCA 640, [9].

<sup>225</sup> [2005] FMCA 87.

<sup>226</sup> [2005] FMCA 87, [19]-[20].

<sup>227</sup> [2012] FMCA 1024.

<sup>228</sup> [2012] FMCA 1024, [17].

<sup>229</sup> [2012] FMCA 1024, [18].

<sup>230</sup> [2013] FCCA 2016.



by the respondent. First, the second respondent had admitted during the course of the hearing that he knew at the time of sending a letter in response to the applicant's complaint to the Commission that the contents of that letter were substantially not true and sought to discredit the applicant. The respondent had persisted in pursuing this response before the court, in circumstances where their own credibility was known or should have been known by them to have been diminished.<sup>231</sup> Second, the respondent's constant objection to questions put to their witnesses unduly delayed the proceedings.<sup>232</sup> Judge Nicholls commented that the respondent's approach was inconsistent with the objectives of the FCC to 'operate as informally as possible' and further that the practice in the FCC in human rights matters is to 'adopt an approach of leaving matters of the exposition and understanding of evidence for submissions rather than approaching cross-examination as a process of attrition'.<sup>233</sup> He had earlier commented that:

the respondents appear not to understand, as the applicant submits, that their approach during the hearing and their constant "objections" were inimical to the exercise of the human rights jurisdiction in this court (see *Burns* at [11]).<sup>234</sup>

In *Kiefel v Victoria*,<sup>235</sup> the applicant sought to resist an order for indemnity costs on the basis of 'the beneficial nature of the DDA, his disabilities and the "evolving jurisprudence" in this area'.<sup>236</sup> Citing *Ruddock v Vadarlis (No 2)*,<sup>237</sup> Tracey J agreed that 'in some circumstances, considerations such as these may properly be taken into account in determining appropriate costs orders'.<sup>238</sup> However, his Honour went on to find that the respondent's complaint relates not to the nature of the legislation but the applicant's failure to plead a viable case under that legislation.<sup>239</sup> Justice Tracey commented that in this case, an 'award of indemnity costs will serve to discourage those with unmeritorious cases who remain determined to pursue all available legal options without regard to the principles to which sections 37M and 37N of the Federal Court Act give effect'.<sup>240</sup>

## 8.4.2 Offers of compromise

Litigants in unlawful discrimination matters should be aware that Federal Court Rule 25 (formerly Order 23), in relation to offers of compromise, applies to proceedings before both the Federal Court and the FCC.<sup>241</sup> Rules 25.14(1) and (3) can be summarised as follows:

... if an offer is made by the first party in accordance with the Federal Court Rules and that offer is not accepted by the second party; and

<sup>231</sup> [2013] FCCA 2016, [120], [125]–[127].

<sup>232</sup> [2013] FCCA 2016, [120], [128]–[129].

<sup>233</sup> [2013] FCCA 2016, [130].

<sup>234</sup> [2013] FCCA 2016, [94].

<sup>235</sup> [2014] FCA 411.

<sup>236</sup> [2014] FCA 411, [48].

<sup>237</sup> (2001) 115 FCR 229, 237.

<sup>238</sup> [2014] FCA 411, [49].

<sup>239</sup> [2014] FCA 411, [50]–[52], [57]. The respondent also relied on the applicant's failure to accept the offer of compromise made on 30 July 2012. In this case, both bases for the claimed entitlement to indemnity costs had been made good but Tracey J stated that an award for indemnity costs would have been warranted even if only one of the grounds had been established.

<sup>240</sup> [2014] FCA 411, [58]. Section 37M of the Federal Court Act provides that the overarching purpose of the civil procedure provisions is to facilitate the just resolution of disputes according to law, and as quickly, inexpensively and efficiently as possible. Section 37N provides that parties are required to conduct proceedings in a way that is consistent with the overarching purpose identified in s 37M. Subsection 37N(2) requires the party's lawyer to take into account the overarching duty and assist his or her client to comply with that duty. A failure of either the party or the lawyer to comply with these obligations may have costs consequences. See s 37N(4) and [2014] FCA 411, [44].

<sup>241</sup> Part 2 of Sch 3 of the FCC Rules provides that Rule 25.14 of the *Federal Court Rules* applies to the FCC.



that second party obtains a judgment that is less favourable than the terms of the offer; then

the first party is entitled to *indemnity* costs from the second business day after the offer was made.<sup>242</sup>

Further, rule 25.14(2) provides that if an offer is made by a respondent and an applicant unreasonably fails to accept the offer and the applicant's proceeding is dismissed, the respondent is entitled to indemnity costs from the second business day after the offer was made.<sup>243</sup>

Under the regime established by rule 25.14, an offer to compromise has to be open for acceptance for a period of not less than 14 days after the offer is made (rule 25.05).<sup>244</sup>

By virtue of rule 1.35, which empowers the court to make an order that is inconsistent with the rules, the terms of rule 25.14 of the Federal Court Rules establish a 'presumptive entitlement' or 'rebuttable presumption' in favour of indemnity costs in cases where the prescribed circumstances are established.<sup>245</sup> It is for the party who is *prima facie* required to pay costs in accordance with the requirements of the rule to persuade the court that some other order should be made.<sup>246</sup> The court needs to be convinced of a 'good reason' to oust the rule's effect.<sup>247</sup>

While rule 25 of the Federal Court Rules is in a slightly different form to former Order 23, they have the same effect due to rule 1.35. Accordingly, the cases decided under former O23 are still of value when considering the exercise of the court's discretion under rule 25 of the Federal Court Rules.<sup>248</sup>

Offers of compromise made by parties in litigation which do not fall within the terms of the Federal Court Rules (also known as '*Calderbank*'<sup>249</sup> offers) may nevertheless be taken into account in the exercise of a court's general discretion in awarding costs. In *Henderson v Amadio Pty Ltd*,<sup>250</sup> Heerey J stated:

Counsel for the respondents argued that O 23 now constitutes a code and excludes any reliance on *Calderbank* letters. I do not agree. The *Calderbank* letter is such a useful and flexible weapon for litigants who want to achieve a reasonable settlement that in the absence of express provisions to that effect I am not prepared to draw the inference that the rule-makers intended to exclude it. In any case, I do think that O 23 was apt to cover an offer addressed to a number of respondents but conditional upon acceptance by all...<sup>251</sup>

In cases involving the rejection of an offer contained in a *Calderbank* offer, it must generally be shown that the rejection of the offer was imprudent or unreasonable before it may be made the basis of an award of indemnity costs.<sup>252</sup> Justice Hely in *Port Kembla Coal Terminal Ltd v Braverus Maritime*

<sup>242</sup> Rule 25.14(1) and (3).

<sup>243</sup> Note it is only r 25.14(2) that contains a reference to the criterion of reasonableness. There is no reference to reasonableness in rr 25.14(1) and (3). In G.E Dal Pont, *Law of Costs* (3<sup>rd</sup> ed, 2013), p382, the author opines that where the rule makes no reference to the criterion of reasonableness, it cannot be seen as central or decisive. See the discussion in *Shaw v Jaldorn* (1999) 76 SASR 28, [35]- [44]; *Uniting Church in Australia Property Trust (NSW) v Takacs* (No 2) [2008] NSWCA 172 [32]-[33] (Basten JA); and *Visscher v Teekay Shipping (Aust) Pty Ltd* (No 5) [2013] FCA 28 [8]-[17] (Katzmann J).

<sup>244</sup> *Burns v Media Options Group Pty Ltd* (No 2) [2013] FCCA 2016, [108]-[109], citing *Specsavers Pty Ltd v Luxottica Retail Australia Pty Ltd* (No 2) [2013] FCA 807, [10] (Griffiths J).

<sup>245</sup> *Kassem and Secatore v Commissioner of Taxation* (No 2) [2012] FCA 293; *Specsavers Pty Ltd v The Optical Superstore Pty Ltd* (No 4) [2012] FCA 652; See also *Futuretronics.com.au Pty Ltd v Graphix Labels Pty Ltd* [2009] FCAFC 40, [10] decided under former O 23 of the FCR.

<sup>246</sup> *Kassem and Secatore v Commissioner of Taxation* (No 2) [2012] FCA 293, [11].

<sup>247</sup> *Port Kembla Coal Terminal Ltd v Braverus Maritime Inc* (No 2) [2004] FCA 1437, [17] (Hely J).

<sup>248</sup> *Kassem and Secatore v Commissioner of Taxation* (No 2) [2012] FCA 293, [9]-[11] (Nicholas J); *Specsavers Pty Ltd v The Optical Superstore Pty Ltd* (No 4) [2012] FCA 652, [10].

<sup>249</sup> *Calderbank v Calderbank* (1975) 3 All ER 333.

<sup>250</sup> Unreported, Federal Court of Australia, Heerey J, 22 March 1996.

<sup>251</sup> Unreported, Federal Court of Australia, Heerey J, 22 March 1996, [51].

<sup>252</sup> *Dukemaster Pty Ltd v Bluehive Pty Ltd* [2003] FCAFC 1 (Sundberg, Emmett and Conti JJ), [7]-[9].

*Inc (No 2)*<sup>253</sup> noted the distinction between an offer of compromise falling within Order 23 of the Federal Court Rules and a *Calderbank* offer:

In the case of a *Calderbank* offer, the issue is whether the conduct of the defendant in failing to accept the offer was unreasonable in all of the circumstances, so as to justify a departure from the usual rule as to costs. However,...in the case of an offer of compromise, the mere fact the defendant's case was 'bona fide and arguable', to adopt the language used in the defendant's submissions, is not of itself sufficient to displace the operation of the Rule [Order 23].<sup>254</sup>

In *Zoltaszek v Downer EDI Engineering Pty Ltd*<sup>255</sup> the court also considered both the principles of *Calderbank* offers and an offer of compromise falling within Order 23. The respondent sought indemnity costs from several possible times at which settlement offers had been made. Federal Magistrate Barnes was not satisfied that the self-represented applicant should have known he had no prospect of success at the time of the earlier offers such that the rejection of those offers warranted indemnity costs pursuant to the principles in *Calderbank*. However, in relation to a later offer of compromise, Barnes FM found that the presumption in Order 23 in favour of indemnity costs arose. The applicant had not established a proper basis for departing from the ordinary consequence of a refusal to accept the offer. Her Honour noted that this later offer was not only a more generous one than earlier offers but was made and refused after all evidence was filed on which judgment against the applicant was based. Accordingly, Order 23 applied and the applicant was ordered to pay indemnity costs from the day after the offer was made.

In the first instance proceedings in *Richardson v Oracle Corporation Australia Pty Ltd (No 2)*,<sup>256</sup> Buchanan J ordered the applicant to pay the respondent indemnity costs in accordance with former Order 23 of the Federal Court Rules. Justice Buchanan could see no basis in principle on which the respondent should be denied the operation of the rule or the applicant should be relieved of its consequences. In particular, Buchanan J considered that the applicant's legal costs to the date of the offer, or otherwise were not relevant to the comparison of what monetary compensation in damages she was awarded and that she was offered by the respondent to settle her claims.<sup>257</sup> Justice Buchanan found further that:

... there is no occasion, either, to diminish the level of protection to which the respondents are entitled by reference to the fact that Ms Richardson's claims to have been sexually harassed were, without exception, upheld.<sup>258</sup>

In *Richardson v Oracle Corporation Australia Pty Ltd (No 2)*,<sup>259</sup> the Full Court of the Federal Court considered the operation of former Order 23 of the Federal Court Rules in circumstances where the Full Court's decision had effected a change to the level of awards for general damages in cases involving sexual harassment. The Full Court increased the appellant's award of damages from \$18,000 to \$130,000, finding that the earlier award was manifestly inadequate even though it was not out of step with some past awards in sexual harassment cases. The respondent had earlier rejected the appellant's offer to settle the case for \$106,500 plus interest and costs. In the principal judgment, Kenny J (with whom the Full Court of the Federal Court concurred with), suggested that perhaps Oracle should not be criticised for rejecting an offer that was out of step with earlier awards.<sup>260</sup> However, the Full Court held that the court's decision in the present case was no more than the orderly development of pre-existing

253 (2004) 212 ALR 281.

254 (2004) 212 ALR 281, [28].

255 [2011] FMCA 141.

256 [2013] FCA 359.

257 [2013] FCA 359, [40], [33], [51]-[53].

258 [2013] FCA 359, [51], [52].

259 [2014] FCAFC 139.

260 [2014] FCAFC 139, [9].

principle which is the everyday work of intermediate appellate courts, and it was not a circumstance which would justify a departure from the appellant's presumptive entitlement to indemnity costs.

In *Chen v Monash University (No 2)*,<sup>261</sup> Tracey J stated that while awards of costs are discretionary, rule 25.14(2) establishes an entitlement, on the part of a respondent, to particular forms of costs orders in the event that an applicant unreasonably fails to accept an offer.<sup>262</sup> Justice Tracey said:

The Rule gives effect to a number of important policy objectives. Those objectives include the early resolution of disputes to avoid the time and expense of trials. To this end parties to litigation are to be encouraged seriously to consider, and not lightly reject, offers made by another party with a view to compromising their dispute and avoiding a trial: see *Alpine Hardwoods (Aust) Pty Ltd v Hardys Pty Ltd (No 2)* (2002) 190 ALR 121 at 125.<sup>263</sup>

His honour considered that:

the reasonableness of an applicant's failure to accept an offer of compromise is to be assessed having regard to all the relevant circumstances at the time the failure occurred and in the knowledge that the applicant has failed at trial.<sup>264</sup>

In this case, Tracey J made an award for indemnity costs in favour of the respondent, finding that the applicant's failure to accept what was, in the circumstances, a generous offer of settlement before any substantial costs had been incurred on either side was unreasonable. The applicant was in possession of independent legal advice which highlighted the weakness of her case and the respondent's solicitors had gone to some trouble to ensure that she was aware of the implications of any failure by her to accept the offer.<sup>265</sup>

### 8.4.3 Calderbank offers in unlawful discrimination cases

A number of unlawful discrimination cases have considered the principles applicable to a *Calderbank* offer which is a written communication where an offer of settlement is made and is not subject to the formal time and notice requirements under Part 25 of the FCR.<sup>266</sup>

In *Burns v Media Options Group Pty Ltd (No 2)*,<sup>267</sup> Judge Nicholls, citing *Specsavers Pty Ltd v Luxottica Retail Australia Pty Ltd (No 2)*,<sup>268</sup> set out a summary of the relevant principles relevant to *Calderbank* offers, including that:

- The unreasonable or imprudent rejection of a *Calderbank* offer may result in indemnity costs being awarded. The mere rejection of a *Calderbank* offer followed by a result which is more favourable to the offeror and less favourable to the offeree than that represented by the offer does not automatically lead to the making of an order for payment of costs on an indemnity basis.
- The offeror needs to show that the conduct of the offeree was unreasonable and that conduct is to be viewed in light of the circumstances which existed at the time the offer was rejected. The fact that the offeree ultimately fails to make good their case does not mean that they acted unreasonably in rejecting an offer.
- A helpful but non-exhaustive list of circumstances which may be relevant in determining whether the rejection of a *Calderbank* offer is reasonable or not is set out in *Hazeldene's Chicken Farm Pty Ltd v*

<sup>261</sup> [2015] FCA 552.

<sup>262</sup> [2015] FCA 552, [14].

<sup>263</sup> [2015] FCA 552, [15].

<sup>264</sup> [2015] FCA 552, [16].

<sup>265</sup> [2015] FCA 552, [22]–[24].

<sup>266</sup> *Burns v Media Options Group Pty Ltd (No 2)* [2013] FCCA 2016, [105] (Judge Nicholls).

<sup>267</sup> [2013] FCCA 2016.

<sup>268</sup> [2013] FCA 807, [10] (Griffiths J).

*Victorian Workcover Authority (No 2)* [2005] VSCA 298 at [25] and includes:

- (a) The stage of the proceeding at which the offer was received;
- (b) The time allowed to the offeree to consider the offer;
- (c) The extent of the compromise offered;
- (d) The offeree's prospects of success, assessed as at the date of the offer;
- (e) The clarity with which the terms of the offer were expressed; and
- (f) Whether the offer foreshadowed an application for an indemnity costs in the event of the offeree's rejection of it.<sup>269</sup>

In *Rispoli v Merck Sharpe & Dohme (No 2)*,<sup>270</sup> Driver FM said that:

There is a public policy underlying the consideration of offers, especially Calderbank offers, by the courts. That public policy is that parties should be encouraged to realistically consider their claims prior to incurring substantial expense in litigation and attempt to settle proceedings on a realistic basis. Bearing that public policy in mind, where a party does not do as well as an offer made to the party during the course of the litigation, it is common for courts either to deny that party costs or even to make a costs order against the party.

In that matter, Driver FM did not grant an indemnity costs order against the unsuccessful applicant holding that 'the decision of the applicant to pursue her claim through to a final hearing was neither improper [n]or unrealistic'.<sup>271</sup>

In *Jacomb v Australian Municipal Administrative Clerical & Services Union*,<sup>272</sup> Crennan J considered an offer from the respondent in the following terms, which was expressed to be in accordance with the principles in *Calderbank*:

1. That the Applicant discontinue the application by 9.30am on Monday 11 August 2003 with no order as to costs.
2. Each party bear its own legal costs associated with these proceedings.<sup>273</sup>

Her Honour stated as follows:

The principles governing Calderbank offers have been the subject of a number of decisions of this Court: see for example *Black v Tomislav Lipovac BHNF Maria Lipovac & Ors* [1998] FCA 699; *Dr Martens Australia Pty Ltd v Figgins Holdings Pty Ltd (No 2)* [2000] FCA 602 ('Dr Martens'). As a general rule, the mere refusal of the Calderbank offer does not automatically mean that the Court should make an order for costs on an indemnity basis, even where the result, following refusal of the offer, is less favourable to the offeree than that contained in the offer. Rather, the offer to settle must be a genuine offer to compromise, and there must be some element of unreasonableness in the offeree's refusal to accept the offer: see *Fresh Express Australia Pty Ltd v Larridren Pty Ltd* [2002] FCA 1640; *Dr Martens*.

It is doubtful that the abovementioned offer amounted to a genuine offer of compromise, consistent with the principles in *Calderbank*, as the offer appeared to be merely an invitation to discontinue the proceedings, a circumstance which a number of courts have found to be insufficient for the purposes of applying the principles applicable to Calderbank offers: *Australian Competition and Consumer Commission v Universal Music Australia Pty Ltd (No. 2)* [2002] FCA 192; *Vasram v AMP Life Ltd* [2002] FCA 1286; [*Fyna Foods Australia Pty Ltd v Cobannah Holdings Pty Ltd (No 2)* [2004] FCA 1212]. Even if the offer were in the nature of a genuine Calderbank offer, that is but one factor to be taken into account in the Court's exercise of discretion: *Fyna Foods* at [10].<sup>274</sup>

269 [2013] FCCA 2016, [108].

270 [2003] FMCA 516, [10].

271 [2003] FMCA 516, [11].

272 [2004] FCA 1600.

273 [2004] FCA 1600, [5].

274 [2004] FCA 1600, [6]-[7].

Her Honour concluded, also taking into account the element of public interest in the proceedings (see 8.3.1 above):

Bearing in mind all the circumstances of this case, and accepting that I have an overall discretion in the matter, this is not an appropriate case to award indemnity costs. In all the circumstances, the applicant was not acting unreasonably, in refusing the offer to compromise, when the question of statutory construction had not been determined by the Federal Court on any prior occasion. Bearing in mind that the proceeding had consequences going beyond the individual applicant, and bearing in mind the various other considerations urged by the applicant and the respondent in their written submissions, I propose to order that the applicant pay seventy-five per centum (75%) of the respondent's costs.<sup>275</sup>

In *Meka v Shell Company of Australia Ltd (No 2)*,<sup>276</sup> Driver FM found that the form of offer made did not strictly comply with Order 23 but that the respondents should receive indemnity costs on the basis of the principles in *Calderbank*. Indemnity costs were awarded from the day after the offer was rejected. While this date was a period of time later than the offer was to have expired, the court held, in effect, that the respondent had kept the offer open by calling the applicant's solicitor to discuss it.<sup>277</sup>

In *San v Dirluck Pty Ltd (No 2)*,<sup>278</sup> the respondent had made a number of offers to settle the matter, none of which were accepted. The last such offer was made on the first day of the hearing of the matter, expressed as follows:

1. The first respondent and second respondent to pay the applicant the total combined sum of \$5,000 by way of damages.
2. ...
3. The complaint to be withdrawn with no order as to costs.

The applicant was successful in the proceedings<sup>279</sup> and was awarded \$2,000 in damages. The respondent sought indemnity costs on the basis of the rejection of the final offer made. Federal Magistrate Raphael noted that the respondent's last offer was: 'obviously less than the \$5,000 offered...but it is quite clearly not less than the amount of \$2,000 plus the applicant's reasonable costs calculated under schedule 1 of the Federal Magistrates Court Rules' and concluded that as the offers made did not therefore exceed the value of the judgment the respondent was not entitled to its costs at all.<sup>280</sup>

In *Iliff v Sterling Commerce (Australia) Pty Ltd (No 2)*,<sup>281</sup> Burchardt FM considered whether the rejection by the applicant of a *Calderbank* offer and an offer of compromise warranted ordering her to pay the respondent's costs. Federal Magistrate Burchardt held that neither the *Calderbank* offer nor the offer of compromise warranted such an order because:

- the *Calderbank* offer was served a week before Christmas and sought a response within two days, which was not, in his Honour's view, reasonable;
- the applicant had sought and been granted declaratory relief in addition to the order for payment of damages and neither the *Calderbank* offer nor the offer of compromise had addressed the issue of such relief; and
- neither the *Calderbank* offer nor the offer of compromise made any offer in relation to payment of the applicant's costs.<sup>282</sup>

275 [2004] FCA 1600, [12].

276 [2005] FMCA 700.

277 [2005] FMCA 700, [7].

278 [2005] FMCA 846.

279 See *San v Dirluck Pty Ltd* (2005) 222 ALR 91.

280 [2005] FMCA 846, [8].

281 [2008] FMCA 38.

282 [2008] FMCA 38, [32]-[33].

In *Vijayakumar v Qantas Airways Ltd (No 2)*,<sup>283</sup> the respondent submitted that the wholly unsuccessful applicant should pay its costs on an indemnity basis from the date on which the respondent invited the applicant to withdraw his claim.<sup>284</sup> Federal Magistrate Scarlett disagreed with this contention and said that the invitation to withdraw the application was not an offer of compromise but an ultimatum.

Federal Magistrate Scarlett then considered when an offer of compromise was made. His Honour considered that the first offer of compromise was made by the respondent on 20 December 2007. The respondent offered:

- payment of \$2000;
- a statement of regret;
- an agreement to review the respondent's Excess Baggage Policy;
- to consider the carriage of disability aids in the review; and
- a written acknowledgement that the applicant could travel on international flights with an additional 10 kilograms of mobility aids/palliative aids without attracting an excess baggage fee.<sup>285</sup>

Federal Magistrate Scarlett noted that the offer appeared to have been genuine, although modest. The applicant rejected the respondent's first offer of compromise. In relation to this decision, Scarlett FM stated:

Whilst this may have been an unfortunate decision, as the Applicant went on to be unsuccessful in his claim, the rejection of the offer at that stage in the proceedings does not appear to be so unreasonable, if it were unreasonable at all, that costs [should be] on an indemnity basis from that point.<sup>286</sup>

The second offer of compromise was made on 12 May 2008. Federal Magistrate Scarlett stated that he was satisfied that it was a genuine offer of compromise and was worth considering. His Honour found that it was not unreasonable for the respondent to produce a genuine settlement offer two days out from the start of the proceedings and held:

The terms of the Respondent's letter of 12 May 2008 are clear. The Applicant was represented by solicitor and counsel. It is inconceivable that he was not made aware of the consequences of rejecting the respondent's final offer. He chose to reject it.

I am satisfied that the Applicant took an imprudent approach and took the risk that his claim would be unsuccessful, with a costs order, and even an order for costs on an indemnity basis, as a not unlikely consequence.<sup>287</sup>

Accordingly, Scarlett FM ordered that the applicant pay the respondent's costs on an indemnity basis from the day on which the second offer of compromise expired.

In *Eatock v Bolt (No.2)*,<sup>288</sup> Bromberg J considered the applicant's rejection of a Calderbank offer made ten days prior to trial. In that case, the applicant had made no claim for money and the relief sought was confined to a declaration, an apology and an injunction restraining republication of the newspaper articles which contravened section 18C of the RDA. The respondents argued that the applicant achieved an outcome at trial that was no more favourable than their offer and should therefore pay indemnity costs from the date of rejecting the offer.

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283 [2009] FMCA 966.

284 [2009] FMCA 966, [60].

285 [2009] FMCA 966, [29].

286 [2009] FMCA 966, [67].

287 [2009] FMCA 966, [80].

288 [2011] FCA 1180.

Justice Bromberg noted that whilst ordinarily compromises are to be encouraged, there may be circumstances where having regard to the nature of the allegations made, compromises may not be appropriate because a party properly seeks vindication in the form of a favourable court determination.<sup>289</sup> However, Bromberg J found it unnecessary to exercise his discretion on this basis. His Honour held that there was a reasonable prospect of achieving a better result than that which was offered by the Calderbank offer at the time of the applicant rejecting the offer. Further, what the applicant achieved by the court's orders was significantly superior to that which was offered. Accordingly, the respondents were ordered to pay the applicant's costs.

In *Noble v Baldwin and Anor (No 2)*,<sup>290</sup> Barnes FM found that it had not been established that a partially successful applicant's rejection of two settlement offers had been unreasonable or imprudent in the circumstances.<sup>291</sup> In the case of the first offer, Barnes FM noted that the time given to respond was a period of one week and the offer was for a figure of somewhat less than half the claimed loss of income component of the applicant's claim without any explanation. Although, with the benefit of hindsight, the offer was realistic because it was the same as the damages ultimately awarded to the applicant, at the time the offer was made the applicant intended to claim more than the loss of income quantified in the original application. Further, the grounds of opposition in the response were not comprehensive and the respondents had not filed any evidence at that stage.<sup>292</sup> The second offer was for an amount five times the result the applicant achieved following the hearing. However, the offer was only open for a short period (five days) and as it was made before any evidence of the respondents was filed, it could not be said that the applicant was in a position to assess the strength of the respondent's case and any prospects of success.<sup>293</sup>

However, in *Huntley v NSW, Dept of Police and Justice (Corrective Services NSW) (No 2)*,<sup>294</sup> the applicant satisfied the court that the respondent had acted unreasonably in not accepting her first offer,<sup>295</sup> even though it was made prior to the commencement of proceedings (and the filing of any evidence). The court noted that it was unusual for parties to rely on offers made before litigation (as the party receiving the offer may not be in a position to know the detail of the case raised against them), although not unprecedented.<sup>296</sup> The central question is whether the rejection of the offer was unreasonable in the circumstances.

In making an award of indemnity costs, the court rejected the respondent's submission that it did not know the applicant's case at the time the offer was made, including the evidence the applicant was to rely on. Judge Nicholls considered that:

[t]he respondent in this case would, or should, have been aware of the detail of the case raised given the proceedings in the NSW IRC, but particularly the AHRC, given that these proceedings before the Court are limited to the matters raised on the complaint to the AHRC (see s 46PO(3) of the AHRC Act). This is particularly so given that the detail in the applicant's exposition and explanation of her complaints to the AHRC was clear and comprehensive. That application clearly outlined the "events" in relation to the

289 Ibid at [38] citing *Australian Competition and Consumer Commission v Harris Scarfe (No.2)* [2009] FCA 433 per Mansfield J at [10].

290 [2011] FMCA 700.

291 [2011] FMCA 700, [27].

292 [2011] FMCA 700, [32], [33].

293 [2011] FMCA 700, [41], [42].

294 [2016] FCCA 146.

295 The total amount payable in the first offer was "\$75,127.98 plus a contribution of \$20,000 for legal costs". The applicant submitted that, not including the legal costs amount, this offer was \$116,113.99 less than the amount awarded to the applicant in the judgment. See [2016] FCCA 146, [14].

296 [2016] FCCA 146, [100].



applicant's complaints, her supporting "evidence", how it had affected her and the outcome which she was seeking.<sup>297</sup>

Judge Nicholls specifically stated that it was not necessary for a respondent to know the evidence to be given by affidavit or after the testing of evidence in court, or oral evidence in that context.<sup>298</sup> The Judge also noted that the applicant's evidence was overwhelmingly the respondent's own material, that is, its workplace documents or material otherwise provided to the respondent before the commencement of the proceedings, or enlivened during proceedings before the Commission and the Industrial Relations Commission (NSW).<sup>299</sup>

The Judge also rejected the respondent's argument that the case was complex due to the large volumes of annexures to the applicant's evidence and the fact that the respondent was required to call seven witnesses. Judge Nicholls stated that 'complexity... does not necessarily, without more, derive from the volume of material presented'.<sup>300</sup> While a number of weaknesses in the respondent's case emerged during cross-examination of its witnesses, given the involvement of counsel from the first court date, much of those weaknesses would, or should, have been anticipated.<sup>301</sup> The Judge also noted that the respondent's offers to settle were manifestly inadequate, as they did not reflect the actual economic loss suffered by the applicant, which it should have known, given that the basis for the calculations was its own employment records.<sup>302</sup>

## 8.5 Application of Section 47 of the *Legal Aid Commission Act 1979* (NSW) to Human Rights Cases in the Federal Court and the FCC

It would appear that legally aided applicants before the Federal Court and the FCC are *not* protected by section 47 of the *Legal Aid Commission Act 1979* (NSW) against liability for the payment of the whole or part of the costs that might be ordered by the court if unsuccessful in human rights proceedings.

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.

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297 [2016] FCCA 146, [101].

298 [2016] FCCA 146, [103].

299 [2016] FCCA 146, [117].

300 [2016] FCCA 146, [121].

301 [2016] FCCA 146, [125].

302 [2016] FCCA 146, [127] - [132].

In *Minns v New South Wales (No 2)*,<sup>303</sup> Raphael FM found that section 47 does *not* apply to proceedings in the then FMC. In reaching this view, Raphael FM applied the decision of the High Court in *Bass v Permanent Trustee Co Ltd*.<sup>304</sup> It is likely that this reasoning would also apply in the Federal Court.<sup>305</sup>

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303 [2002] FMCA 197.

304 (1999) 198 CLR 334. The majority of the High Court in this matter noted that s 47 applies at a stage *after* which an order for costs has been made – it may, therefore, be raised in the course of enforcement proceedings in respect of a costs order. The majority also expressed the view that a ‘court or tribunal’ for the purpose of s 47 means a state court or tribunal and further that s 43 of the Federal Court of Australia Act provides as to the costs of proceedings in that Court and, thus, otherwise provides for the purpose of s 79 of the Judiciary Act’: 361-362 [63]-[65]. Note also *Hinchliffe v University of Sydney (No 2)* [2004] FMCA 640, in which costs were awarded against a legally aided applicant, without discussion of either the *Legal Aid Commission Act 1979* (NSW) or the decision in *Minns*.

305 See *Dinnison v Commonwealth of Australia* (Unreported, Federal Court of Australia, NSW District Registry, Foster J, 22 May 1998).